

BUSINESS COMPANIES (ECONOMIC SUBSTANCE) ACT, 2018-41

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BARBADOS

I assent
S. MASON
Governor-General
24th December, 2018.

2018-41

An Act to provide for the imposition of an economic substance test on companies carrying on business in Barbados and for related matters.

[Commencement: 1st January, 2019]

ENACTED by the Parliament of Barbados as follows:

Short title

1. This Act may be cited as the *Business Companies (Economic Substance) Act, 2018*.

Interpretation

2. In this Act,

“authorised person” means the Director of International Business or any person authorised by the Director to perform functions under section 17;

“banking business” has the meaning assigned to it by the *Financial Institutions Act*, Cap. 324A;

“business premises” means premises used in connection with the carrying on of a business, trade, profession or vocation;

“company” includes a society and any other entities except where the context otherwise requires;

“competent authority”, in respect of a country other than Barbados, means the authority designated in or for the purposes of an approved obligation owed by Barbados to another country;

“core income-generating activities” means activities set out in section 5;

“deposit-taking business” has the meaning assigned to it by the *Financial Institutions Act*, Cap. 324A;

“Director” means the Director of International Business;

“distribution and service centre business” means the business of

- (a) purchasing from a foreign related party
 - (i) component parts or materials for goods; or
 - (ii) goods ready for sale; and

reselling such component parts, materials or goods;

(b) providing services to a foreign related party in connection with the business,

but does not include any activity included in any other relevant activity except holding company business;

“finance and leasing business” has the meaning assigned to it by the *Insurance Act*, Cap. 310;

“fiscal period” has the meaning assigned to it by the *Income Tax Act*, Cap. 73;

“foreign related party” means a person connected with a resident company, such person not being resident or regarded as resident in Barbados;

“headquarters business” means the business of providing any of the following services to one or more foreign related parties of the resident company:

- (a) the provision of senior management;
- (b) the assumption or control of material risk for activities carried out by, or assets owned by, any of those related parties;
- (c) the provision of substantive advice in connection with the assumption or control of risk referred to in paragraph (b),

but does not include anything falling within the definition of financing and leasing business, intellectual property holding business, insurance business, or banking business;

“high risk intellectual property company” means a company which carries on an intellectual property holding business and

- (a) the company
 - (i) did not create the intellectual property in an intellectual property asset which it holds for the purposes of its business;
 - (ii) acquired the intellectual property asset
 - (A) from a related party; or

(B) in consideration for funding research and development by another person situate in a country or territory other than Barbados; and

(iii) licenses the intellectual property asset to one or more related parties or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by foreign related parties; or

(b) the company does not carry out research and development, branding or distribution as part of its core-income generating activities in Barbados;

“holding company” has the meaning assigned to it by the *Companies Act*, Cap. 308;

“income” in respect of an intellectual property asset, includes

- (a) royalties;
- (b) income from a franchise agreement; and
- (c) income from licensing the intangible asset;

“insurance business” has the meaning assigned to it by the *Insurance Act*, Cap. 310;

“intellectual property holding business” means the business of holding intellectual property assets;

“intellectual property asset” means

- (a) any intellectual property right in intangible assets, including but not limited to copyright, patents, trade marks, brand, and technical know-how, from which identifiable income accrues to the business (such income being separately identifiable from any income generated from any tangible asset in which the right subsists); and
- (b) includes income for the sale of an intellectual property asset;

“Minister” means the Minister responsible for International Business;

“related party” in relation to a resident company has the meaning assigned to it by the *Financial Institutions Act*, Cap. 324A;

“relevant activity” has the meaning assigned by section 4;

“resident company” means a company whose business is centrally managed and controlled from Barbados;

“service provider” has the meaning assigned to it by the *Corporate and Trust Service Providers Act, 2015* (Act 2015-12);

“ship” has the meaning assigned to it by the *Shipping Act*, Cap. 296;

“shipping business” means any of the following activities involving the operation of a ship anywhere in the world, other than solely within the territorial waters of Barbados,

- (a) the business of transporting, by sea, persons, animals, goods or mail;
- (b) the renting or chartering of ships for the purpose described in paragraph (a);
- (c) the sale of travel tickets or equivalent, and ancillary services connected with the operation of a ship;
- (d) the use, maintenance or rental of containers, including trailers and other vehicles or equipment for the transport of containers, used for the transport of anything by sea; and
- (e) the management of the crew of a ship;

“societies” means a society with restricted liability organised under the *Societies With Restricted Liability Act*, Cap. 318B.

