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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Saint Kitts and Nevis' Fiscal Incentives Act regime (KN002) – Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2020)

On 30 December 2019, Saint Kitts and Nevis parliament adopted amendments to the Income Tax Act and communicated these amendments to the Chair of the Code of Conduct Group (business taxation) (COCG) (See Annex 1).

The COCG meeting of 4 February 2020 assessed the amendments as follows:

	1a	**1b**	**2a**	**2b**	**3**	**4**	**5**
Saint Kitts and Nevis, Fiscal Incentives Act regime (KN002)	X	?	X	?	X	X	X

V = harmful
X = not harmful

This conclusion was endorsed by the ECOFIN Council on 18 February 2020.

Annex 1: Income Tax Act

Annex 2: assessment of the KN002 regime in 2018 (standstill)

Explanation

The harmful assessment made by the COCG was based on the fact that the Fiscal Incentives Act was considered to be ring-fenced (criterion 1 and 2) and did not appear to have any provisions on profit attribution applicable to the beneficiaries of the regime or in general (criterion 4).

Criterion 1 – Targeting non-residents:

"*whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents*"

The ring-fencing consisted of an "export allowance" available only in relation to income from export profits, for up to 5 years. The higher the share of total profits derived from exports, the higher the rebate on income tax.

Section 6 of the Act (No 13 of 2019) to Amend the Fiscal Incentives Act abolished the provisions on "export allowance" as of 1 January 2020 and provided for grandfathering of the old provisions until 31 December 2022. These amendments remove the ring-fencing and provide for 3 years of grandfathering, which is in line with the established criteria.

The amended regime is therefore in line with criterion 1a of the COCG.

There is currently no data available to establish whether the regime is in line with criterion 1b of the COCG, therefore "?" is inserted under this criterion.

Criterion 2 – Ring-fencing:

"*whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base*"

The same assessment than against criterion 1a is applied by analogy. The amended regime is therefore in line with criterion 2a of the COCG.

There is currently no data available to establish whether the regime is in line with criterion 2b of the COCG, therefore "?" is inserted under this criterion.

Criterion 3 – Substance:

"*whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages*"

The Fiscal Incentives Act provided for a number of conditions for an enterprise to be recognised as an "approved enterprise" in section 6. This ensures that only substantial activities can benefit from the regime. The regime is therefore in line with criterion 3 of the COCG, as was concluded in the original assessment of the regime in 2018.

Criterion 4 – Internationally accepted principles:

"*whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD*"

Saint Kitts and Nevis has informed the COCG that a provision already exists under the Income Tax Act[1]; Section 4A covers Transactions and Arrangement Between Related Persons and Associates and reflects internationally acceptable standards (see Annex I).

According to Saint Kitts and Nevis, this provision permits the Comptroller of Inland Revenue to adjust the chargeable income or tax payable in respect of transactions or arrangements between related taxpayers, if these transactions or arrangements do not properly reflect arm's length terms.

To ensure that it is clear that these standards also apply to the Fiscal Incentives Act, the Fiscal Incentives (Amendment) Act 2019 indicates that section 4A of the Income Tax Act applies equally to the Fiscal Incentives Act. Therefore, the provisions on profit distribution now meet the requirements of the COCG. The provisions on profit distribution are therefore in line with criterion 4 of the COCG.

Criterion 5 – Transparency:

"*whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way*"

The benefits of the measure are granted on the basis of the provisions in sections 6, 17, 18 and 19 of the act. The Governor-General, who approves an enterprise for the regime, has the power to verify that the conditions are fulfilled and can revoke the approval in cases of continued non-fulfilment. These provisions are available in the Act. An order to approve an enterprise is published in the Gazette. The regime is therefore in line with criterion 5 of the COCG, as was concluded in the original assessment of the regime in 2018.

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[1] Chapter 20.22 of the Revised Laws of St. Christopher and Nevis

fulfilment. These provisions are available in the Act. An order to approve an enterprise is published in the Gazette.

Overall assessment

"*Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community*"

The amended legislation has removed the harmful aspects of the Fiscal Incentives Act.

