

GUERNSEY STATUTORY INSTRUMENT

2018 No. 90

**The Income Tax (Substance Requirements)  
(Implementation) Regulations, 2018**

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# The Income Tax (Substance Requirements) (Implementation) Regulations, 2018

<i>Made</i>	<i>13<sup>th</sup> December, 2018</i>
<i>Coming into operation</i>	<i>1<sup>st</sup> January, 2019</i>
<i>Laid before the States</i>	<i>2019</i>

THE POLICY & RESOURCES COMMITTEE, in exercise of the powers conferred upon it by sections 75CC(1A), 171A and 203A of the Income Tax (Guernsey) Law, 1975, as amended<sup>a</sup>, and all other powers enabling it in that behalf, hereby makes the following regulations:-

## *Introductory*

### **Implementation of substance requirements.**

1. (1) These Regulations prescribe, for the purposes of section 171A of the Income Tax (Guernsey) Law, 1975 ("**the Law**"), the requirements and criteria that must be complied with or fulfilled by or in respect of a company resident in Guernsey ("**substance requirements**") in order to ensure that real economic activity is being carried on in Guernsey in respect of the profits and income of the company.

(2) A company resident in Guernsey within the meaning of section 4 of the Law is referred to in these Regulations as a "**resident company**".

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<sup>a</sup> Ordres en Conseil Vol. XXV, p. 124; sections 75CC(1A) and 171A were inserted by the Income Tax (Substance Requirements) (Guernsey) (Amendment) Ordinance, 2018 and section 203A was inserted by the Income Tax (Guernsey) (Amendment) Law, 2005 (No. XVII of 2005); there are other amendments not material to these Regulations.

*Substance requirements*

**Companies to which substance requirements apply.**

2. Substance requirements apply in respect of a resident company specified in any of the following subparagraphs -

(a) a resident company with income from carrying on business of any of the following classes or descriptions ("**relevant activities**") -

(i) banking,

(ii) insurance,

(iii) fund management,

(iv) financing and leasing,

(v) headquartering,

(vi) shipping,

(vii) a distribution and service centre,

(b) a resident company with income from intellectual property assets (an "**IP company**"),

(c) a resident company -

- (i) which is a pure equity holding company, and
- (ii) with income from that activity.

**Substance requirements for companies carrying on relevant activities.**

3. (1) A resident company carrying on a relevant activity must ensure that -

- (a) it is directed and managed in Guernsey (see paragraph (2)),
- (b) it carries on core income-generating activity in relation to that relevant activity in Guernsey (see paragraph (3)),
- (c) there is an adequate level of appropriately qualified employees in Guernsey proportionate to the level of that relevant activity carried on in Guernsey, whether or not employed by it or another entity and whether on temporary or long-term contracts,
- (d) there is an adequate level of operating expenditure in Guernsey proportionate to the level of that relevant activity carried on in Guernsey, and
- (e) there is an adequate physical presence in Guernsey (including, without limitation, offices and/or premises) proportionate to the level of that relevant activity carried on in Guernsey,

and the company must be able to demonstrate that these requirements are or were complied with in each accounting period in which the requirements apply or applied in respect of it.

(2) For the purposes of paragraph (1)(a), a resident company carrying on a relevant activity is directed and managed in Guernsey if -

- (a) the company's board of directors meets in Guernsey with adequate frequency having regard to the level of decision-making required of the board,
- (b) during each meeting of the board of directors in Guernsey, a quorum of the directors is physically present in Guernsey,
- (c) strategic decisions of the company are made at meetings of the board of directors and the minutes of the meetings record those decisions,
- (d) the board of directors, as a whole, has the necessary knowledge and expertise to discharge the duties of the board, and
- (e) all minutes of board meetings and all other company records required by the Companies (Guernsey) Law, 2008 or (as the case may be) the Companies (Alderney) Law, 1994 to be kept by the company are kept in Guernsey.

(3) For the purposes of paragraph (1)(b), a resident company carrying on a relevant activity carries on core income-generating activity in relation to that activity in Guernsey even if it outsources such activity, provided that -

- (a) the outsourcing is performed in Guernsey, and
- (b) the company is able to demonstrate adequate supervision of the outsourced activity.

