

I Assent

Tim Foy
Governor

Date

ANGUILLA
No /2018

A BILL FOR
COMPANIES (AMENDMENT) ACT, 2018

[Gazette Dated: 2018] [Commencement: under section 11]

An Act to amend the Companies Act, R.S.A., c. C65 to require certain companies to demonstrate that they satisfy "economic substance" requirements, to require mandatory reporting of information, and for incidental and connected purposes.

ENACTED by the Legislature of Anguilla

Interpretation

1. In this Act, "the principal Act" means the Companies Act, R.S.A., c. C65.

Amendment of section 160 of the principal Act

2. Section 160(3)(b) of the principal Act is amended by deleting "or officer of the company or by its registered agent", and substituting ", officer, registered agent or liquidator of the company".

Amendment of section 190 of the principal Act

3. Section 190 of the principal Act is amended by deleting subsection (1) of that section, and substituting the following subsection –

“(1) Unless it is registered under this Division, a foreign company –

- (a) must not carry on business in Anguilla; and

(b) must not be centrally managed and controlled in Anguilla.”.

Insertion of new Part 4A in the principal Act

4. The principal Act is amended by inserting, immediately after Part 4, the following Part—

“PART 4A
ECONOMIC SUBSTANCE REQUIREMENTS

Purpose and operation of this Part

205A. (1) The purpose of this Part is to require –

- (a) any relevant company carrying on a relevant activity to satisfy the Registrar annually that it meets the economic substance test in relation to the relevant activity; and
- (b) mandatory reporting of information for the purposes of the Multilateral Convention on Mutual Administrative Assistance on Tax Matters.

(2) Subsection (1)(a) does not apply to an exempt relevant company.

(3) Subject to any regulations made for the purposes of this Part, the Registrar may by notice published in the *Gazette* issue guidance on how the Registrar intends to determine whether a relevant company meets the economic substance test in relation to any relevant activity.

(4) The Registrar may delegate in writing to a specified person or authority all or any of his functions under this Part.

(5) In this Part –

"compliant", in relation to a relevant company, means that the relevant company is not, or no longer, non-compliant;

"economic substance return" means a return required to be filed under section 205C;

"the economic substance test", in relation to a relevant activity, means the test prescribed as the economic substance test for the relevant activity;

“exempt relevant company” means a relevant company that is prescribed to be exempt from the economic substance test;

“filed information”, in relation to a relevant company, means any economic substance return or other information or evidence filed by it with the Registrar;

“intellectual property asset” includes any copyright, design right, trademark, patent or similar asset including any utility model or any right given for plant breeders and genetic material;

“non-compliant” has the meaning specified in section 205D(2);

“relevant activity” means an activity specified in Schedule 2;

“relevant company” or “company” means –

- (a) a body corporate that is incorporated or continued under this Act; or
- (b) a foreign company registered under Division 3 of Part 4 of this Act;

“relevant quarter”, in relation to any relevant company, means the calendar quarter in which the anniversary of the incorporation, continuance or first registration under this Act of the company falls; and

“relevant year”, in relation to any relevant company, means the year immediately preceding the 1st day of the relevant quarter for the company.

Meaning of information subject to legal professional privilege.

205B. For the purposes of this Part, information is subject to legal professional privilege where the information would reveal confidential communications between a client and his legal representative where the communication is produced for the purpose of –

- (a) seeking or providing legal advice; or
- (b) use in existing or contemplated legal proceedings;

but legal professional privilege does not apply to any information or other matter, which is communicated or given with the intention of furthering a criminal purpose.

Economic substance returns

205C. (1) A relevant company shall make up and file with the Registrar a return for each relevant year in accordance with this section.

(2) The return –

(a) shall be made up to, and filed in accordance with –

(i) in the case of a foreign company registered under Division 3 of Part 4, the times specified in section 193(1); and

(ii) in any other case, the times specified in section 160(1) and (2), as if it were an annual return;

(b) shall be filed together with the annual return for the relevant year filed under section 160 or 193;

(c) shall include the prescribed information and be in the prescribed form; and

(d) shall be certified as correct by a director, officer, registered agent or liquidator of the company.

