

BUSINESS TAX (AMENDMENT) BILL, 2020

(Bill No. 30 of 2020)

OBJECTS AND REASONS

This Bill seeks to amend sections 2 and 5 and to insert a Schedule after Tenth Schedule to the Business Tax Act (Cap 20) in order to introduce a revised definition of “permanent establishment” in line with international standards and new rules regarding what foreign source income is considered to be sourced in the Seychelles.

Clause 2 of the Bill seeks to insert after section 2, new sections viz., section 2A, 2B and 2C, to amend section 5 and to insert the Eleventh Schedule after the Tenth Schedule to the Act.

The Bill *inter alia* seeks to amend the Act —

- (i) to insert sections 2A to 2C to replace the existing definition of “permanent establishment” with a definition that is closely aligned with the one that is used in the latest Model Tax Convention of the Organisation for Economic Co-operation and Development;
- (ii) to insert a new section 5(1A) to laydown what income is deemed sourced in the Seychelles for the purposes of the Act; and
- (iii) to insert a new Schedule, relating to qualifying companies, after the Tenth Schedule to the Act.

Dated this 7th day of December, 2020.

**FRANK D.R. ALLY
ATTORNEY-GENERAL**

BUSINESS TAX (AMENDMENT) BILL, 2020

(Bill No. 30 of 2020)



**A BILL
OF**

AN ACT to amend the Business Tax Act (Cap 20).

ENACTED by the President and the National Assembly.

1. This Act may be cited as the Business Tax (Amendment) Act, 2020 and shall come into operation on such date as the Minister may, by notice published in the Gazette, appoint.

Short title and
commencement

Amendment of
Cap. 20

2. The Business Tax Act is amended as follows —

- (a) by repealing in section 2, the definition of “permanent establishment”;
- (b) by inserting after section 2, the following sections —

Definition of
permanent
establishment

“**2A.**(1) In this Act, a person shall be deemed to have a “permanent establishment” in a territory if —

- (a) it has a fixed place of business where the business of the person is wholly or partly carried on;
- (b) it has a construction site or project therein;
- (c) it provides therein, subject to subsection (4), services, including consultancy services, through employees or other personnel engaged for such purpose; or
- (d) an agent acting on behalf of the person habitually exercises therein the authority to do business on behalf of the person subject to subsections (5) to (7),

but, for the purposes of subsection (1) (a), it shall not be considered to be a

permanent establishment if the person's place of business is used solely for activities of a preparatory or auxiliary character, in accordance with subsection (8).

(2) For the purposes of subsection (1)(a), a fixed place of business includes —

- (a) a place of management, branch, office, factory, warehouse or workshop; and
- (b) a mine, oil or gas well, quarry, or other place of extraction of natural resources.

(3) For the purposes of subsection (1)(b), a construction site of project includes —

- (a) a building site or a construction, assembly or installation project; and
- (b) supervisory activities connected to and provided in such site or project,

provided that the site, project or activities (alone or combined with the site or project) continue for more than ninety days.

(4) Subsection (1)(c) applies only if the services are provided for a period or periods aggregating more than ninety days in that territory in any 12-month period commencing or ending in the financial year concerned.

(5) Subsection (1)(d) applies where an agent acting on behalf of the person —

(a) habitually concludes contracts on his or her behalf; or

(b) habitually plays the principal role on his or her behalf leading to the conclusion of contracts that are routinely concluded without material modification; and

(c) the contracts concluded are —

(i) in the name of the person;

(ii) for the transfer of the ownership of or for the granting of the right to use property owned by the person or which the person has the right to use; or

(iii) for the provision of services by the person.

(6) Subsection (1)(d) shall not apply where the agent is of independent status acting in the ordinary course of the agent's business.

(7) A person who acts exclusively or almost exclusively on behalf of another person to which it is closely related shall not be considered to be an agent of independent status under subsection (6).

(8) Subsection (1) (a) shall not apply, in relation to the place of business of a person, to —

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the person;
- (b) the maintenance of a stock of goods or merchandise belonging to the person solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the person solely for

the purpose of processing by another enterprise;

- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the person;
- (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the person, any other activity;
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e),

provided that such activity, or in the case of subparagraph (f) the overall activity of the place of business, is of a preparatory or auxiliary character.

(9) The fact that a person resident in one territory controls or is controlled by a person which is a resident in another territory, or which carries on business in that other territory (whether through a permanent establishment or otherwise) shall not of itself constitute either person a permanent establishment of the other.

Non-application
of Section 2A
to a place of
business

2B. Section 2A(8) shall not apply to a place of business that is used or maintained by a person if that person (“A”) or a closely related enterprise (“B”) carries on business activities at that place or one or more other places in the same territory and —

- (a) one of those places constitute a permanent establishment for either A or B; or
- (b) the overall activity resulting from the combination of the activities carried on by A and B at those places is not of a preparatory or auxiliary character,

provided that the business activities carried on by A and B at the same place or places constitute complementary functions that are part of a cohesive business operation.

Closely related
enterprises

2C.(1) For the purposes of sections 2A(7) and 2B, “closely related” means, in relation to a person (“A”), another person (“B”) —

- (a) which has control of A;
- (b) which is under the control of A;
- (c) which together with A

is under the control of a third person; or

- (d) which together with A meets the 50 per cent investment condition.