**Substance requirements for IP companies.**

4. (1) A resident company which is an IP company must ensure that -

- (a) it is directed and managed in Guernsey (see paragraph (2)),
- (b) it carries on core income-generating activity in relation to intellectual property assets in Guernsey (see paragraph (3)),
- (c) there is an adequate level of appropriately qualified employees in Guernsey proportionate to the level of that activity carried on in Guernsey, whether or not employed by it or another entity and whether on temporary or long-term contracts,
- (d) there is an adequate level of operating expenditure in Guernsey proportionate to the level of that activity

carried on in Guernsey,

- (e) there is an adequate physical presence in Guernsey (including, without limitation, offices and/or premises) proportionate to the level of that activity carried on in Guernsey,

and the company must be able to demonstrate that these requirements are or were complied with in each accounting period in which the requirements apply or applied in respect of it.

(2) For the purposes of paragraph (1)(a), an IP company is directed and managed in Guernsey if -

- (a) the company's board of directors meets in Guernsey with adequate frequency given the level of decision-making required of the board (and for the purpose of this subparagraph periodic decisions of non-resident board members are not taken into account),
- (b) during each meeting of the board of directors in Guernsey, a quorum of the board of directors is physically present in Guernsey,
- (c) strategic decisions of the company are made at meetings of the board of directors and the minutes of the meetings record those decisions,
- (d) the board of directors, as a whole, has the necessary

knowledge and expertise to discharge the duties of the board, and

- (e) all minutes of board meetings and all other company records required by the Companies (Guernsey) Law, 2008 or (as the case may be) the Companies (Alderney) Law, 1994 to be kept by the company are kept in Guernsey.

(3) For the purposes of paragraph (1)(b), an IP company carries on core income-generating activity in relation to intellectual property assets in Guernsey, even if it outsources such activity provided that –

- (a) the outsourcing is performed in Guernsey, and
- (b) the company is able to demonstrate adequate supervision of the outsourced activity.

**Substance requirements for companies which are pure equity holding companies.**

5. A resident company which is a pure equity holding company must ensure that -

- (a) it complies with all obligations applicable to it under the provisions of the Companies (Guernsey) Law, 2008 or (as the case may be) the Companies (Alderney) Law, 1994, and
- (b) there is -

- (i) an adequate level of persons in Guernsey proportionate to the level of activity carried on in Guernsey, and
- (ii) an adequate physical presence in Guernsey (including, without limitation, offices and/or premises) proportionate to the level of activity carried on in Guernsey,

for holding and managing the shares or equitable interests,

and the company must be able to demonstrate that these requirements are or were complied with in each accounting period in which the requirements apply or applied in respect of it.

**Non-application to companies with no income in accounting period.**

6. For the avoidance of doubt, a resident company specified in any subparagraph of regulation 2 need not, in any accounting period, comply with the substance requirements set out in regulations 3 to 5 if in that accounting period it has no income from the business or activity carried on by it and by virtue of which that subparagraph would, but for the provisions of this paragraph, apply to it.

**Core income-generating activity.**

7. For the purposes of these Regulations "core income-generating activity" -

- (a) in relation to banking, includes -

- (i) raising funds,
  - (ii) managing risk including credit, currency and interest risk,
  - (iii) taking hedging positions,
  - (iv) providing loans, credit or other financial services to customers,
  - (v) managing regulatory capital, and
  - (vi) preparing regulatory reports and returns,
- (b) in relation to insurance, includes -
- (i) predicting and calculating risk,
  - (ii) insuring or re-insuring against risk, and
  - (iii) providing client services,
- (c) in relation to fund management, includes -
- (i) taking decisions on the holding and selling of investments,
  - (ii) calculating risks and reserves,

- (iii) taking decisions on currency or interest fluctuations and hedging positions, and
  - (iv) preparing relevant regulatory or other reports for governmental or regulatory authorities and investors,
- (d) in relation to financing and leasing, includes -
- (i) agreeing funding terms,
  - (ii) identifying and acquiring assets to be leased (in the case of leasing),
  - (iii) setting the terms and duration of any financing or leasing,
  - (iv) monitoring and revising any agreements, and
  - (v) managing any risks,
- (e) in relation to headquartering, includes -
- (i) taking relevant management decisions,
  - (ii) incurring expenditures on behalf of group entities, and
  - (iii) co-ordinating group activities,

