



BERMUDA

USA-BERMUDA (COUNTRY-BY-COUNTRY REPORTING)
REGULATIONS 2017

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The Minister in exercise of the power conferred by section 13 of the USA-Bermuda Tax Convention Act 1986 makes the following Regulations:

PART 1 PRELIMINARY PROVISION

Citation

1 These Regulations may be cited as the USA-Bermuda (Country-by-Country Reporting) Regulations 2017.

Interpretation

2 (1) In these Regulations, unless the context otherwise requires—

“Act” means the USA-Bermuda Tax Convention Act 1986;

“Arrangement” means the arrangement to be entered into between the competent authority of the United States of America and the competent authority of Bermuda on the exchange of country-by-country reports pursuant to Article 3 of the Tax Information Exchange Agreement;

“Bermuda Reporting Entity” means the entity resident in Bermuda for tax purposes that is required to file in its jurisdiction of tax residence on behalf of the MNE Group a country-by-country report conforming to the requirements in regulation 4, and such entity may be the Ultimate Parent Entity or the Surrogate Parent Entity;

“Consolidated Financial Statements” means the financial statements of an MNE Group in which the assets, liabilities, income, expenses and cash flows of the Ultimate Parent Entity and the Constituent Entities are presented as those of a single economic entity;

“Constituent Entity” means—

- (a) any separate business unit of an MNE Group that is included in the Consolidated Financial Statements of the MNE Group for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange;

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(b) any such business unit that is excluded from the MNE Group's Consolidated Financial Statements solely on size or materiality grounds; and

(c) any permanent establishment of any separate business unit of the MNE Group included in paragraph (a) or (b) provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes;

“country-by-country report” means the country-by-country report to be filed annually in accordance with these Regulations containing the information and in the form referred to in regulation 4;

“electronic address” includes an email address;

“electronic portal” means the Minister's electronic portal for the automatic exchange of information;

“Excluded MNE Group” means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than EUR750 million during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year;

“file” except where stated in relation to filing in a jurisdiction outside Bermuda, means file with the Minister;

“Fiscal Year” means an annual accounting period with respect to which the Ultimate Parent Entity of the MNE Group prepares its financial statements;

“Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange;

“inaccurate” means incomplete, incorrect or unreliable;

“International Agreement” means—

(a) the Tax Information Exchange Agreement; or

(b) if applicable, the Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral Tax Convention, or any Tax Information Exchange Agreement to which Bermuda is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information;

“MNE Group” means a Multinational Enterprise Group that—

(a) includes two or more enterprises the tax residence for which are in different jurisdictions, or includes an enterprise that is resident for tax purposes in

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one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction;

(b) is not an Excluded MNE Group;

“notice” means written information given electronically or by another mode of communication;

“OECD Final Report” means the document entitled “Transfer Pricing Documentation and Country-by Country Reporting - Action 13: Final Report” published by the Organisation for Economic Co-operation and Development (“OECD”) as part of the OECD/G20 Base Erosion and Profit Shifting Project (as the same may be modified from time to time);

“official website” means any website of the Minister about international tax cooperation;

“Qualifying Competent Authority Agreement” means the Arrangement.

“Reporting Entity” means the entity that is required to file in its jurisdiction of tax residence on behalf of the MNE Group a country-by-country report conforming to the requirements in regulation 4, and such entity may be—

(a) the Ultimate Parent Entity; or

(b) the Surrogate Parent Entity;

“Reporting Fiscal Year” means the Fiscal Year the financial and operational results of which are reflected in the country-by-country report;

“required information” for a the purposes of regulation 5, means information the Minister shall require pursuant to that regulation which will include, but is not limited to, the following—

(a) the Bermuda Reporting Entity’s name; and

(b) the full name, address, business entity, position and contact details (including an electronic address) of an individual which the Bermuda Reporting Entity has authorised to be its principal point of contact for compliance with these Regulations;

“resident in Bermuda for tax purposes”, for a Reporting Entity, means—

(a) being incorporated or established under the laws of Bermuda (including where such laws provide for the issuance of a permit to enable an entity incorporated or established outside of Bermuda to carry on trade or business in Bermuda);