(3) Without limiting the generality of subsection (2)(c), regulations made for the purposes of that provision may require the company to provide sufficient information in the return to enable the Registrar –

(a) to identify the type of activities carried on by the company;

(b) to determine whether the company is carrying on a relevant activity; and

(c) if the company is carrying on a relevant activity –

(i) to determine the nature of the relevant activity; and

(ii) unless the company is an exempt relevant company, to determine whether or not the company meets the economic substance test in relation to the relevant activity.

(4) A company that contravenes subsection (1) commits an offence.

Registrar may require further information or evidence to remedy non-compliance

205D. (1) This section applies where, in the opinion of the Registrar, a relevant company is non-compliant.

(2) A relevant company is non-compliant if it –

- (a) does not meet the economic substance test in relation to each relevant activity that it carries on; or
 - (b) is in contravention of section 205C(1).
- (3) Subsection (2)(a) does not apply to an exempt relevant company.
- (4) Where this section applies, the Registrar may, by giving the company notice in writing, require it to file with the Registrar within a period specified in the notice an economic substance return, a revised economic substance return or any further information or evidence described in the notice in order to rectify or remedy the non-compliance.
- (5) The period specified in a notice shall be not less than 7 days and not more than 30 days from the date of issue of the notice.
- (6) A relevant company given a notice shall file with the Registrar the return, further information or evidence required by the notice within the period specified in that notice.
- (7) A notice —
- (a) has effect notwithstanding any obligation as to confidentiality or other restriction upon the disclosure of information imposed by any enactment, rule of law or otherwise; but
 - (b) does not require a relevant company to file with the Registrar any information subject to legal professional privilege.

Financial penalties for continuing non-compliance

205E. (1) This section applies where a relevant company given a notice under section 205D(4) —

- (a) fails to file with the Registrar the return, further information or evidence required by the notice within the period specified in it; or
- (a) despite filing the return, further information or evidence required by the notice, fails to satisfy the Registrar that the company is compliant.

(2) Subject to subsections (4) and (5), where the company is or continues to be non-compliant under section 205D(2)(a), the Registrar shall order that company to pay to the Registrar a civil penalty consisting of –

- (a) a fine of not less than \$1,000 and not more than \$25,000 in respect of the first relevant year to which the non-compliance relates; and
- (b) thereafter, a fine of not less than \$5,000 and not more than \$100,000 in respect of each subsequent relevant year to which the non-compliance relates.

(3) Subject to subsections (4) and (5), where the company is or continues to be non-compliant under section 205D(2)(b), the Registrar shall order that company to pay to the Registrar a civil penalty consisting of –

- (a) a fine of not less than \$500 and not more than \$2,500 in respect of the first relevant year to which non-compliance relates; and
- (b) thereafter, a fine of not less than \$1,000 and not more than \$5,000 in respect of any other relevant year to which the non-compliance relates.

(4) Where the Registrar intends to order a relevant company to pay a penalty in accordance with subsection (2) or (3), the Registrar shall give the company notice of his intention, and a reasonable opportunity to do either or both –

- (a) satisfy the Registrar that the company is compliant; and
- (b) show cause why the company should be fined an amount that is less than the proposed fine.

(5) After the expiration of the time specified in a notice the Registrar shall, unless the relevant company satisfies the Registrar that it is compliant, issue a written order to the company to pay a civil penalty consisting of the proposed fine or a fine of any other amount the Registrar considers appropriate in accordance with subsection (2) or (3).

(6) Subject to section 205G, a relevant company to which an order is issued shall pay the penalty specified in the order within 30 days of the date on which the order was issued.

(7) Any penalty payable under subsection (6) that remains unpaid for 30 days immediately following the date on which the order was issued is recoverable at the instance

of the Attorney General before a Magistrate in civil proceedings as a debt due to the Crown notwithstanding the amount sought to be recovered.

(8) For the avoidance of doubt, nothing in this section limits or restricts the power of the Registrar to strike off a relevant company under section 243.

Mandatory information sharing

205F. (1) This section applies to a relevant company if, in respect of any relevant year –

- (a) section 205E applies in relation to the company in accordance with section 205E(1);
- (b) in the opinion of the Registrar, the company was a high-risk intellectual property entity; or
- (c) in the opinion of the Registrar the company carried on a relevant activity, and the company claims, through filed information, that it was an exempt relevant company.