- (f) in relation to shipping, includes -
  - (i) managing crew (including hiring, paying, and overseeing crew members),
  - (ii) hauling and maintaining ships,
  - (iii) overseeing and tracking deliveries,
  - (iv) determining what goods to order and when to deliver them, and
  - (v) organising and overseeing voyages,
  
- (g) in relation to distribution and service centres, includes -
  - (i) transporting and storing goods, components and materials,
  - (ii) managing stocks,
  - (iii) taking orders, and
  - (iv) providing consulting or other administrative services,
  
- (h) in relation to intellectual property assets, includes -

- (i) research and development (rather than acquiring or outsourcing),
- (ii) marketing, branding and distribution,
- (iii) taking the strategic decisions and managing (as well as bearing) the principal risks relating to the development and subsequent exploitation of the intellectual property asset,
- (iv) taking the strategic decisions and managing (as well as bearing) the principal risks relating to the third party acquisition and subsequent exploitation of the intellectual property asset, and
- (v) carrying on the underlying trading activities through which the intellectual property asset is exploited and which lead to the generation of revenue from third parties.

*Provision of information and reporting, etc*

**Reporting obligations.**

8. (1) A resident company must, in respect of its first accounting period beginning after the 31<sup>st</sup> December, 2018 and every following accounting period, provide the Director with such reports and returns (containing such declarations, statements and other information), and such other documents and information or class or description of documents or information, as may be required -

- (a) for the purpose of ascertaining whether the resident company -
  - (i) is or was, in that accounting period, one in respect of which substance requirements apply or applied by virtue of regulation 2, and
  - (ii) is or was, in that accounting period, in compliance with any substance requirements applicable in respect of it,
- (b) generally in respect of substance requirements and adequacy,
- (c) otherwise by, under or for the purposes of these Regulations or the performance of the Director's functions under them, and
- (d) for the purposes of any approved international agreement or international tax measure,

and as the Director may by notice specify.

(2) Reports, returns and other documents and information required to be provided by or under paragraph (1) must be provided in such form and manner (including, without limitation and for the avoidance of doubt, by being set out in or appended to the company's return of income under section 68 of the Law), by such means, at such times, intervals or places and in respect of such periods as the

Director may by notice require.

(3) For the purposes of, but without prejudice to the generality of, paragraphs (1) and (2) -

(a) the notices referred to in those paragraphs may require a resident company to register with, to use and to provide documents and information by means of an electronic portal specified in the notices for that purpose,

(b) the notices may be given or published in such form and manner, by such means and at such times or intervals and for such period as the Director thinks fit, including (without limitation) by publication on the official website of the States of Guernsey Income Tax office or by being set out in guidance notes issued under regulation 26.

**Provisions as to high risk IP companies.**

9. In respect of any accounting period, and irrespective of whether the substance requirements are met, the Director shall, under and in accordance with the provisions of any approved international agreement or international tax measure relating to the spontaneous exchange of information, disclose to a competent authority any information which relates to a high risk IP company.

**Application of information powers.**

10. (1) Section 75A of the Law ("power to call for documents, etc, from taxpayer") applies in respect of these Regulations as if there were added at the end of

subsection (1)(a)(iii) the words "and/or compliance with the Income Tax (Substance Requirements) (Implementation) Regulations, 2018", and sections -

- (a) 75C ("notices under section 75A and 75B: requests for information"),
- (b) 75D ("sections 75A and 75B: supplementary"),
- (c) 75E ("court orders for delivery of documents, etc, from a taxpayer"),
- (d) 75G ("court orders under sections 75E and 75F: supplementary"),
- (e) 75H ("court orders under sections 75E and 75F: notice and procedure"),
- (f) 75I ("entry with warrant to obtain material"),
- (g) 75J ("procedure where documents etc, are removed"),
- (h) 75K ("right of appeal to Royal Court"), and
- (i) 75L ("offences in relation to falsification, etc, of documents"),

of the Law, apply accordingly.

