

BUSINESS TAX (AMENDMENT) BILL, 2022*(Bill No. 33 of 2022)***OBJECTS AND REASONS**

The fundamental objective of this Bill is to make certain changes to the Business Tax Act, 2009 by amending Section 2 thereby introducing new terms that give meaning to the replaced section 54.

The Bill in Section 54 seeks to prevent a person or permanent establishment from obtaining a tax advantage as a result of transfer pricing from actual conditions that are inconsistent with the arm's length principle, giving power to the Commissioner General to make consequential adjustments to those conditions.

The Bill also seeks to prevent a person or the permanent establishment from establishing commercial or financial relations that would result in that person or a permanent establishment obtaining a transfer pricing benefit.

Section 54 delineates when a transfer pricing benefit is deemed to have been obtained, taking in to account foreign residents and makes clear how exactly the Commissioner General is to determine the transfer pricing benefit when conducting a transfer pricing audit.

The amendment also makes inoperable those conditions which are not at arm's length and bestows upon the Commissioner General power to make a determination pursuant to subsection (28) in relation to those persons who become disadvantaged as a result of the Commissioner General making a transfer pricing adjustment.

Dated this 21st day of November, 2022.

**NAADIR HASSAN
MINISTER OF FINANCE,
NATIONAL PLANNING AND TRADE**

BUSINESS TAX (AMENDMENT) BILL, 2022

(Bill No. 33 of 2022)



A BILL

FOR

AN ACT TO AMEND THE BUSINESS TAX ACT, (CAP 20).

ENACTED by the President and the National Assembly.

Short title and commencement

1. This Act may be cited as the Business Tax (Amendment) Act, 2022 (hereinafter the “Act”), amending the Business Tax Act (Cap 20) (hereinafter the “principal Act”) and shall come into operation on such date as the Minister may, by notice published in the *Gazette*, so appoints.

Amendment of Section 2

2. Section 2 of the principal Act is amended as follows —

- (a) by inserting before the definition of “associate” the following definitions —

“Actual conditions” are the conditions that operate in the commercial or financial relations between persons and permanent establishments and other persons which include, but is not limited to, the conditions which can influence or have the potential to influence, the financial indicators used in applying the appropriate transfer pricing method;

“Actual price” means the price set during a transaction between persons and permanent establishments and other persons giving rise to a transfer pricing benefit;

“Actual profit” means profits that would have accrued to a person or a permanent establishment had a person or permanent establishment gained a transfer pricing benefit;

“Area covered under an international tax sharing treaty” means an area identified by or under an international tax sharing treaty in which the Seychelles and another country share taxing rights over activities undertaken within that area;

“Arm's length” means a distance discouraging personal contact and familiarity between persons and permanent establishments dealing with one another in terms of this Act, such that the dealings occur wholly independently;

“Arm's length conditions” means conditions expected to arise between independent persons and permanent establishments or another person dealing wholly independently of one another in comparable circumstances;

“arm's length principle” means the principle that commercial or financial relations established in a transaction between two related parties must be the same as the commercial or financial relations established in a comparable transaction between two unrelated parties;

“Arm's length profits” means the profits that would have accrued to a person or a permanent establishment had the owner of that person or permanent establishment who being related to it, allocated expenditure and income to that person or permanent establishment at arm's length;

- (b) by inserting after the definition of “business building” the following definition —

“business profits article” means —

- (i) Article 7 of the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital; or
- (ii) a corresponding article of another international tax agreement that the Seychelles has entered into;

- (c) by inserting after the definition of “commencement date” the following definition —

“Commercial or financial relations” means connections or arrangements between persons and permanent establishments or relevant parts of those persons or permanent establishments that relate to or could otherwise affect the commercial or financial activities of one or all of the persons or permanent establishments or parts thereof which arrangements may include —

- (i) a single arrangement or a series of arrangements;
- (ii) an understanding, things to be done or not to be

done, and practices, whether expressed or implied and whether or not legally enforceable;

(iii) unilateral actions or mutual arrangements;

(iv) a strategy; or

(v) allocation of overall profit outcomes by two or more persons or permanent establishments.

