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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group (Business Taxation)
Subject: The EU list of non-cooperative jurisdictions for tax purposes
– Barbados: final legislation and assessment under criterion 2.2
= Economic Substance Guidelines (Part 2)

SECTOR-SPECIFIC GUIDANCE ON RELEVANT ACTIVITIES

HOLDING COMPANIES

SINGLE PURPOSE EQUITY HOLDING COMPANY

A single purpose equity holding company” means a resident company that only holds equity participations in other entities and only earns dividends and capital gains.

A resident company meets the criteria to be regarded as a single purpose equity holding company when it passively receives income from that activity alone.

If a resident company meets the criteria to be regarded as a single purpose equity holding company, the placing of dividend monies received on deposit or using them to acquire and passively hold other securities such as government bonds, will not constitute a “relevant activity” and therefore the company will still be regarded as a single purpose equity holding company.

HOLDING COMPANIES CARRYING ON OTHER RELEVANT ACTIVITIES

A resident holding company which derives any income from any other relevant activities must meet the substance requirements applicable for any other relevant activity.

If the resident company provides senior management, takes responsibility, control or provides substantive advice in respect of material risks to companies it controls, then it will not be a single purpose equity holding company. The resident company could be considered to carry on the activity of providing headquarters services.

INTELLECTUAL PROPERTY (“IP”) BUSINESS

For the purposes of the ESA, the term “intellectual property asset” includes any right from which identifiable income accrues to the business (i.e. such income being separately identifiable from any income generated from any tangible asset in which the right subsists) and includes royalties and gain on the sale of an IP asset. That is, the term does not apply to a business which owns intellectual property merely as an adjunct

to its business. This means that the term IP asset does not include IP which is incidental and not exploited directly by the business.

With respect to core income generating activities for patents and similar assets:

- (a) research and development activities include but are not limited to: advancing the understanding of scientific relations or technologies, addressing known scientific or technological obstacles, increasing knowledge or developing new applications; or

With respect to core income generating activities for marketing intangibles including trademarks:

- (b) marketing, branding and distribution activities should be directly linked to the specific IP asset.

The requirements of the ESA would not be met by merely passively holding IP assets and/or having periodic meetings of board members.

A resident company that is carrying on high risk IP business is presumed not to have met the ES Test for a fiscal period, even if there are CIGA relevant to the business and the IP assets being carried out in Barbados. A resident company may rebut this presumption if it can produce materials to the Director which demonstrate that there is, and historically has been, a high degree of control over the development, exploitation, maintenance, protection and enhancement (also referred to as "DEMPE") of the IP asset, exercised by an adequate number of suitably qualified employees who are physically present and perform their functions from within Barbados or who are on long-term contracts.

For the purposes of section 6(5) sufficient information which must be filed together with the Economic Substance Declaration includes the following:

- (a) detailed business plans which demonstrate the commercial rational for holding the IP assets in the jurisdiction;
- (b) employee information, including level of experience, type of contracts, qualifications and duration of employment;
- (c) evidence that decision making is taking place within Barbados; and (d) any other information as may be reasonably required.

SHIPPING BUSINESS

This section will be included in subsequent versions of this Guidance.

BANKING BUSINESS

This section will be included in subsequent versions of this Guidance.

FINANCING AND LEASING BUSINESS

The definition encompasses any company which offers credit or financing of any kind for consideration, such as loans, hire purchase agreements, long term credit plans, and finance leases in relation to assets other than land. This includes intra-group financing.

The scope also extends to the situation where a loan advanced for consideration by one company, which is within the scope of this sector, is transferred to a different company which then receives the loan capital repayments and consideration.

The scope does not extend to cases where credit is offered and there is no expectation of consideration from the credit when providing it. A lending fee would be consideration, whereas the grant of security in favour of the lender would not constitute consideration.

The scope does not extend to cases where the company has purchased debt securities as an investment, as opposed to providing a credit facility, for example, where the company has purchased government bonds, quoted bonds or similar securities which are actively traded on one of the major security exchanges.

In banking, insurance and fund management businesses it may be a normal part of their activities to provide credit, and so these sectors are excluded from being within the scope of financing and leasing, to prevent duplicate reporting.

'Setting the terms and duration of any financing or leasing' includes the financial terms, the parameters as to acceptable counterparties, the amounts, rates of interest, the legal agreements and the period for which financing or leasing is to be provided.

'Monitoring and revising any agreements' includes the acquisition of data about a borrower or lessee (or group of them), testing against covenants, extending durations of loans, and feeding back into decision making on writing new terms.

'Managing risk' includes instigating debt collection, considering spreading of risk across sectors or consumer groups. In leasing it includes monitoring and maintaining the underlying assets.

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FUND MANAGEMENT BUSINESS

This section will be included in subsequent versions of this Guidance.

INSURANCE BUSINESS

This section will be included in the next version of this Guidance.

DISTRIBUTION AND SERVICE CENTRE

The definition encompasses companies which purchase raw materials and finished products from other non-resident members of the same group/connected persons and re-sell them for a profit.

The definition also encompasses companies which provide services, consulting or other administrative services, to other non-resident members of the same group/connected persons.

The scope does not extend such activities to cases where a company purchases raw materials and finished products from, or provides services to third parties.

In banking, insurance, fund management, financing and leasing, shipping or headquartering businesses it may be a normal part of their activities to provide such services, and so these activities are excluded from being within the scope of distribution and service centre, to prevent duplicate reporting.