- (2) Section 75B of the Law ("power to call for documents, etc,

relating to taxpayer") applies in respect of these Regulations as if there were added at the end of subsection (2)(c) the words "and/or compliance with the Income Tax (Substance Requirements) (Implementation) Regulations, 2018", and sections -

- (a) 75C ("notices under section 75A and 75B: requests for information"),
- (b) 75CB ("notices under section 75B: ancillary provision"),
- (c) 75D ("sections 75A and 75B: supplementary"),
- (d) 75F ("court orders for delivery of documents, etc, relating to a taxpayer"),
- (e) 75G ("court orders under sections 75E and 75F: supplementary"),
- (f) 75H ("court orders under sections 75E and 75F: notice and procedure"),
- (g) 75I ("entry with warrant to obtain material"),
- (h) 75J ("procedure where documents etc, are removed"),
- (i) 75K ("right of appeal to Royal Court"), and
- (j) 75L ("offences in relation to falsification, etc, of documents"),

of the Law, apply accordingly.

*Procedure, penalties and other sanctions  
in respect of non-compliance*

**Penalties and spontaneous exchange of information where substance requirements not met - first accounting period of default.**

11. (1) Where, following the submission by a resident company of its return pursuant to regulation 8 in respect of its first accounting period of default, the Director forms the opinion that the company -

- (a) is or was, in that accounting period, one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not, in that accounting period, in compliance with any of the substance requirements applicable in respect of it,

the Director shall take the steps detailed in paragraph (2).

(2) The Director shall -

- (a) by notice impose a penalty not exceeding £10,000 and
- (b) under and in accordance with the provisions of any approved international agreement or international tax measure relating to the spontaneous exchange of information, disclose to a competent authority any

information which relates to the company.

- (3) The notice under paragraph (1) must -
- (a) state the grounds of the Director's decision,
  - (b) set out particulars of the substance requirements which in the opinion of the Director –
    - (i) are or were, in that accounting period, applicable in respect of the company, and
    - (ii) the company is not or was not, in that accounting period, complying with or fulfilling,
  - (c) explain the sanctions (civil or criminal) that may arise or be imposed under these regulations or the Law in respect of non-compliance or non-fulfilment, and
  - (d) set out particulars of any right of appeal that may be applicable.

(4) The notice under paragraph (1) may, without prejudice to the powers conferred by regulation 8, require the provision of such documents or information or class or description of documents or information as the Director may require for any of the purposes set out in subparagraphs (a) to (d) of regulation 8(1).

(5) A resident company's first accounting period of default means an accounting period of the company beginning after the 31<sup>st</sup> December, 2018 in which,

in the opinion of the Director, the company -

- (a) is or was one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not in compliance with any of the substance requirements applicable in respect of it,

being an accounting period -

- (i) beginning on the 1<sup>st</sup> January, 2019, or
- (ii) which immediately succeeds an accounting period of the company ending after the 31<sup>st</sup> December, 2018 in which, in the opinion of the Director, the company -
  - (A) was not one in respect of which substance requirements applied by virtue of regulation 2, or
  - (B) was in compliance with any of the substance requirements applicable in respect of it.

**Penalties and spontaneous exchange of information where substance requirements not met - third accounting period of default.**

12. (1) Where, following the submission by a resident company of its

return pursuant to regulation 8 in respect of its third accounting period of default, the Director forms the opinion that the company -

- (a) is or was, in that accounting period, one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not, in that accounting period, in compliance with any of the substance requirements applicable in respect of it,

the Director shall -

- (i) by notice impose a penalty not exceeding £50,000, and
  - (ii) under and in accordance with the provisions of any approved international agreement or international tax measure relating to the spontaneous exchange of information, disclose to a competent authority any information which relates to the company.
- (2) The notice under paragraph (1) must -
- (a) state the grounds of the Director's decision,
  - (b) set out particulars of the substance requirements which in the opinion of the Director -

- (i) are or were, in that accounting period, applicable in respect of the company, and
  - (ii) the company is not or was not, in that accounting period, complying with or fulfilling,
- (c) explain the sanctions (civil or criminal) arising under these regulations or the Law in respect of non-compliance or non-fulfilment, and
  - (d) set out particulars of any right of appeal that may be applicable.