(b) having a place of management, including effective management (as defined under the Commentary, in Bermuda; or

(c) being subject to financial supervision in Bermuda;

“return” means a return or report required under regulation 6;

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“Surrogate Parent Entity” means one Constituent Entity of the MNE Group that has been appointed by such MNE Group, as the sole substitute for the Ultimate Parent Entity, to file the country-by-country report in that Constituent Entity’s jurisdiction of tax residence, on behalf of such MNE Group, when one or more of the conditions set out in regulation 6(2) apply;

“Systemic Failure”, with respect to a jurisdiction, means that a jurisdiction has a Qualifying Competent Authority Agreement in effect with Bermuda, but has suspended automatic exchange (for reasons other than those that are in accordance with the terms of that Agreement) or otherwise persistently failed to automatically provide to Bermuda country-by-country reports in its possession of MNE Groups that have Constituent Entities in Bermuda (as applicable);

“Tax Information Exchange Agreement” or “TIEA” means the agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on behalf of the Government of Bermuda) for the Exchange of Information with respect to Taxes which was entered into on 2 December 1988;

“Ultimate Parent Entity” means a Constituent Entity of an MNE Group that meets the following criteria—

- (a) it owns directly or indirectly a sufficient interest in one or more other Constituent Entities of such MNE Group such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence, or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence; and
- (b) there is no other Constituent Entity of such MNE Group that owns directly or indirectly an interest described in paragraph (a) in the first mentioned Constituent Entity.

(2) In these Regulations, a word or expression which is defined in the Act and the Tax Information Exchange Agreement has that meaning for terms not defined under paragraph (1), except to the extent in so far as such use would not frustrate the purposes of any Qualifying Competent Authority Agreement.

(3) For the avoidance of doubt, these Regulations apply to Constituent Entities resident in Bermuda for tax purposes.

PART 2

APPLICATION OF COUNTRY-BY-COUNTRY REPORTING

Country-by-country reporting in force

3 The provision of information by means of country-by-country reports, pursuant to section 4A of the Act and Article 3 of the Tax Information Exchange Agreement, applies in

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Bermuda in relation to the Arrangement that Bermuda may enter into with the United States which is to be implemented in accordance with these Regulations.

Meaning of “country-by-country report”

4 (1) For the purpose of these Regulations, a country-by-country report with respect to an MNE Group is a report containing—

- (a) aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates; and
- (b) an identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organized, and the nature of the main business activity or activities of such Constituent Entity.

(2) The country-by-country report shall be completed and filed in a form reflecting the standard template set out at Annex III of Chapter V of the OECD Final Report.

Obligation to notify

5 (1) Any Constituent Entity of an MNE Group that is resident in Bermuda for tax purposes, which is the Ultimate Parent Entity or Surrogate Parent Entity of the MNE Group, shall notify the Minister that it is the Ultimate Parent Entity or the Surrogate Parent Entity, no later than 10 December 2017 for Reporting Fiscal Years ending up to 31 August 2016, and thereafter no later than the last day of the Reporting Fiscal Year of such MNE Group.

(2) Each reporting Constituent Entity required to notify the Minister under paragraph (1) shall give the Minister—

- (a) a notice (an “information notice”) stating the required information about the Constituent Entity on or before the date required; and
- (b) if any of the required information so notified changes, a notice stating details of the change (a “change notice”).

(3) An information notice or change notice shall be given electronically in such form and manner as the Minister shall determine by—

- (a) posting on an official website, for the information of Constituent Entities generally; or
- (b) stating in a notice given to any particular Constituent Entity in question.

Obligation to report

6 (1) Each Ultimate Parent Entity of an MNE Group that is resident in Bermuda for tax purposes shall file with the Minister on or before the date or period specified in

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regulation 7 a country-by-country report conforming to the requirements of these Regulations with respect to its Reporting Fiscal Year.