(2) Where this section applies to a relevant company, the Registrar shall promptly deliver to the competent authority of Anguilla the following information relating to the company –

- (a) the name of that company;
- (b) a statement of which of subsection (1)(a), (b) or (c) applies, and why the Registrar believes it applies;
- (c) any inculpatory information for the relevant year;
- (d) any other filed information that the Registrar considers relevant to the company's tax matters for the relevant year; and
- (e) any other prescribed information.

(3) Upon receiving that information, the competent authority of Anguilla shall promptly forward it to the competent authority of each tax-concerned Member State.

(4) Nothing in this section requires either the Registrar or the competent authority of Anguilla to deliver or forward to any person any information subject to legal professional privilege.

(5) In this section –

“beneficial owner” has the meaning specified in section 2 of the Anti-Money Laundering and Terrorist Financing Regulations, Revised Regulations of Anguilla P98-1;

“competent authority” has the meaning specified in section 1(1) of the Tax Information Exchange (International Co-operation) Act, 2016;

“a high-risk intellectual property entity” means a relevant company that –

- (a) acquired an intellectual property asset –
 - (i) from an affiliated entity; or
 - (ii) in consideration for funding research and development by another person situated in a country or territory other than Anguilla; and
- (b) licenses the intellectual property asset to an affiliated entity, or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by an affiliated entity;

“inculpatory information” means any information or evidence filed by the company with the Registrar, the knowledge of which, in the Registrar’s opinion, might trigger off Anguilla’s obligation to forward that information or evidence to another Party under Article 7 of the Multilateral Convention on Mutual Administrative Assistance on Tax Matters; and

“tax-concerned Member State” means any Member State of the European Union in which any of the following is known to be resident for tax purposes –

- (a) a holding body of the company;
- (b) an ultimate holding body of the company; or
- (c) a beneficial owner of the company.

(6) An entity is an affiliated entity in relation to another entity if –

- (a) one of them is the subsidiary of the other;
- (b) both are subsidiaries of the same entity;
- (c) each of them is controlled by the same entity; or

(d) they are both affiliated (within the meaning of paragraph (a), (b) or (c)) with the same entity at the same time.

(7) An entity is the holding body of another entity if the later-mentioned entity is a subsidiary of the first-mentioned entity.

(8) An entity is a subsidiary of another entity if the first-mentioned entity is controlled by the later-mentioned entity.

(9) An entity is controlled by another entity if, for example, any shares of the first-mentioned entity carrying voting rights sufficient to elect a majority of its directors are, except by way of security only, held, directly or indirectly by or on behalf of the later-mentioned entity.

Appeals against penalties

205G. (1) A relevant company to which an order under section 205E(5) is issued may appeal the order to a Judge in Chambers within 90 days of the date on which the order was issued.

(2) Notice of an appeal to the Judge in Chambers under subsection (1) must be served on the Registrar who shall be entitled to appear and be heard at the hearing of the appeal.

(3) The Registrar may, pending an appeal under subsection (1), suspend the operation of the order upon any terms he considers appropriate pending the determination of the appeal.”.

Insertion of new sections 233A and 233B and substitution of section 234 in the principal Act

5. The principal Act is amended by deleting section 234, and substituting the following sections –

“Economic substance records to be kept

233A. (1) A relevant company required under Part 4A to satisfy the Registrar that it meets the economic substance test with respect to any relevant year shall retain at the registered office of the company for six years after the end of the relevant year, any book,

document or other record, including any information stored by electronic means, that relates to the economic substance return or any further information or evidence required to be provided to the Registrar under that part.

(2) A relevant company that contravenes subsection (1) commits an offence.

Confidentiality

233B. (1) Except in so far as may be necessary for the due performance of his functions under Part 4A or any other provision of this Act, the Registrar and any officer or other person acting as an officer, a servant, an agent or an adviser of the Registrar shall preserve and aid in preserving confidentiality with regard to all matters relating to information or documents that may come to his knowledge in the course of the performance of his duties under this Act.

(2) A person who contravenes subsection (1) commits an offence.