(3) The notice under paragraph (1) may, without prejudice to the powers conferred by regulation 8, require the provision of such documents or information or class or description of documents or information as the Director may require for any of the purposes set out in subparagraphs (a) to (d) of regulation 8(1).

(4) A resident company's third accounting period of default means a third consecutive accounting period of the company beginning after the 31<sup>st</sup> December, 2018 in which, in the opinion of the Director, the company -

- (a) is or was one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not in compliance with any of the substance requirements applicable in respect of it.

**Penalties and spontaneous exchange of information where substance requirements not met - fourth and subsequent accounting periods of default.**

13. (1) Where, following the submission by a resident company of its return pursuant to regulation 8 in respect of its fourth accounting period of default and any subsequent accounting period of default, the Director forms the opinion that the company -

- (a) is or was, in that accounting period, one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not, in that accounting period, in compliance with any of the substance requirements applicable in respect of it,

the Director shall -

- (i) by notice impose a penalty not exceeding £100,000,
- (ii) under and in accordance with the provisions of any approved international agreement or international tax measure relating to the spontaneous exchange of information, disclose to a competent authority any information which relates to the company,
- (iii) where the company is registered in the Register

of Companies within the meaning of section 496 of the Companies (Guernsey) Law, 2008<sup>b</sup>, give notice to the Registrar of Companies for the purposes of section 355(1)(f) of that Law (striking defaulting company off Register of Companies), and

- (iv) where the company is one the memorandum and articles of which are registered in the Register of Companies within the meaning of section 163(1) of the Companies (Alderney) Law, 1994<sup>c</sup>, give notice to the Registrar of Companies for the purposes of section 107(1)(e) of that Law (striking a company off the Register).

(2) The notice under paragraph (1)(i) must -

- (a) state the grounds of the Director's decision,
- (b) set out particulars of the substance requirements which in the opinion of the Director -
  - (i) are or were, in that accounting period,

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<sup>b</sup> Order in Council No. VIII of 2008; there are amendments not material to these Regulations.

<sup>c</sup> Ordres en Conseil Vol. XXXV(2), p. 777; there are amendments not material to these Regulations.

applicable in respect of the company, and

- (ii) the company is not or was not, in that accounting period, complying with or fulfilling,
- (c) explain the sanctions (civil or criminal) arising under these regulations or the Law in respect of non-compliance or non-fulfilment, and
- (d) set out particulars of any right of appeal that may be applicable.

(3) The notice under paragraph (1)(i) may, without prejudice to the powers conferred by regulation 8, require the provision of such documents or information or class or description of documents or information as the Director may require for any of the purposes set out in subparagraphs (a) to (d) of regulation 8(1).

(4) A resident company's fourth accounting period of default means a fourth consecutive accounting period of the company beginning after the 31<sup>st</sup> December, 2018 in which, in the opinion of the Director, the company -

- (a) is or was one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not in compliance with any of the substance requirements applicable in respect of it.

(5) A resident company's subsequent accounting period of default

means a consecutive accounting period of the company, after its fourth accounting period of default and beginning after the 31<sup>st</sup> December, 2018, in which, in the opinion of the Director, the company -

- (a) is or was one in respect of which substance requirements apply or applied by virtue of regulation 2, and
- (b) is not or was not in compliance with any of the substance requirements applicable in respect of it.

**High risk IP companies - special procedure.**

14. (1) In the case of a high risk IP company, there is a presumption that the substance requirement in regulation 4(1)(b) relating to carrying on core income-generating activity in Guernsey is not met, which the company may rebut by providing sufficient evidence to the contrary.

(2) The company's return under regulation 8 in respect of each of its accounting periods beginning after the 31<sup>st</sup> December, 2018 must -

- (a) declare that the substance requirement in regulation 4(1)(b) is met and contain or be accompanied by evidence sufficient to rebut the presumption that the substance requirement is not met, or
- (b) declare that the company is unable to rebut the presumption and that the substance requirement in regulation 4(1)(b) is not met.