(2) The 50 per cent investment condition shall be considered to have met in relation to A and B, if —

- (a) either A or B possess directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company); or
- (b) a third person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in A and B.”;

- (c) in section 5 —

- (i) by repealing subsection (1) and substituting therefor the following subsection —

“(1) An amount derived by a resident person, other than a company to which Eleventh Schedule applies, in carrying on a business is derived from sources in Seychelles if derived from activities conducted, goods situated or rights used in Seychelles.”;

- (ii) by inserting after subsection (1) the following subsections —

“(1A) An amount derived by a resident person that is a company to which Eleventh Schedule applies is derived from sources in Seychelles if derived from —

- (a) activities conducted, goods situated or rights used in Seychelles;
- (b) activities conducted outside Seychelles unless attributable to business carried on through a permanent establishment of the person outside Seychelles;
- (c) income derived from an intellectual property right held in Seychelles, other than qualifying income from—
 - (i) a patent; or

(ii) a right functionally equivalent to a patent; or

(d) passive income, other than that referred to in paragraph (c), generated outside Seychelles except to the extent that the resident company is a qualifying company in accordance with the Eleventh Schedule.

(1B) For the purpose of subsection (1A)(c), qualifying income shall be determined as —

$$\frac{A}{B} \times C$$

Where “A” is qualifying expenditures, “B” is overall expenditures and “C” is the overall income arising from the intellectual property right.”;

(iii) by repealing in subsection (3) the the words “(1) and (2)” and substituting therefor the words “(1), (1A), (1B) and (2)”;

(iv) by inserting after subsection (4) the following subsections —

(5) In this section —

“overall expenditures” means expenditures incurred to create, invent or develop the intellectual property, including acquisition

costs and the costs of research and development outsourced to related or unrelated parties;

“passive income” means any income arising other than from a company's own business activities and includes interest, rents, royalties and dividends;

“qualifying expenditures” means expenditures to fund research and development activities in Seychelles, conducted either by the resident person or outsourced to unrelated parties, that are directly connected with the creation, invention or significant development of the patent or right functionally equivalent to a patent;

“right functionally equivalent to a patent” means a right that is both legally protected and subject to a similar approval and registration process to a patent, including copyrighted software;

- (d) by adding after the Tenth Schedule the following Schedule —

**“ELEVENTH SCHEDULE
QUALIFYING COMPANIES**

[Section 5]

1. This Schedule applies to a company which, either on its own or as part of a group on a

consolidated basis, exceeds the limits of at least two of the following criteria on the balance sheet of the parent undertaking —

- (a) a balance sheet total in excess of 20,000,000 euros;
 - (b) net turnover in excess of 40,000,000 euros;
 - (c) an average number of employees in excess of 250 during the financial year.
2. A company shall be considered to be a qualifying company for the purposes of Section 5(1A)(d) if that company has adequate economic substance in the tax year.
3. For the purpose of paragraph (2), a company shall be regarded as having adequate economic substance if —
- (a) it has complied with filing requirements applicable to it under the Companies Act, 1972 (Cap. 40) and the International Business Companies Act, 2016 (Act 15 of 2016);
 - (b) it has adequate human resources and premises in Seychelles for holding and managing the investment assets; and
 - (c) in the case of a company other than a pure equity holding company or a real estate holding company it, in respect of any assets it acquires, holds, or disposes of —

- (i) takes necessary strategic decisions; and
 - (ii) manages and bears principal risks in Seychelles; and
 - (iii) incurs adequate expenditure relating to the acquisition, holding or disposal, as the case may be.
- 4. The requirements in paragraph 3(b) and 3(c)(ii) may be fulfilled if they are outsourced by the company provided that the company is able to demonstrate adequate supervision and that the relevant functions or activities are conducted in Seychelles.
- 5. The Minister may adopt guidelines on the interpretation of “adequate economic substance” including in relation both to the matters referred to in paragraphs 3 and 4 and to other matters which may be regarded as “adequate economic substance”.
- 6. In this Schedule —
“group”, in relation to a company herein referred to as the “first company”, means the first company and any other company that is —
 - (i) a parent of the first company;
 - (ii) a subsidiary of the first company;
 - (iii) a subsidiary of a parent of the first company; or

- (iv) a parent of a subsidiary of the first company;

“net turnover” means the amounts derived from the sale of products and the provision of services after deducting sales rebates and value added tax and other taxes directly linked to turnover;

“parent”, in relation to a company (referred to in this paragraph as the “first company”), means another company that, whether acting alone or under an agreement with one or more other persons —

- (i) holds, whether legally or beneficially, a majority of the issued shares of the first company;
- (ii) has the power, directly or indirectly, to exercise, or control the exercise of, a majority of the voting rights in the first company;
- (iii) has the right to appoint or remove the majority of the directors of the first company; or
- (iv) has the right to exercise a dominant influence over the management and control of the first company,

and includes a parent of a parent of the first company;

“pure equity holding company” means a company which, as its primary function, acquires and holds shares or equitable

interests in companies and performs no substantial commercial or investment activity;

“real estate holding company” means a company which as its primary function acquires and holds interests in immovable property;

“subsidiary” means a company which has a parent.”.