(2) A Bermuda Reporting Entity (other than an Ultimate Parent Entity) shall file with the Minister on or before the date specified in regulation 7 a country-by-country report conforming to the requirements of these Regulations with respect to the Reporting Fiscal Year of an MNE Group of which it is a Bermuda Reporting Entity, if—

- (a) the entity is resident in Bermuda for tax purposes; and
- (b) one of the following conditions applies—
 - (i) the Ultimate Parent Entity of the MNE Group is not obligated to file a country-by-country report in its jurisdiction of tax residence;
 - (ii) the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has a current International Agreement to which Bermuda is a party but does not have a Qualifying Competent Authority Agreement in effect to which Bermuda is a party by the time specified in regulation 7 for filing the country-by-country report for the Reporting Fiscal Year; or
 - (iii) there has been a Systemic Failure of the jurisdiction of tax residence of the Ultimate Parent Entity that has been notified by the Minister to the Constituent Entity resident for tax purposes in Bermuda;
 - (iv) one or more of the Constituent Entities of the MNE Group of the Bermuda Reporting Entity—
 - (A) are resident for tax purposes in the United States;
 - (B) are subject to tax with respect to the business carried out through a permanent establishment situated in the United States; or
 - (C) are subject to tax in the United States with respect the business carried out through a permanent establishment situated in a jurisdiction outside of the United States.

Time and manner of filing

7 (1) The country-by-country reports required by these Regulations shall be filed no later than twelve months after the last day of the Reporting Fiscal Year of the MNE Group for Reporting Fiscal Years starting on or after 1 January 2016.

(2) The Minister shall notify Constituent Entities of the form and manner of making returns by—

- (a) a post on an official website, for the information of Constituent Entities generally; or
- (b) a notice given to any particular Constituent Entity in question.

(3) Unless the contrary is proved, the Minister shall assume that a return accepted by the electronic portal—

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- (a) has been made as required under paragraph (4); or
- (b) was made—
 - (i) when the return was accepted by the electronic portal;
 - (ii) by whoever made the return by using the electronic portal; and
 - (iii) with the authority of the Bermuda Reporting Entity on whose behalf the return purports to have been made.

Use and confidentiality of country-by-country report information

8 (1) All information exchanged is subject to the confidentiality and other protections provided for under the Act and the Tax Information Exchange Agreement, including the provisions limiting the use of the information exchanged.

(2) The Minister shall only use the country-by-country reports as necessary for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Bermuda, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis (if applicable).

(3) For purposes of paragraph (2), transfer pricing adjustments by the Minister (if applicable) will not be based on the country-by-country reports.

(4) The Minister shall preserve the confidentiality of the information contained in the country-by-country report at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Minister's monitoring function and measures

9 (1) The Minister may, by notice given to a Constituent Entity, require the Constituent Entity—

- (a) within a time specified by the Minister, to provide to the Minister information, including a copy of a relevant book, document or other record, or any electronically stored information; or
- (b) at a time specified by the Minister, to make available to the Minister for inspection, a book, document or other record, or any electronically stored information,

that is in the Constituent Entity's possession or under its control that the Minister reasonably requires to decide whether or not information the Constituent Entity gave the Minister was accurate.

(2) If information the Minister wants or wants to inspect is outside Bermuda and the Minister requires the Constituent Entity to bring the information to Bermuda, the Minister shall specify a time that will enable the Constituent Entity to bring the information to Bermuda and the Constituent Entity shall comply with the requirement of the Minister.

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(3) A Constituent Entity shall retain for six years a book, document or other record, including any information stored by electronic means, that relates to the information required to be reported to the Minister under this Part.

Anti-avoidance

10 If a person enters into any arrangement, the main purpose or one of the main purposes of which is to avoid any obligation under these Regulations, the arrangement is deemed not to have been entered into by the person and these Regulations are to have effect as if the arrangement had never been in existence.

PART 3

OFFENCES

Offence to contravene notification, reporting and monitoring regulations

11 A person commits an offence if that person contravenes any provision of regulation 5, regulation 6, or regulation 9.

Tampering offence

12 A person commits an offence if the person—

- (a) alters, destroys, mutilates, defaces, hides or removes information in a way that causes the person or anyone else to contravene these Regulations in relation to the information; or
- (b) authorizes, advises or counsels someone else to contravene paragraph (a).

