

2019-11-26

Bill as amended

OBJECTS AND REASONS

This Bill would provide for

- (a)* the imposition of an economic substance test on companies carrying on business in Barbados;
- (b)* the determination of whether the test is met by assessing the extent of relevant activities carried out by such companies and taking appropriate enforcement action; and
- (c)* related matters.

Arrangement of Sections

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BARBADOS

A Bill entitled

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

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

(iii) the ultimate beneficial owner,
of the resident company, is resident;

(b) where the resident company is incorporated outside Barbados, the Barbados competent authority shall forward the information to the foreign competent authority of the country or territory in which

(i) the holding company;

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

(iii) the ultimate beneficial owner,

of the resident company, is resident.

(3) In respect of a high risk intellectual property company regardless of whether or not the Director has made a determination under section 6 in respect of it, 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.

(4) Where the Barbados competent authority receives information from the Director under subsection (4) relating to a resident company, the Barbados competent authority shall, in accordance with any law or international agreement relating to the exchange of information, exchange full details for each fiscal period of the resident company commencing on or after 1st January 2019

(a) to the foreign competent authority of the country in which

(i) a holding company;

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

(iii) an ultimate beneficial owner,

of the resident company, is resident;

(b) where the high risk intellectual property company is incorporated outside Barbados, the Barbados competent authority shall forward the

information to the foreign competent authority of the country or territory in which the company is resident.

(5) Where the Barbados competent authority receives information from the Director under section 8, the Barbados competent authority shall in accordance with any law or international agreement relating to exchange of information, exchange full details for each fiscal period of a company under section 8 commencing on or after 1st January, 2019 to the foreign competent authority of the country

- (a) in which the company under section 8 claims to be tax resident; or
- (b) in which
 - (i) a holding company;
 - (ii) the ultimate holding company of the resident company; and
 - (iii) an ultimate beneficial owner,of the company, is resident.

Penalty where the economic substance test is not met

10.(1) Where the Director determines under section 6 that a resident company has failed to meet the economic substance test for a fiscal period, the Director shall 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 the determination;
- (c) of the amount of penalty imposed on the resident company under subsection (5);
- (d) of the date from which the penalty under subsection (5) 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 resident company to meet the economic substance test; and
 - (f) of the resident company's right of appeal under section 13.
- (2) Where the Director pursuant to subsection (1) has determined that a resident company did not meet the economic substance test on account of failure to have an adequate number of employees who are physically present in Barbados in relation to that relevant activity, depending on the nature of the breach, the Director may issue a notice to the resident company notifying it
 - (a) that he has determined that the resident company does not meet the economic substance test for that year; and
 - (b) of the reasons for that determination.
- (3) The resident company shall no later than 12 months from the date of the notice issued under subsection (1), rectify the breach and advise the Director of the rectification no later than the last day of the 12 months from the date of the notice.
- (4) Where the resident company fails to rectify the breach referred to in subsection (3) within the time given in the notice issued pursuant to subsection (1), the Director shall issue a second notice to the resident company notifying it
 - (a) that it failed to remedy the breach for which the first notice was issued;
 - (b) of the amount of penalty imposed on the resident company under subsection (5) in addition to the penalty previously imposed under subsection (1);
 - (c) of the date from which the penalty under subsection (5) is due, being not less than 30 days after the issue of the notice;
 - (d) that the Director may within 2 days make a report to the Minister under this subsection; and
 - (e) of what action the Director considers should be taken by the resident company to meet the economic substance test.

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

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

- (a) that the Director has determined that the resident company does not meet the economic substance test for the further fiscal period;
- (b) of the reasons for the determination;
- (c) of the amount of penalty imposed on the resident 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 resident company to meet the economic substance test; and
- (g) of the resident company's right of appeal under section 13.

(7) Following the issue of a notice under subsection (4), the Director shall 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.

(8) The Director shall notify the Registrar of any failure after two consecutive years. The Registrar may issue an order that the company be struck off the register of companies under section 412 of the *Companies Act*, Cap. 308.

Penalty for failure to provide information or for inaccurate information

11.(1) A person is liable to a penalty of \$10 000 where that person fails to provide the information required under section 8.

(2) A person is liable to a penalty of \$10 000 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 referred to in subsection (2) 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 a judge in chambers

that there is a reasonable excuse for the failure.

(6) Where a person has a reasonable excuse for failure to provide information in accordance with subsection (1), but the excuse is no longer valid that person may be allowed to provide the information within a reasonable time after the excuse becomes 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 10 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) the date on which the penalty is due, being not less than 28 days after the issue of the notice; and
 - (c) of the person's right of appeal under section 13.
- (3) A penalty under this section may only be imposed within a period of 6 years commencing on the date on which the person became liable to pay the penalty.

Right of appeal against penalty

- 13.**(1) 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.
- (2) An appeal under subsection (1) shall lie to a judge in chambers whose decision shall be final.

Enforcement of penalty

- 14.**(1) A penalty under this Act shall 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) or (3)(b);
- or

- (b) where notice of appeal is given under section 13, the date on which the appeal is finally determined or withdrawn.
- (3) A penalty under this Act is a debt due to the Crown and is recoverable in the Magistrate's Court for District A, notwithstanding that the amount exceeds the monetary limit of the jurisdiction of the Magistrate fixed by the *Magistrate's Court Act*, Cap. 116.

Confidentiality

- 15.(1)** The Director's power to disclose information under section 8 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

- 16.(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

- 17.(1)** A person who, without reasonable excuse,
- (a) obstructs an authorised person in the exercise of his powers under section 16; or
 - (b) fails to provide such reasonable assistance as the authorised person may require in the exercise of his powers under section 16 is guilty of an offence.
- (2) A person who intentionally alters, suppresses or destroys any business document specified in a notice under section 7(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 \$50 000 or to imprisonment for 2 years, or to both.
- (4) A person guilty of an offence under subsection (2) is liable on summary conviction to a fine of \$100 000 or imprisonment for 5 years or to both.

Regulations

- 18.(1)** 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.
- (2) The Director shall issue Guidelines in respect of the application and interpretation of this Act and all such Guidelines shall have the force of law.

Repeal

- 19.** The *Business Companies (Economic Substance) Act* (Act 2018-41) is repealed.

Read three times and passed the House of Assembly this
day of _____, 2019.

Speaker

Read three times and passed the Senate this _____ day of
, 2019.

President