ST CHRISTOPHER AND NEVIS

CHAPTER 20.22

INCOME TAX ACT and Subsidiary Legislation

Revised Edition showing the law as at 31 December 2017

[…]

4A. Transactions and Arrangements Between Related Persons and Associates

(1) In any arrangement, transaction or group of transactions between persons who are related or associated persons, the Comptroller may, by notice in writing,

(a) distribute, apportion, or allocate amounts to be included or deducted in calculating income and foreign income tax paid between the persons as is necessary to reflect the chargeable income or tax payable that would have arisen for them if the arrangement had been conducted at arm's length;

(b) re-characterise the source and type of any income, loss, amount, or payment derived, incurred, made or received under an arrangement, transaction or group of transactions the form of which does not reflect its substance or is classified as an avoidance arrangement;

(c) disregard an arrangement, transaction or part of an arrangement or a transaction that does not have substantial economic effect or is classified as an avoidance arrangement;

(2) For the purposes of this Act, a company is associated with another company in a tax year if, at any time in the year,

(a) one of the companies controls, directly or indirectly in any manner, the other;

(b) both of the companies are controlled, directly or indirectly in any manner, by the same person or group of persons;

(c) each of the companies is controlled, directly or indirectly in any manner, by a person and the person who so controlled one of the companies is related to the person who controls the other, and either of those persons owns, in respect of each company, not less than 25% of the issued shares of any class of the capital stock thereof;

(d) one of the companies is controlled, directly or indirectly in any manner, by a person and that person is related to each member of a group of persons that so controls the other company, and that person owns, in respect of the other company, not less than 25% of the issued shares of any class of capital stock thereof; or

(e) each of the companies is controlled, directly or indirectly in any manner, by a related group and each of the members of one of the related groups is related to all of the members of the other related group, and one or more persons who are members of both related groups, either alone or together, owns, in respect of each company, not less than 25% of the issued shares of capital stock thereof.

Assessment of the KN002 regime in 2018 (standstill)

Fiscal Incentives Act regime

Gateway criterion - Significantly lower level of taxation:

"*Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code*"

The Saint Kitts and Nevis Fiscal Incentives Act provides a tax holiday for 10 – 15 years for certain qualifying activities relating to manufacturing and construction. The period of tax holiday granted is in correlation to the investment and employment stimulated by a particular enterprise's activities. The higher the investment and employment, the higher the number of years of tax holiday provided. At the end of the tax holiday and for 5 years the approved enterprises can benefit from between 25 and 50% rebate on income tax as an "export allowance" depending on the share of their profits which is export related.

The measure provides for a significantly lower level of taxation. It is therefore potentially harmful within the meaning of paragraph A of the Code.

	1a	**1b**	**2a**	**2b**	**3**	**4**	**5**
Saint Kitts and Nevis – Fiscal Incentives Act (KN002)	V	?	V	?	X	V	X

V = harmful
X = not harmful

Explanation:

Criterion 1 – Targeting non-residents:

"*whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents*"

Four categories are entitled to tax holidays between 10 and 15 years (third schedule). The regime is open to domestic as well as foreign companies. One category – "enclave enterprises" - is reserved for exporting companies (section 2.1). The three other categories which benefit from 10, 12 or 15 years of tax holidays do not need to be exporting companies (section 2.1). The tax holidays appear to be open to domestic and foreign companies alike and exporting companies as well as other non-exporting companies. There is no ring-fencing resulting from this aspect.

Enterprise	Value Added	Maximum Tax Holiday
Group I	50% or more	15 years
Group II	25% to 50 %	12 years
Group III	10% to 25%	10 years
Enclave	Enclave	15 years

The "export allowance" is available for up to 5 years only in relation to income from export profits (section 16 and second schedule, part 2). The higher the share of total profits which is derived from export the higher the rebate on income tax. For instance, a company with a 10% share of its profits derived from export will benefit from a 25% reduction of its income tax. A company with a 61% share of its profits derived from export will benefit from a 50% reduction of its income tax. The tax reduction resulting from the export allowance benefits only export companies and therefore leads to ring-fencing.

Criterion 1b is used to complement the assessment under criterion 1a which only looks at the literal interpretation of the measure. It takes account of the de facto effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents the measure will fall foul of criterion 1b. There is no data available of the de facto effect of the measure.

Criterion 2 – Ring-fencing:

"*whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base*"

The same assessment than against criterion 1 is applied by analogy.

Criterion 3 – Substance:

"*whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages*"

The Fiscal Incentives Act provides for a number of conditions for an enterprise to be recognised as an "approved enterprise" in section 6. This ensures that only substantial activities can benefit from the regime.

Criterion 4 – Internationally accepted principles:

"*whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD*"

There do not appear to be any provisions on profit attribution applicable to the beneficiaries of the regime or in general.

Criterion 5 – Transparency:

"*whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way*"

The benefits of the measure are granted on the basis of the provisions in sections 6, 17, 18 and 19 of the act. The Governor-General who has approved an enterprise for the regime has the power to verify that the conditions are fulfilled and can revoke the approval in cases of continued non-fulfilment. These provisions are available in the Act. An order to approve an enterprise is published in the Gazette.

Overall assessment

"*Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community*"

In light of the assessment made under all Code criteria, the regime should be considered as overall harmful.