Finance and leasing business

3.(1) For the purposes of finance and leasing business

- (a) consideration may include consideration by way of interest;

- (b) the provision of credit may be by way of instalments for which a separate charge is made and disclosed to the customer in connection with
 - (i) the supply of goods by hire purchase;
 - (ii) leasing, other than any lease granting an exclusive right to occupy land; or
 - (iii) conditional sale or credit sale.

(2) Where an advance or credit repayable by a customer to a person is assigned to another person, that other person is deemed to be providing the credit facility for the purposes of this section.

(3) This section does not apply to banking business, fund management business or insurance business.

Relevant activity

4. For the purpose of this Act any of the following is a relevant activity:

- (a) banking business;
- (b) insurance business;
- (c) fund management business;
- (d) finance and leasing business;
- (e) headquarters business;
- (f) shipping business;
- (g) holding company business;
- (h) intellectual property holding business;
- (i) distribution and service centre business; and
- (j) such other activities as the Minister may by order prescribe to be relevant activities.

Core income-generating activities

5. Core income-generating activities, include the following relevant activities being carried on from within Barbados

- (a) in respect of banking business
 - (i) raising funds, and managing risk, including credit risk, currency risk and interest risk;
 - (ii) taking hedging positions;
 - (iii) providing loans, credit or other financial services to customers;
 - (iv) managing capital and preparing reports and returns to the Central Bank of Barbados;
- (b) in respect of insurance business,
 - (i) predicting and calculating risk;
 - (ii) insuring or re-insuring against risk and providing insurance business services to clients;
- (c) in respect of fund management business,
 - (i) taking decisions on the holding and selling of investments;
 - (ii) calculating risk and reserves;
 - (iii) taking decisions on currency or interest fluctuations and hedging positions;
 - (iv) preparing reports and returns for submission to investors and to the Director;
- (d) in respect of finance and leasing business,
 - (i) agreeing funding terms;
 - (ii) identifying and acquiring assets to be leased (in the case of leasing);

- (iii) setting the terms and duration of any financing or leasing;
 - (iv) monitoring and revising any agreements;
 - (v) managing any risks;
- (e) in respect of headquarters business;
 - (i) taking relevant management decisions;
 - (ii) incurring expenditures on behalf of group entities;
 - (iii) co-ordinating group activities;
- (f) in respect of shipping business;
 - (i) managing crew (including hiring, paying and overseeing crew members);
 - (ii) overhauling and maintaining ships;
 - (iii) overseeing and tracking deliveries;
 - (iv) determining what goods to order and when to deliver them, organising and overseeing voyages;
- (g) in respect of holding company business, all activities related to that business;
- (h) in respect of intellectual property holding business,
 - (i) taking strategic decisions, managing and bearing the principal risks related to development and subsequent exploitation of the intangible asset generating income;
 - (ii) taking the strategic decisions, managing and bearing the principal risks relating to acquisition by third parties and subsequent exploitation and protection of the intangible assets;
 - (iii) carrying on the underlying trading activities through which the intangible assets are exploited leading to the generation of revenue from third parties;

- (iv) research and development, branding or distribution;
- (i) in respect of distribution and service centre business
 - (i) transporting and storing goods, components and materials
 - (ii) managing stocks;
 - (iii) taking orders;
 - (iv) providing consulting or other administrative services.

Requirement to meet economic substance test

6.(1) A resident company must satisfy the economic substance test in relation to any relevant activity carried on by it.

(2) A resident company meets the economic substance test in relation to a relevant activity carried on by the company where

- (a) the company is directed, managed and controlled in Barbados in relation to that activity;
- (b) having regard to the level of relevant activity carried on in Barbados
 - (i) there is an adequate number of employees in relation to that activity who are physically present in Barbados, whether or not employed by the resident company or by another entity and whether on temporary or long-term contracts;
 - (ii) there is adequate expenditure incurred in Barbados; and
 - (iii) there are adequate physical assets in Barbados;
- (c) the company conducts its core-income generating activities in Barbados; and
- (d) in the case of Barbados core-income generating activity carried out for the relevant company by another entity, it is able to monitor and control the carrying out of that activity by the other entity.