(d) by inserting after the definition of “Depreciable asset” the following definition —

“Disadvantaged person” is a person that becomes disadvantaged as a result of the Commissioner General making a Transfer Pricing adjustment resulting in an increase in that person's taxable income and withholding tax, or a decrease in that person's loss and tax concessions for a tax year;

(e) by inserting after the definition of “Interest” the following definition —

“International tax agreement” means a tax agreement or treaty within the meaning of section 2(i) of Act 16 of 2011.

(f) by inserting after the definition of “Rent” the following definition —

“Residence article” means

(a) Article 4 of the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital; or

(b) a corresponding article of another international tax agreement that the Seychelles has entered into;

- (g) by inserting after the definition of “Trading stock” the following definition —

“Transfer price” means the difference between the actual price and arm's length price at which a person and its associates, who being related parties, transact with each other and transfer pricing shall be accordingly construed;

“Transfer pricing benefit” means a benefit accruing to a person or a permanent establishment as a result of transfer pricing.

Amendment of section 54

3. Section 54 of the principal Act is amended by repealing section 54 of the principal Act and substituting therefor the following —

“54.(1) This section applies to —

- (a) an arrangement between associates;
- (b) an arrangement between different businesses of a person, as though that arrangement was between associates;
- (c) an arrangement between a business of a person and another activity conducted by that person or another person, as though that arrangement was between associates; and
- (d) an arrangement between a person and a permanent establishment of that person, as though that arrangement was between associates.

(2) A person or a permanent establishment shall not obtain a tax advantage as a result of transfer pricing in Seychelles from actual conditions that are inconsistent with the arm's length principle.

(3) Nothing in the provisions of this Act other than this section limits the operation of this section.

(4) A person shall not establish commercial or financial relations that would result in that person, a permanent establishment or another person obtaining a transfer pricing benefit.

(5) A person is deemed to have obtained a transfer pricing benefit referred to in subsection (4) if —

- (a) the actual conditions differ from the arm's length conditions recognised by the Seychelles revenue Commission;
- (b) had the arm's length conditions operated instead of the actual conditions, one or more of the following ensued —
 - (i) the amount of the person's taxable income for a tax year is greater;
 - (ii) the amount of the person's loss for a tax year is less;
 - (iii) the amount of the person's tax concessions for a tax year is less;
 - (iv) an amount of withholding tax payable in respect of interest or royalties by the person is greater.

(6) The Commissioner General, shall when conducting a transfer pricing audit, determine the transfer pricing benefit by calculating the difference in the actual and arm's length amounts in, —

- (a) the taxable income of the person for a tax year;
or

(b) the tax loss of the person for a tax year.

(7) A foreign resident shall not establish commercial or financial relations that would result in itself, a permanent establishment in the Seychelles or another person in the Seychelles obtaining a transfer pricing benefit.

(8) A foreign resident obtains a transfer pricing benefit if —

(a) it has a permanent establishment in the Seychelles; and

(b) the amount of profits attributed to that permanent establishment is less than the amount of profits the permanent establishment might be expected to make if it were a distinct and separate person engaged and dealing in the manner mentioned in the business profits article; and

(c) had the arm's length profits instead of the actual profits been attributed to the permanent establishment, the following ensued —

(i) the amount of the taxable income of the permanent establishment for a tax year is greater than its actual amount;

(ii) the amount of a tax loss of the permanent establishment for a tax year is less than its actual amount; or

(iii) the amount of tax concessions of the permanent establishment for a tax year is less than its actual amount.

(9) The Commissioner General shall when conducting a transfer pricing audit, determine the transfer pricing benefit by

calculating the difference in the actual and arm's length amounts in subsection (8)(c)(i), (ii) and (iii).

(10) Where a person or permanent establishment obtains a transfer pricing benefit from conditions that operate between a person, a permanent establishment or another person in connection with their commercial or financial relations, those conditions shall be deemed inoperable and the arm's length principle shall apply.

(11) Where the person or permanent establishment gains a transfer pricing benefit, the Commissioner General may make consequential adjustments to those actual conditions that would result in that person or permanent establishment being treated for business tax and withholding tax purposes as if arm's length conditions had operated.

