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European Union

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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
= Companies (Economic Substance) Act, 2019-43 (Part 1)



BARBADOS

The Official Gazette Part A

Act 2019-43

(Corrected Copy)

COMPANIES (ECONOMIC SUBSTANCE) ACT, 2019-43

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BARBADOS

I assent
S. MASON
Governor-General
28th November, 2019.

2019-43

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

[Commencement: 29th November, 2019]

ENACTED by the Parliament of Barbados as follows:

Short title

1. This Act may be cited as the *Companies (Economic Substance) Act, 2019*.

Interpretation

2. In this Act,

“authorised person” means the Director or any person authorised by the Director to perform functions under section 16;

“banking business” means the business of providing financial services by a company licenced under the *Financial Institutions Act, Cap. 324A*;

“Barbados competent authority” means the Barbados Revenue Authority;

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

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

“core income-generating activities” means activities set out in section 4;

“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 related party outside Barbados

(i) component parts or materials for goods; or

(ii) goods ready for sale;

and reselling such component parts, materials or goods outside Barbados;

(b) providing services to a related party outside Barbados 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” means the business of providing credit facilities for any kind of consideration and undertaking the leasing of assets but does not include leasing of land or an interest in land, banking business, fund management business or insurance business;

“financial services” means services of a financial nature and includes:

- (a) the acceptance of deposits and other repayable funds from the public;
- (b) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions;
- (c) financial leasing;
- (d) the provision of all payment and money transmission services, including credit cards, charge cards and debit cards, travellers cheques and bankers drafts;
- (e) the provision of guarantees and commitments, including letters of credit;
- (f) engaging in trading for own account or for the account of customers, whether on an exchange, in an over-the-counter market or otherwise in the following:
 - (i) money market instruments, such as cheques, bills, certificates of deposit;
 - (ii) foreign exchange;
 - (iii) derivative products, including but not limited to futures and options;
 - (iv) exchange rate and interest rate instruments, including products such as swaps and forward rate agreements;
 - (v) transferable securities; and

- (vi) other negotiable instruments and financial assets, including bullion,
- (g) participation in issues of all kinds of securities, including underwriting and placement as agent, whether publicly or privately, and the provision of services related to such issues;
- (h) the provision of money broking services;
- (i) engaging in asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services;
- (j) the provision of settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (k) the provision of transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (l) the provision of advisory, intermediation and other auxiliary financial services on all activities listed above, including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy;

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

“foreign 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;

“fund management business” means a business which derives income from the discretionary management of pooled securities or other assets held in a collective investment arrangement;

“Guidelines” mean guidance notes issued from time to time by the Director with respect to the application and interpretation of this Act;

“headquarters business” means the business of providing in Barbados any of the following services to one or more related parties outside of Barbados:

- (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 business, insurance business, or banking business;

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

- (a) acquired the intellectual property asset
 - (i) from a related party; or
 - (ii) in consideration for funding research and development by another person situate in a country or territory other than Barbados; and
- (b) 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 related parties outside of Barbados;

“holding company business” means the business of establishing or acquiring entities and administering the holdings of the group that company controls;

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

“intellectual property asset” means

- (a) patents and assets that share the same features of patents including research and development;

(b) marketable intangibles such as trademarks and similar assets;

“intellectual property business” means the business of holding, exploiting or receiving income for intellectual property assets;

“Minister” means the Minister responsible for International Business;

“MN Group” means any group that includes two or more companies for which the tax residence is in different jurisdictions or includes a company 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;

“Registrar” means the Registrar of Companies within the meaning of the *Companies Act, Cap. 308*;

“related party” means an affiliate or associate within the meaning of the *Companies Act, Cap. 308*;

“relevant activity” has the meaning assigned by section 3;

“resident company” for the purposes of this Act means

- (a) a company, whether incorporated in Barbados or elsewhere, or a society with restricted liability organised in Barbados, or an association formed in Barbados, other than an association of underwriters, which is managed and controlled in Barbados; or
- (b) a company incorporated outside Barbados, that is registered in Barbados as an external company that is not regarded as a tax resident company in the jurisdiction of incorporation; or
- (c) a company incorporated in Barbados as an entity but which is not tax resident in any other jurisdiction;

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

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

- (a) the business of transporting by sea person, animals, goods or mail;
- (b) the hiring or chartering of ships for the purpose set out 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 hire 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 the ship;

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

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

Relevant activity

3. 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 business;
- (i) distribution and service centre business; and
- (j) such other activities as the Minister may by order prescribe.

Core income-generating activities

4. Core income-generating activities, include the following relevant activities

- (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;
 - (v) any other financial services activity carried on by a regulated financial institution which is similar to any of the activities described in this paragraph;
- (b) 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;
- (c) 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;
- (d) 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 Financial Services Commission;
- (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 holding company business, all activities related to that business;
- (g) in respect of insurance business,
 - (i) predicting or calculating risk;
 - (ii) insuring or re-insuring against risk;
 - (iii) providing insurance business services to clients;
- (h) in respect of intellectual property business conducted by a company that is not a high-risk intellectual property company
 - (i) in the case of a business exploiting patent assets and assets that share similar features of a patent, research and development;

- (ii) in the case of a business exploiting assets which are marketing intangibles such as trademarks, marketing, branding and distribution;
- (iii) in all other cases, other core income generating activities relevant to the creation of the income, which could include:
 - (A) taking the strategic decisions and managing and bearing the principal risks relating to the development and subsequent exploitation of the intangible intellectual property asset generating income;
 - (B) taking the strategic decisions and managing and bearing the principal risks relating to acquisition by third parties and subsequent exploitation of the intangible intellectual property asset; or
 - (C) carrying on the underlying trading activities through which the intangible intellectual property assets are exploited, and which lead to the generation of revenue from third parties;
- (i) 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;
 - (v) organising and overseeing voyages;

Requirement to meet economic substance test

5.(1) A resident company which derives income from the carrying on of a relevant activity must satisfy the economic substance test in relation to that relevant activity.