- (3) The test in subsection (2)(a) is satisfied where
- (a) the company's board of directors meets in Barbados at an adequate frequency having regard to the amount of decision-making required at that level;
 - (b) at such board meetings described in paragraph (a), there is a quorum of directors physically present in Barbados;
 - (c) the minutes of such board meetings described in paragraph (a) record the making of strategic decisions of the company at the meeting;
 - (d) the directors of the company have the necessary knowledge and expertise to discharge the duties of the board; and
 - (e) the minutes of all board meetings and the records of the company are kept in Barbados.
- (4) The Director may issue guidance on how the economic substance test may be met, including without affecting the foregoing, any expression used in this section for the purpose of that test, including the meaning of "adequate".
- (5) Regard must be had to any guidance under subsection (4) concerning the interpretation of any expression.
- (6) Guidance issued under subsection (4) must be published by the Director in the *Official Gazette* and in a daily newspaper that is circulated in Barbados.

Assessment of whether economic substance test is met

- 7.(1) The Director may determine that a resident company has not met the economic substance test during any financial year of the company commencing on or after 1st January 2019.
- (2) A determination referred to in subsection (1) must be made no later than 18 months after the end of the financial year to which the determination relates.
- (3) Subsections (1) and (2) do not apply where the Director is unable to make a determination within the 18 months period by reason of any deliberate

misrepresentation or negligent or fraudulent action by the resident company or by any other person.

(4) In relation to a high risk intellectual property company, for the purposes of subsection (1), the Director must determine that the economic substance test was not met during a financial year unless the company provides sufficient information to satisfy the Director that the test was met.

Requirement to provide information

8.(1) A resident company must provide any information reasonably required by the Director in order to assist the him in making a determination under section 7.

(2) The Director may serve notice on any person requiring that person to provide within the period specified in the notice and at such place as is specified in the notice, such documents and information as the Director requires for the purpose of facilitating him in the exercise of his functions under this Act.

Exchange of information to competent authority

9.(1) Subject to subsection (2), where the Director determines under section 7 that a resident company has not met the economic substance test for a financial year, the Director must, in accordance with any law or international agreement relating to exchange of information, forward the information provided under section 8 relating to that company for that year to

- (a) the competent authority of the country in which resides
 - (i) a holding company;
 - (ii) the ultimate holding company of the resident company; and
 - (iii) an ultimate beneficial owner; and
- (b) where the resident company is incorporated outside Barbados, the competent authority of the country or territory in which the resident company is incorporated.

(2) In respect of a high risk intellectual property company, regardless of whether or not the Director has made a determination under section 7 in respect of it, the Director must, in accordance with any law or international agreement relating to exchange of information, forward the information provided to the Director under section 8 in respect of that company for each financial year of the company commencing on or after 1st January 2019 to

- (a) the competent authority of the country in which resides
 - (i) a holding company;
 - (ii) the ultimate holding company of the resident company; and
 - (iii) an ultimate beneficial owner; and
- (b) where the high risk intellectual property company is incorporated outside Barbados, the competent authority of the country or territory in which the company is incorporated.

Penalty where the economic substance test is not met

10.(1) Where the Director determines under section 7 that a resident company has failed to meet the economic substance test for a financial year, the Director must within 21 days of the date of that determination issue a notice to the company notifying it

- (a) that he has determined that the resident company does not meet the economic substance test for that year;
- (b) of the reasons for that determination;
- (c) of the amount of penalty imposed on the company under subsection (2);
- (d) of the date from which the penalty under subsection (2) is due, being not less than 28 days after the issue of the notice;
- (e) of what action he considers should be taken by the company to meet the economic substance test; and

(f) of the company's right of appeal under section 13.

(2) For the purpose of this section, the Director may impose a penalty not exceeding \$300 000 payable within 30 days of the date of notice of the imposition of the penalty.

(3) Where, for the financial year following a financial year in which a notice was issued under subsection (1), hereinafter called the "further financial year", the Director determines that the resident company has failed to meet the economic substance test, he must issue a further notice to the resident company notifying it

(a) that the Director has determined that the resident company has not met the economic substance test for the further financial year;

(b) of the reasons for the determination;

(c) of the amount of penalty imposed on the company under subsection (2) in addition to the penalty previously imposed under subsection (1);

(d) of the date from which the penalty under subsection (4) is due, being not less than 30 days after the issue of the notice;

(e) that the Director may within 2 days make a report to the Minister under subsection (4);

(f) of what action the Director considers should be taken by the company to meet the economic substance test; and

(g) of the company's right of appeal under section 13.

(4) Following the issue of a notice under subsection (3), the Director may provide the Minister with a report of the matters referred to in that notice together with any additional information, whether or not such additional information was provided to the Director under section 8.

Penalty for failure to provide information or for inaccurate information

11.(1) A person is liable to a penalty not exceeding \$150,000 where that person fails to provide the information required under section 8.