(12) The Commissioner General, in ensuring that the amount of profit being subjected to tax in the Seychelles between persons and permanent establishments or other persons is not less than it should be, shall work out the amount (if any) —

- (a) of the taxable income of the persons or permanent establishments for the tax year if it can be established that a transfer pricing benefit has arisen resulting in a lesser income;
- (b) of the loss of the persons or permanent establishments for the tax year if it can be established that a transfer pricing benefit has arisen resulting in a greater loss;
- (c) of the tax concessions of the persons or permanent establishments for the tax year if it can be established that a transfer pricing benefit has arisen resulting in a greater amount of tax concession; and
- (d) of the withholding tax of the persons or permanent establishments for the tax year if it

can be established that a transfer pricing benefit has arisen resulting in less withholding tax payable in respect of interest or royalties.

(13) There shall be deemed a difference between the actual conditions and the arm's length conditions if —

- (a) an actual condition exists that is not one of the arm's length conditions; or
- (b) a condition does not exist in the actual conditions but is one of the arm's length conditions.

(14) The Commissioner General may —

- (a) treat a person or a permanent establishment that has no taxable income for a tax year as having a taxable income for the year of a nil amount; and
- (b) treat a person or a permanent establishment that has no loss for a tax year as having a loss for the year of a nil amount; and
- (c) treat a person or a permanent establishment that has no tax concessions for a tax year as having tax concessions for the year of a nil amount.

(15) The Commissioner General, shall in conducting audits, ensure that the arm's length profits for a permanent establishment in Seychelles is taken, for the purposes this Act, to be attributable to sources in Seychelles.

(16) The Commissioner General in conducting audits shall ensure that the arm's length profits for a permanent establishment in an area covered by an international tax sharing agreement are taken, for the purposes of this Act, to be attributable to sources in that area.

(17) In identifying the arm's length conditions, the Commissioner General shall use the method, or the combination of methods that is the most appropriate and reliable, having regard to all relevant factors, including the following —

- (a) the respective strengths and weaknesses of the possible methods in their application to the actual conditions;
- (b) the circumstances, including the functions performed, assets used and risks borne by the persons or permanent establishments;
- (c) the availability of reliable information required to apply a particular method; and
- (d) the degree of comparability between the actual circumstances and the comparable circumstances, including the reliability of any adjustments to eliminate the effect of material differences between those circumstances.

(18) In identifying comparable circumstances referred to in subsection (17)(d), regard must be had to all relevant factors, including the following —

- (a) the functions performed, assets used and risks borne by the persons or permanent establishments;
- (b) the characteristics of any property or services transferred between persons and permanent establishments;
- (c) the terms of any relevant contracts between the persons or the permanent establishments;
- (d) the economic circumstances;

- (e) the business strategies of the persons or permanent establishments.

(19) The circumstances referred to in subsection (18) are comparable to actual circumstances if, to the extent, if any, that the circumstances differ from the actual circumstances —

- (a) the difference does not materially affect a condition that is relevant to the method; or
- (b) a reasonably accurate adjustment can be made to eliminate the effect of the difference on a condition that is relevant to the method.

(20) The Commissioner General shall —

- (a) ensure that the identification of the arm's length conditions are based on the commercial or financial relations in connection with which the actual conditions operate; and
- (b) have regard to both the form and substance of those relations.

(21) Notwithstanding subsection (20) (b), the Commissioner General may disregard the form of the actual commercial or financial relations to the extent, if any, that it is inconsistent with the substance of those relations.

(22) Notwithstanding subsection (20) (a) and (b), the identification of the arm's length conditions must be based on other commercial or financial relations if —

- (a) independent persons or permanent establishments dealing wholly independently with one another in comparable circumstances would not have entered into the actual commercial or financial relations;

- (b) independent persons or permanent establishments dealing wholly independently with one another in comparable circumstances would have entered into other commercial or financial relations; and
- (c) those other commercial or financial relations differ in substance from the actual commercial or financial relations;

(23) Notwithstanding subsection (20)(a) and (b), if independent persons or permanent establishments dealing wholly independently with one another in comparable circumstances would not have entered into commercial or financial relations, the identification of the arm's length conditions is to be based on that absence of commercial or financial relations.

(24) Where conditions pertaining to debt financing operating between persons and permanent establishments are inoperable for reasons cited in subsection (10), the Commissioner General may —

- (a) disregard those conditions to the extent to which that financial arrangement would not have occurred between unrelated persons and permanent establishments or other persons; or
- (b) recharacterise an arrangement pertaining to those conditions as equity if the substance of the arrangement is such.