Immunity

234. No liability attaches to the Registrar, the competent authority of Anguilla (as defined in section 205F(5)), or any person acting under the authority of either for any act done in good faith in the discharge of the functions under this Act of the Registrar or, as the case may be, the competent authority.”.

Amendment of section 243 of the principal Act

6. Section 243 of the principal Act is amended –

(a) by inserting, immediately after paragraph (a) of subsection (1), the following paragraph –

“(aa) the company, being a relevant company, carries on a relevant activity and fails to satisfy the Registrar, through filed information, that it either –

(i) meets the economic substance test for each relevant activity carried on by that company; or

- (ii) is an exempt relevant company;” and
- (b) by inserting, immediately after subsection (5), the following subsection –
- “(6) For the purposes of subsection (1)(a) and (aa), and subsections (2), (3), (4) and (5) in connection with any striking off under subsection (1)(a) and (aa) –
- “company” includes a relevant company, and
- “filed information”, “the economic substance test”, “exempt relevant company”, “relevant activity” and “relevant company” have the respective meanings given by section 205A(5).”.

Amendment of section 270 of the principal Act

7. Section 270(1) of the principal Act is amended by inserting, immediately after paragraph (k), the following paragraph –

- “(ka) providing for such savings, transitional and consequential provisions as the Governor may consider necessary or expedient to have effect in connection with the coming into operation of any provision of this Act or the regulations.”.

Renaming of the Schedule to the principal Act

8. The principal Act is amended by –

- (a) deleting, in the Schedule to the principal Act, the heading “SCHEDULE” and substituting the heading “SCHEDULE 1”; and
- (b) deleting the phrase “the Schedule” wherever it appears and substituting the phrase “Schedule 1”.

Insertion of new Schedule 2 in the principal Act

9. The principal Act is amended by inserting, immediately after the renamed Schedule 1, the schedule set out in the Schedule to this Act.

Transitional

10. (1) Nothing in this Act applies to an existing company until 1st July, 2019.

(2) In subsection (1), “existing company” means a company that was incorporated, continued or first registered under the principal Act before 1st January, 2019.

Citation and commencement

11. This Act may be cited as the Companies (Amendment) Act, 2018 and shall come into force on 1st January, 2019.

SCHEDULE

(Section 9)

SCHEDULE TO BE INSERTED IMMEDIATELY AFTER RENAMED SCHEDULE 1 OF THE PRINCIPAL ACT

“SCHEDULE 2

(Section 205A(5))

RELEVANT ACTIVITIES

Each of the following is a relevant activity for the purposes of Part 4A –

1. **Banking**

A "banking business" as defined in the Banking Act, 2015 and in the Trust Companies and Offshore Banking Act, R.S.A. c.T60.

2. **Insurance**

An "insurance business" as defined in the Insurance Act, R.S.A. c.I16.

3. **Fund management**

A business earning income from providing management services (including making decisions on investments) to an investment fund or its investors.

4. **Financing and leasing**

A business earning income from providing credit facilities for any kind of consideration to another person but does not include financial leasing of land or an interest in land, a banking business, an insurance business or a fund management business.

5. **Distribution and service centre**

A business earning income from –

- (a) purchasing raw materials and finished products from other group members and reselling these; or
- (b) providing services to other entities of the same group, for example transporting and storing goods, managing stocks, taking orders, or providing consulting or other administrative services.

6. Shipping

A business earning income from shipping activities, for example –

- (a) managing the crew (including hiring, paying or overseeing crew members);
- (b) hauling and maintaining ships;
- (c) overseeing and tracking deliveries;
- (d) determining what goods to order and when to deliver them; or
- (e) organising and overseeing voyages.

7. Intellectual property business

A business earning income from intellectual property assets, including royalties and income from the sale of an intellectual property asset.

8. Headquarters

A business earning income from providing services such as managing, coordinating or controlling business activities for a group with which it is affiliated, whether for the group as a whole or for members of the group in a specific geographical area, for example –

- (a) taking relevant management decisions;
- (b) incurring expenditures on behalf of group entities; or
- (c) coordinating group activities.

9. Holding company

A business holding equity participation from which dividends or capital gains are earned."