(2) A person is liable to a penalty not exceeding \$150,000 where

(a) in complying with a requirement under section 8 that person provides inaccurate information; and

(b) condition A or B set out in subsections (3) and (4), respectively is met.

(3) Condition A is that the person knows of the inaccuracy at the time when information is provided but does not inform the Director at that time.

(4) Condition B is that the person

(a) discovers the inaccuracy after the information was provided to the Director; and

(b) fails to take reasonable steps to inform the Director.

(5) A person is not liable to a penalty under this section where

(a) that person satisfies the Director; or

(b) on an appeal under section 13, satisfies the Minister

that there is a reasonable excuse for the failure.

(6) Where a person had a reasonable excuse for failure to provide information but the excuse is no longer valid that person may be allowed to provide the information within a reasonable time after the excuse become invalid without the imposition of a penalty.

(7) A penalty for failure to provide accurate information may only be imposed within 12 months commencing on the date on which the inaccuracy first came to the attention of the Director.

Imposition of penalty for failure to provide information or for inaccurate information

12.(1) Where a person is liable to a penalty under section 11 the Director may determine the amount of penalty and impose it on that person.

(2) Where the Director imposes a penalty, he must notify the person

(a) of the reasons for imposing the penalty;

(b) of the amount of penalty imposed on that person;

(c) the date on which the penalty is due, being not less than 28 days after the issue of the notice; and

(d) of the person's right of appeal under section 13.

(3) A penalty under this section may only be imposed within the period of 6 years commencing on the date on which the person became liable to the penalty.

Right of appeal against penalty

13. A person upon whom a penalty is imposed by the Director may

(a) appeal on the ground that liability to that penalty does not arise; or

(b) appeal against the amount of the penalty.

Commission of Appeal and procedure on appeal against penalty

14.(1) Notice of an appeal under section 13 must be forwarded to the Minister

(a) in writing; and

(b) within 30 days commencing on the date on which notification to the person under section 10 or 12 was given.

(2) The notice under subsection (1) must state the ground of appeal.

(3) On an appeal under section 13(a), the Minister may confirm or cancel the penalty.

- (4) On an appeal under section 13(b), the Minister may
- (a) confirm the penalty; or
 - (b) substitute a lesser amount for the penalty which the Director imposed.

Enforcement of penalty

- 15.(1) A penalty under this Act must be paid within 30 days after the date mentioned in subsection (2).
- (2) The date referred to in subsection (1) is the later of
- (a) the date from which the penalty is due under section 10(1)(d), 10(3)(d) or 12(2)(c); or
 - (b) where notice of appeal under section 13 is given, the date on which the appeal is finally determined or withdrawn.
- (3) A penalty under this Act may be enforced as if it were a debt due to the Crown recoverable in civil proceedings.

Confidentiality

- 16.(1) The Director's power to disclose information under section 9 has effect despite any obligation as to confidentiality or other restriction on the disclosure of information imposed by statute, contract or otherwise.
- (2) Disclosure of information under this Act does not breach
- (a) any obligation of confidentiality in relation to the information so disclosed; or
 - (b) any other restriction on the access to or disclosure of the information so accessed.

Power to enter business premises and examine business documents

- 17.(1) An authorised person may examine and take copies of any business document that is located on business premises.

- (2) The power under subsection (1) may be exercised only for the purpose of investigating any issue relating to compliance with any provision of this Act.
- (3) An authorised person may at any reasonable time enter business premises for the purpose of exercising the power under subsection (1).
- (4) An authorised person may by notice require any person to produce any specified business document at the business premises where the business document is located for the purpose of enabling the authorised person to exercise the power under subsection (1) in relation to that document.

Obstructing an authorised person

- 18.(1)** A person who, without reasonable excuse,
- (a) obstructs an authorised person in the exercise of his powers under section 17; or
 - (b) fails to provide such reasonable assistance as the authorised person may require in the exercise of his powers under section 17 is guilty of an offence.
- (2) A person who intentionally alters, suppresses or destroys any business document specified in a notice under section 8(2) is guilty of an offence.
- (3) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine of \$5 000 or to imprisonment for 6 months, or to both.
- (4) A person guilty of an offence under subsection (2) is liable on summary conviction to a fine of \$10 000 or imprisonment for 2 years or to both.

Regulations

- 19.** The Minister may make such regulations as may be necessary to give effect to this Act and for prescribing anything that is required by this Act to be prescribed.

Commencement

20. This Act shall come into operation on the 1st day of January 2019.