(3) The provisions of regulations 11, 12 and 13 apply in respect of a high risk IP company with the following modifications -

- (a) regulation 11(2)(b) applies as if after the words "relating to the spontaneous exchange of information," there were inserted "and without prejudice to the powers conferred by regulation 9,"
- (b) regulation 12(1) applies with the substitution of the words "second accounting period of default" for the words "third accounting period of default",
- (c) regulation 12(1)(ii) applies as if after the words "relating to the spontaneous exchange of information," there were inserted "and without prejudice to the powers conferred by regulation 9,"
- (d) regulation 12(4) applies with the substitution of the word "second" for the word "third", wherever appearing,
- (e) regulation 13(1) applies with the substitution of the words "third accounting period of default" for the words "fourth accounting period of default",
- (f) regulation 13(1)(ii) applies as if after the words "relating to the spontaneous exchange of information," there were inserted "and without prejudice to the powers conferred by regulation 9,"

- (g) regulation 13(4) applies with the substitution of the word "third" for the word "fourth", wherever appearing.

**Penalties for failure to provide information or for false information.**

15. (1) Section 193 of the Law (penalties in respect of returns not relating to income) applies in respect of these Regulations with the following modifications -

- (a) subsections (1) and (2) apply as if the references to a return other than a return of income included references to a return or other document or information required to be provided by or under these Regulations,
- (b) subsection (1) applies as if the references to the time prescribed included references to the time prescribed by or under these Regulations, and
- (c) subsection (3) of that section is omitted.

(2) The penalties arising under section 193 of the Law are in addition to any penalties applicable under these Regulations.

**Right of appeal against penalties.**

16. (1) A person aggrieved by a decision of the Director to impose a penalty under these Regulations may appeal to the Guernsey Tax Tribunal on giving to the Director notice in writing, stating the grounds of appeal, within a period of 30 days beginning on the date of the notice imposing the penalty.

(2) The Guernsey Tax Tribunal may admit an appeal under paragraph (1) after the expiration of the 30 day period if satisfied that a person was prevented from giving notice of appeal within that period by reason of exceptional circumstances.

(3) The sole grounds of appeal are that the company on which the penalty was imposed -

- (a) is not one in respect of which substance requirements apply by virtue of regulation 2,
- (b) is in compliance with the substance requirements applicable in respect of it, or
- (c) is not subject to the penalty under the provisions of these Regulations.

(4) In disposing of an appeal the Guernsey Tax Tribunal may confirm or annul the penalty.

(5) Subject to section 80 of the Law, the decision of the Guernsey Tax Tribunal is final and conclusive.

(6) This regulation applies to the exclusion of sections 76 and 79 of the Law.

(7) Sections 77, 78, 78A and 80 of the Law apply in relation to an appeal under this regulation as they apply in relation to an appeal under section 76 of the Law.

*Powers of entry and inspection, etc*

**Power to enter premises and inspect documents.**

17. (1) The Director may, during normal business hours or at any other reasonable time, if he considers necessary to do so for any of the purposes set out in subparagraphs (a) to (d) of regulation 8(1) -

- (a) enter any business premises, and
- (b) inspect the premises and any business documents therein.

(2) The entry and inspection may only take place if -

- (a) the occupier of the premises consents,
- (b) the Director has given the occupier at least 7 days' written notice of the entry and inspection and when it will take place, or
- (c) the entry and inspection has been approved by the Bailiff under regulation 18 and the Director complies with regulation 19.

(3) The Director may not inspect -

- (a) any part of the premises used solely as a dwelling,

- (b) items subject to legal professional privilege within the meaning of section 24 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 (but for the purposes of this regulation items held with the intention of furthering a criminal purpose are not items subject to legal professional privilege), or
- (c) a document relating to the conduct of any appeal relating to tax or taxation.

(4) The powers of inspection conferred by this regulation include power to obtain and record information (whether electronically or otherwise) relating to business premises and business documents inspected.

(5) In these Regulations -

**"business documents"** means documents which relate to the carrying on of a business and which -

- (a) are of a class or description required under the Law (or any Ordinance or regulation thereunder) to be kept in respect of the business, or
- (b) contain or may contain information relevant to any of the purposes set out in subparagraphs (a) to (d) of regulation 8(1),

**"business premises"** means premises or any parts of premises which the Director has reason to believe are used in connection with the carrying on

of a business.