(25) For the purpose of determining the effect that this section has in relation to a person, the Commissioner General and persons shall identify arm's length conditions so as best to achieve consistency with the following documents —

- (a) the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by the Council of the Organisation for Economic Co-operation and Development; and

- (b) a document, or a part thereof, prescribed by the regulations for the purposes of this paragraph.

(26) (a) For the purpose of determining the effect of that this section has in relation to a permanent establishment, the Commissioner General and permanent establishments shall work out the arm's length profits, and identify the arm's length conditions, so as best to achieve consistency with —

- (i) the documents covered under paragraph (b); and
- (ii) subject to paragraph (i), the documents covered by subsection 25 (a) and (b).

(b) The documents referred to under paragraph (a)(i) are as follows —

- (i) the Model Tax Convention on Income and on Capital, and its Commentaries, as adopted by the Council of the Organisation for Economic Co-operation and Development, to the extent that document extracts the text of Article 7 and its Commentary as they read before 21 November 2017;
- (ii) a document, or part thereof, prescribed by the regulations for the purposes of this paragraph.

(27) The Commissioner General may make a determination under subsection (28) in relation to a disadvantaged person if —

- (a) the arm's length conditions are taken by subsections (10) and (12) to operate; and

- (b) the Commissioner General considers that, if the arm's length conditions, instead of the actual conditions, had operated —
- (i) the amount of the disadvantaged person's taxable income for a tax year might have been expected to be less than its actual amount;
 - (ii) the amount of the disadvantaged person's loss for a tax year might have been expected to be greater than its actual amount;
 - (iii) the amount of the disadvantaged person's tax concessions for a tax year might have been expected to be greater than its actual amount; or
 - (iv) the amount of withholding tax payable in respect of interest or royalties by the disadvantaged person might have been expected to be less than its actual amount;
- (c) the Commissioner General considers that it is fair and reasonable that the actual amounts mentioned in subsection (27) (b) (i), (ii), (iii) or (iv) (as the case requires) be adjusted accordingly.

(28) (a) For the purpose of adjusting an amount as mentioned in subsection(27)(c), the Commissioner General may make a determination stating the amount that is (and has been at all times) the amount of the disadvantaged person's —

- (i) taxable income for the tax year;
- (ii) loss for the tax year;

(iii) tax concessions, or tax concessions of a particular kind, for the tax year; or

(iv) withholding tax payable in respect of interest or royalties.

(b) The Commissioner General may take such action as the Commissioner General considers necessary to give effect to a determination under subsections (27) and (28).

(c) The Commissioner General must give a copy of a determination under subsections (27) and (28) to the disadvantaged person.

(d) A failure to comply with paragraph (c) above does not affect the validity of the determination.

(e) A person may give the Commissioner General a written request to make a determination under subsections (27) and (28) relating to the person.

(f) The Commissioner General shall decide whether or not to grant the request, and give the person notice of the Commissioner General's decision.

(g) If the disadvantaged person is dissatisfied with the Commissioner General's decision, the person may object, in the manner set out in Part IV of the Revenue Administration Act, 2009, against that decision.

(29) Section 11 of the Revenue Administration Act, 2009, does not prevent the amendment of an assessment of a person for a tax year if —

(a) the amendment is made within seven years of the date the Commissioner General served or is treated as having served notice of the assessment to the person; and

(b) the amendment is made for the purpose of giving effect to subsections (10) and (12).

(30) Where an adjustment is made by the Commissioner General, in relation to an arrangement between a person and another person that is a resident of Seychelles, the Commissioner General shall make a consequential adjustment to the taxable income of the other person.

(31) Where an adjustment is made by a person to give effect to subsections (20) to (24) in relation to an arrangement between the person and another person that is resident in Seychelles, the other person may apply to the Commissioner General to make a corresponding adjustment to the taxable income of the associate.

(32) The granting of an application under subsection (31) is at the discretion of the Commissioner General.

(33) Subsection (30) shall not apply to an adjustment made by the Commissioner General to give effect to the provisions of an agreement with the government of a foreign country referred to in Section 79(1) of this Act.