

**BUSINESS TAX (AMENDMENT) BILL, 2022***(Bill No. 35 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 replace those conditions with arm's length conditions.

The Bill also seeks to prevent a person or a 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 into account domestic and 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 (25) in relation to those persons who become disadvantaged as a result of the Commissioner General making a transfer pricing adjustment.

**Dated this 29<sup>th</sup> day of November, 2022.**

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

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**BUSINESS TAX (AMENDMENT) BILL, 2022**

*(Bill No. 35 of 2022)*

**ARRANGEMENT OF SECTIONS**

**SECTIONS**

1. Short title and commencement
2. Amendment of section 2
3. Repeal and replacement of section 54

**BUSINESS TAX (AMENDMENT) BILL, 2022**

*(Bill No. 35 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 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 Business Tax Act (Cap 20), in this Act referred to as the “principal Act” is amended as follows —

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

“Actual conditions” are conditions that are set by and apply between persons in their commercial or financial relations, which include, but are not limited to conditions pertaining to price, gross margin, net profit and the division of profit between persons;

“Actual price” means the price set by persons during a transaction;

“Actual profit” means a profit that accrues to a person as a result of commercial or financial relations;

“Area covered by an international tax sharing agreement” means an area identified by an international tax sharing agreement 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 dealing with one another, such that the dealings occur wholly independently;

“Arm's length conditions” means conditions operating in commercial or financial relations between persons 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 associates must be the same as the commercial or financial relations established in a

comparable transaction between persons who are not associates;

“Arm's length profits” means the profits that would have accrued to a person had the owner of that person, who being its associate, allocated expenditure and income to that person 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 that relate to or could otherwise affect the commercial or financial activities of one or all those persons 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) an allocation of overall profit outcomes by two or more persons.
- (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 deleting the definition of “person” and replacing therefor the following —
- “person” includes an individual, partnership, entity, trust, government body or for the purpose of section 54, a permanent establishment;
- (g) by inserting after the definition of “Rent” the following definition —
- “Transfer pricing” means the determination of prices charged in transactions between associates;
- “Transfer pricing benefit” means a benefit accruing to a person as a result of a difference between the actual conditions and the arm's length conditions.

### **Repeal and replacement of section 54**

**3.** Section 54 of the principal Act is repealed and substituted with the following —

**“Transfer pricing**

**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 shall not obtain a transfer pricing benefit as a result of transfer pricing in Seychelles from actual conditions that differ from the arm's length conditions and inconsistent with the arm's length principle.

(3) A person shall not engage in commercial or financial relations that would result in that person or another person obtaining a transfer pricing benefit.

(4) A person is deemed to have obtained a transfer pricing benefit referred to in subsections (2) and (3) if —

- (a) the actual conditions differ from the arm's length conditions as determined by the Seychelles Revenue Commission established under the Seychelles Revenue Commission Act, Cap 322;
- (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 would have been greater;
- (ii) the amount of the person's loss for a tax year would have been less;
- (iii) the amount of the person's tax concessions for a tax year would have been less;
- (iv) the amount of withholding tax payable in respect of interest or royalties by the person would have been greater.

(5) 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.

(6) A non-resident shall not establish commercial or financial relations that would result in itself, or another person in the Seychelles obtaining a transfer pricing benefit.

(7) A non-resident obtains a transfer pricing benefit referred to in subsection (6) if —

- (a) it has a permanent establishment in the Seychelles;
- (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 —
  - (i) the amount of the taxable income of the permanent establishment for a tax year would have been greater than its actual amount;
  - (ii) the amount of a tax loss of the permanent establishment for a tax year would have been less than its actual amount; or
  - (iii) the amount of tax concessions of the permanent establishment for a tax year would have been less than its actual amount.

(8) 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 (7)(c)(i), (ii) and (iii).

(9) Where a person obtains a transfer pricing benefit from conditions that operate between that person and another person in connection with their commercial or financial relations, those conditions shall be deemed inoperable and the Commissioner General may impose, for the purpose of such relations, arm's length conditions.

(10) The Commissioner General, in ensuring that the amount of profit being subjected to tax in the Seychelles by persons is not less than it should be, shall work out the amount (if any) —

- (a) of the taxable income of the persons 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 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 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 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.

(11) 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.

(12) The Commissioner General, in conducting a transfer pricing audit, shall 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.

(13) The Commissioner General, in conducting a transfer pricing audit, 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.

(14) The Commissioner General may, for audit purposes —

- (a) treat a person with no assessable income for a tax year as having assessable income for that year;
- (b) treat a person who has made no loss in a tax year as having a loss for that year; and
- (c) treat a person who has not obtained tax concessions for a tax year as having obtained tax concessions for that year.

(15) 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;
- (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.

(16) In identifying comparable circumstances referred to in subsection (15)(d), regard must be had to all relevant factors, including the following —

- (a) the functions performed, assets used and risks borne by the persons;
- (b) the characteristics of any property or service transferred between the persons;
- (c) the terms of any relevant contracts between the persons;
- (d) the economic circumstances; and
- (e) the business strategies of the persons.

(17) The circumstances referred to in subsection (16) shall be comparable to actual circumstances if —

- (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 in a condition that is relevant to the method.

(18) 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.

(19) Notwithstanding subsection (18) (b), the Commissioner General may disregard the form of the actual

commercial or financial relations to the extent that it is inconsistent with the substance of those relations.

(20) Notwithstanding subsection (18) (a) and (b), the identification of the arm's length conditions shall be based on other commercial or financial relations if —

- (a) a person dealing wholly independently with one another in comparable circumstances would not have entered into the actual commercial or financial relations;
- (b) a person 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.

(21) Notwithstanding paragraphs (a) and (b) of subsection (18), if a person 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 shall be based on that absence of commercial or financial relations.

(22) Where conditions pertaining to debt financing operating between persons are not at arm's length, the Commissioner General may —

- (a) disregard those conditions to the extent to which that financial arrangement would not have occurred between wholly independent persons; or
- (b) recharacterise an arrangement pertaining to

those conditions as equity if the substance of the arrangement is such.

(23) 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, that may by regulations be prescribed for the purposes of this paragraph.

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

- (a) the documents covered under paragraph (b); and
- (b) subject to paragraph (i), the documents covered by subsection 23 (a) and (b).

(25) The documents referred to under subsection (24) (a) are as follows —

- (a) 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 the document extracts the text of Article 7 and its Commentary as they read before 21 November 2017;

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

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

- (a) the arm's length conditions are taken by subsections (9) and (10) 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 (26) (b) (i), (ii), (iii) or (iv), as the case requires, be adjusted accordingly.

(27) (a) For the purpose of adjusting an amount as mentioned in subsection (26)(c), the Commissioner General may make a determination 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 (26) and (27);

(c) The Commissioner General shall give a copy of a determination under subsections (26) and (27) 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 (26) and (27) 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, Cap 322 against that decision.

(28) 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 (9) and (10).

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

(30) Where an adjustment is made by a person to give effect to subsections (18) to (22) in relation to an arrangement between a person and another person that is a resident of the Seychelles, the other person may apply to the Commissioner General to make a corresponding adjustment to the taxable income of one of the persons.

(31) The granting of an application under subsection (30) is at the discretion of the Commissioner General.

(32) Subsection (29) 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.”