(2) A resident company meets the economic substance test in relation to a relevant activity carried on by the company where it conducts its core income generating activities in Barbados, and the company is directed, managed and controlled in Barbados in relation to that activity.

(3) A resident company conducts its core income generating activities in Barbados in circumstances where, having regard to the level of income derived from the relevant activity carried on,

- (a) there is an adequate number of qualified full-time employees in relation to that activity in Barbados;
- (b) there is an adequate number of employees who are physically present in Barbados in relation to that activity;
- (c) there is adequate operating expenditure incurred in Barbados; and
- (d) there are adequate physical assets in Barbados.

(4) A resident company may satisfy the economic substance test in relation to a relevant activity if its core-income generating activities in relation to that relevant activity are conducted by any other person in Barbados and the resident company is able to monitor and control the carrying out of the core income generating activities by that other person.

(5) The test in subsection (2) is satisfied where

- (a) the board of directors of the company hold meetings in Barbados at an adequate frequency having regard to the amount of decision-making required at that level and there is a quorum of directors physically present;
- (b) the minutes of the board meetings referred to in paragraph (a) record the making of strategic decisions of the company at the meeting;
- (c) the directors of the company have the necessary knowledge and expertise to discharge the duties of the board; and

- (d) the minutes of all board meetings and the records of the company are kept in Barbados.
- (6) A resident company that is a single purpose equity holding company is subject to a reduced economic substance test which is satisfied if the resident company
- (a) complies with all applicable filing requirements under the *Companies Act*, Cap. 308, *Societies with Restricted Liabilities Act*, Cap. 318B, and the *Income Tax Act*, Cap. 73;
 - (b) has adequate human resources and adequate physical assets in Barbados for holding and managing equity participations in other entities; and
 - (c) submits confirmation of its compliance with paragraphs (a) and (b) to the Director in the prescribed manner.
- (7) A resident company which is controlled by residents of Barbados, that is not part of an MN group and which carries on a relevant activity exclusively in Barbados and derives income solely from such relevant activity, is subject to a reduced economic substance test which is satisfied where the resident company has adequate human resources and adequate physical assets in Barbados.
- (8) A resident company that is carrying on a relevant activity shall satisfy the economic substance test from the date prescribed in the Guidelines.
- (9) In determining whether a person has complied with subsections (4) and (5), the Director shall consider whether a resident company, to which those subsections apply, has followed the relevant Guidelines.
- (10) Subject to section 18, the Director shall publish all Guidelines in any other manner which the Director considers will bring it to the attention of those most likely to be affected by it.
- (11) For the purposes of subsection (7) “resident of Barbados” means:
- (a) in the case of an individual, a person who satisfies subsections (5), (6) and (7) of section 85 of the *Income Tax Act*, Cap. 73; and

- (b) in the case of a company, a company which is managed and controlled in Barbados.

Assessment of whether economic substance test is met

6.(1) The Director may determine that a resident company has not met the economic substance test during any fiscal period beginning on the date prescribed in the regulations from which the resident company commences the relevant activity.

(2) A determination referred to in subsection (1) must be made no later than 4 years after the date of filing of the economic substance declaration.

(3) Subsections (1) and (2) do not apply where the Director is unable to make a determination within the 3 years after the economic substance declaration has been provided by reason of any deliberate misrepresentation, or fraudulent action by the resident company or by any other person.

(4) In relation to a high risk intellectual property company, the Director must determine that the economic substance test was not met during a fiscal period unless the high risk intellectual property company provides sufficient information to satisfy the Director that the test was met.

(5) For the purposes of subsection (4), sufficient information is information which demonstrates that the high risk intellectual property company exercises a high degree of control over the development, exploitation, maintenance, enhancement and protection of the intellectual property asset, which high degree of control has historically been and is exercised by suitably qualified employees of the high risk intellectual property company who are physically present and perform their functions within Barbados.

Failure to provide evidence of tax residence outside Barbados

7.(1) Where a company incorporated in Barbados is managed and controlled outside Barbados, the company shall be subject to the provisions of this Act unless it satisfies the Director that it is tax resident outside Barbados.

(2) Where a company incorporated outside Barbados is registered in Barbados as an external company it shall be subject to the provisions of this Act unless it satisfies the Director that it is tax resident outside Barbados.

Requirement to provide information

8.(1) A resident company shall file an economic substance declaration annually in the prescribed form on or before the date stated in the Guidelines.

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

(3) The economic substance declaration and any additional documents shall be filed by an officer of the company designated to handle all matters related to substance, a corporate and trust service provider or any other appointed officer.

Exchange of information to competent authority

9.(1) Subject to subsection (2), where the Director determines under section 6 that a resident company has not met the economic substance test for a fiscal period, the Director shall provide to the Barbados competent authority the information filed pursuant to section 8 relating to that resident company for the relevant period.

(2) Where the Barbados competent authority receives information from the Director under subsection (1) relating to a resident company, the Barbados competent authority shall, in accordance with any law or international agreement relating to exchange of information, exchange relevant information for each fiscal period of the resident company commencing on or after 1st January, 2019 to the foreign competent authority of the country

(a) in which

- (i) the holding company;
- (ii) the ultimate holding company of the resident company; and