HEADQUARTERING

The definition encompasses companies which provide headquarters services to other nonresident members of the same group/connected persons. The definition also encompasses services provided from within Barbados. A headquarters will take responsibility for the overall success of the group, or an important aspect of the group's performance, and ensure corporate governance. Such headquarters services include:

- the provision of senior management;
- taking responsibility or control of material risk for activities carried out by, or assets owned by, any of those persons; or
- the provision of substantive advice in relation to such risks

In banking, insurance, fund management, financing and leasing, shipping or distribution and service centre businesses it may be a normal part of their activities to provide headquarters services, and so these activities are excluded from being within the scope of Headquarters, to prevent duplicate reporting.

DIRECTORS' FUNCTIONS

DETERMINATION OF WHETHER ES TEST IS SATISFIED

The Director will take a "principles-based" approach to determining whether or not a resident company has satisfied the ES Test with respect to its relevant activities. This Guidance does not prescribe a minimum/maximum number of full-time employees or other personnel for a particular level of income either generally or for any particular type of relevant activity because that would be arbitrary and would prove uneconomical in many cases.

For the purpose of conducting an assessment, the Director may consider various factors, including the following:

1. CIGA are of central importance in terms of generating income and must be carried out in Barbados.
2. Such activities for a resident company may naturally fluctuate during the course of a fiscal period and from one fiscal period to the next with the result that what is an adequate level of employees/personnel may not be constant during the period or periods.
3. The Director may consider timesheets or other evidence of relevance when assessing whether a resident company has an adequate number of full-time employees or other personnel with appropriate qualifications or experience in Barbados.
4. The directors (or equivalent) of a resident company may sometimes perform CIGA in addition to performing their fiduciary duties for the resident company and thereby reduce or even eliminate the resident company's practical need for full-time employees or an outsourcing arrangement. In these cases, the Director may consider evidence of the CIGA performed by the directors (or equivalent) in Barbados.

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5. The Director will need to take outsourcing activity into account in making its determination as to whether a resident company meets the ES Test, and this may include:
- (a) identifying cases where outsourcing has taken place;
 - (b) verifying the accuracy of reports of employee numbers attributable to a resident company where this includes employees of a service provider (rather than counting all employees of a service provider for each entity that engages the service provider);
 - (c) verifying if outsourcing of CIGA has taken place outside Barbados; and (d) distinguishing cases of genuine outsourcing of non-core activities.

SHARING OF INFORMATION

It should be noted that the Director is required to automatically and systematically provide full details of relevant information to the Competent Authority for spontaneous exchange when the company in question is non-compliant, a high-risk intellectual property company or a company claiming tax residence outside of Barbados.

This section is to be completed subject to the final guidelines on EOI.

GLOSSARY

Terms which are defined in the ESA shall have the same meanings in the guidance. Further the following terms when used in the Guidance shall have the meanings following:

"carrying on business in Barbados" means carrying on a trade or business from in Barbados ;

"competent Director" means, for each respective jurisdiction, the persons and authorities authorised pursuant to a scheduled agreement ;

"Consolidated Financial Statements" has the meaning given to that expression by section 2(1) of the Tax Information Director (International Tax Compliance) (Country-By-Country Reporting) Regulations, 2017 ;

"Constituent Entity" has the meaning given to that expression by section 2(1) of the Tax Information Director (International Tax Compliance) (Country-By-Country Reporting) Regulations, 2017;

“**director**”, in relation to an entity, means any director, officer, member or other person in whom the management of the entity is vested and “board of directors” shall be construed accordingly;

“**the Director**” means the Director of the International Business Unit for the purposes of the ESA. The Director’s functions under the ESA include administering the ESA, determining whether a resident company satisfies the ES Test in respect of its relevant activities, monitoring compliance with the ESA and sharing information with other competent authorities.

ES test means “**economic substance test**” and shall be construed in accordance with section 5 of the ESA;

“**ESA**” means the Companies (Economic Substance) Act, 2018;

“**ES Portal**” means the electronic portal to be developed by the Director for the purpose of receiving notifications and reports from resident companies to facilitate the Director performing its statutory functions under the ESA and ES Regulations, including the sharing of information with other competent authorities;

“**ES Regulations**” means regulations made by the Minister under the ESA.

“**income**” means gross income as recorded in its books and records under the relevant accounting standards.

“**grandfathered**” when used in respect of a resident company shall mean a resident company which has applied to the relevant Director under any of the following statutory provisions:

- section 20(a) of the Insurance (Amendment) Act, 2018-52
- section 35(1) (a) of the Financial Institutions (Amendment) Act, 2018-51
- section 3(1) of the International Business Companies (Repeal) Act, 2018-40
- section 6(1) of the Societies with Restricted Liability (Amendment) Act, 2018-47

“group” means a collection of companies and or 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 companies and or enterprises were traded on a public securities exchange.

“Public Director” means a person exercises the duties of a custodian, receiver, judicial manager, public trustee or otherwise in respect of the administration of the affairs of a resident company under the authority of law.”

“Registrar” means

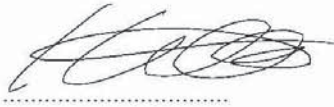
- (a) in the case of a company that is incorporated or registered under the Companies Act, has the meaning given to that expression by section 2 of that Act; and
- (b) in the case of a society with restricted liability that is organised or registered under the Societies with Restricted Liability Act, has the meaning given to that expression by section 2 of that Act.

“ultimate holding company” means a Constituent Entity of a Group that meets the following criteria -

- (a) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of the 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; and
- (b) there is no other Constituent Entity of the Group that owns directly or indirectly an interest described in paragraph (a) in the first mentioned Constituent Entity.

BARBADOS ECONOMIC SUBSTANCE GUIDELINES

These Barbados Economic Substance Guidelines are hereby re-issued by Director,
International Business, Ministry of International Business and Industry on March 11, 2020.



Director, International Business

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