Hindering offence

13 A person commits an offence if the person hinders the Minister in performing a function under these Regulations or the Act.

Reasonable excuse defence

14 (1) It is a defence to an offence against these Regulations for the defendant to prove that the defendant had a reasonable excuse.

(2) However, neither insufficiency of funds nor reliance on an agent (or anyone else) is a reasonable excuse.

(3) If a defendant had a reasonable excuse for committing an offence but the excuse has ceased, the defendant is to be treated as having continued to have the excuse if the offence is remedied without unreasonable delay after the excuse ceased.

Punishment for offences under these Regulations

15 A person who commits an offence under these Regulations is liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.

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PART 4

PENALTIES

Civil penalty not to apply in case of conviction

16 (1) When a person is convicted of an offence under Part 3, such person shall not also be liable to a civil penalty imposed under this Part in relation to the same matter.

(2) Any civil penalty payable under this Part may be recovered by the Accountant General in the Supreme Court or in a court of summary jurisdiction as a civil debt.

Penalty for failure to comply with Regulations

17 A person who fails to comply with any obligation under these Regulations is liable to a civil penalty not exceeding \$4,000.

Daily default penalty

18 Any person who fails to pay the civil penalty imposed under regulation 17 shall be liable to a further penalty of an amount not exceeding \$200 for each day during which the first penalty remains unpaid.

Penalties for inaccurate information

19 (1) A person is liable to a civil penalty not exceeding \$5,000, if—

- (a) the person provides inaccurate information when filing a country-by-country report; and
- (b) condition A or B is met.

(2) Condition A is that the person knows of the inaccuracy at the time the information is provided but does not inform the Minister at that time.

(3) Condition B is that the person—

- (a) discovers the inaccuracy after the information is provided to the Minister; and
- (b) fails to take reasonable steps to inform the Minister.

Matters to be disregarded in relation to liability to penalties

20 (1) Liability to a civil penalty under this Part does not arise if there is a reasonable excuse for the failure to comply or provision of inaccurate information.

(2) For the purposes of this Regulation, neither of the following is a reasonable excuse—

- (a) that there is an insufficiency of funds to do something; or
- (b) that a person relies upon another person to do something.

(3) If a person had a reasonable excuse for a failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Imposition of penalties

21 (1) If a person becomes liable to a civil penalty under this Part, the Minister may impose the penalty.

(2) If the Minister intends to impose a civil penalty, the Minister shall notify the person of his intention and the notice shall specify—

- (a) the Minister's reasons for holding the person liable to a civil penalty; and
- (b) a reasonable period (which shall not be less than 14 days) within which the person to whom it is given may make representations to the Minister,

and where such representations are made, the Minister shall take them into account in deciding whether to impose the civil penalty.

(3) A civil penalty under regulation 17 or 18 may only be imposed within the period of twelve months beginning with the date on which the person became liable to the penalty.

(4) A civil penalty under regulation 19 may only be imposed—

- (a) within the period of twelve months beginning with the date on which the inaccuracy first came to the attention of the Minister; and
- (b) within the period of six years beginning with the date on which the person became liable to the penalty.

Right of appeal

22 (1) A person upon whom a civil penalty is imposed may, subject to this Regulation, appeal against it to the Supreme Court, pursuant to Order 55 of the Rules of the Supreme Court 1985.

(2) An appeal under this regulation may be made on questions of law or fact or both, and the Supreme Court may affirm or reverse the penalty or substitute its own penalty for that of the Minister.

(3) A person upon whom a civil penalty is imposed may appeal it on the ground that liability to a penalty does not arise.

(4) A person upon whom a civil penalty is imposed may appeal against the amount imposed by the Minister.

(5) For the avoidance of doubt, this regulation does not limit or otherwise affect any obligation of the person or Constituent Entity under these Regulations.

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Made this 6th day of December 2017

Minister of Finance