**Approval of entry and inspection by Bailiff.**

18. (1) The Director shall, where he wishes to obtain approval of an entry and inspection for the purposes of regulation 17(2)(c), make a written application accompanied by information on oath to the Bailiff.

(2) The application must specify the reasons for making it and identify the premises, the occupier and the business documents or class or description of business documents to which the application relates.

(3) The application may, with the approval of the Bailiff, and subject to such terms and conditions as he may direct, be made ex parte.

(4) The Bailiff may give approval in writing if he is satisfied that he is reasonably justified in doing so in all the circumstances of the case.

(5) The approval may be given on such terms and conditions (including, without limitation, a term or condition that the Director must or may be accompanied by any person specified, or of a class or description specified, in the approval) and subject to such penalty as the Bailiff thinks just.

(6) In these Regulations the “**Bailiff**” means the Bailiff, Deputy-Bailiff, Judge of the Royal Court, Lieutenant-Bailiff or Juge Délégué and, where the premises in question are in Alderney, includes the Chairman of the Court of Alderney or, if he is unavailable, a Jurat thereof.

**Notice requirement for entry and inspection.**

19. The Director must, when entering premises pursuant to the approval

of the Bailiff under regulation 18, give notice -

- (a) to the occupier of the premises, if he is present,
- (b) if the occupier is not present, to another person who appears to be in charge of the premises, or
- (c) if there is no such person, by leaving it in a prominent place in the premises.

**Power to require reasonable assistance.**

20. (1) This regulation applies if the Director has entered business premises pursuant to the approval of the Bailiff under regulation 18.

(2) The Director may require a person described in paragraph (3) who is present on the premises to give the Director all such assistance as may reasonably be requested to facilitate the execution of the search for, accessing, inspection or removal of any document and otherwise to enable the performance of the Director's functions for the purposes of the entry and inspection (an "**assistance requirement**").

(3) The persons referred to in paragraph (2) are -

- (a) the person whose tax position, business or activities are being examined (the "**investigated person**"),
- (b) a tax adviser of the investigated person,
- (c) anyone employed or engaged by the investigated

person or the tax adviser to perform work at the business premises, and

- (d) any other person on the premises appearing to have charge of, or to be otherwise concerned in the operation of, the management, recording or storage of any document which is on or accessible from the premises, whether or not stored or recorded in electronic form, or any system, arrangement or technology in or by virtue of which any such document is stored, recorded or accessed.

(4) When making an assistance requirement of a person, the authorised officer must inform the person in writing that a contravention of the requirement is an offence under these Regulations.

**Other provisions in respect of documents.**

21. (1) The Director may take copies of or extracts from any business document.

(2) The Director may -

- (a) at any reasonable time, remove any business document and retain it for a reasonable period, or
- (b) take any steps which appear to be necessary for preserving any business document or preventing interference with it.

(3) The Director may require any person who was required to produce a business document -

(a) to attend at such time and place as may be required and to give an explanation of and to answer questions relating to it or anything in it, and

(b) if the document is not produced, to state, to the best of his knowledge and belief, where it is.

(4) If a business document is stored or recorded in electronic form, the Director may require the document to be produced in a form –

(a) in which it can be taken away, and

(b) in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(5) The Director must, if the owner of any business document removed and retained under this regulation so requests at any time, give the owner -

(a) a receipt for the document, and

(b) if the owner reasonably requires the document for any immediate purpose, and the Director does not wish to return it, a copy of the document, which must be given free of charge.

(6) If a business document is lost or damaged before it is returned

to the owner, the Director must compensate the owner for any costs reasonably incurred in the document's replacement or repair.

**Offences of obstruction, etc.**

22. A person who, without reasonable excuse, contravenes an assistance requirement made of him under regulation 20 or otherwise obstructs or fails to comply with any requirement imposed by a person exercising or purporting to exercise any power conferred by or under these Regulations is guilty of an offence and liable on summary conviction to a fine not exceeding twice level 5 on the uniform scale for the time being in force under the Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989.

*Penalties and offences, etc*

**Criminal penalties for false statements, etc.**

23. (1) Without prejudice to the application of regulation 10, section 75L of the Law (offences in relation to falsification, etc, of documents) applies in respect of these regulations as if -

- (a) references in subsection (1) of that section to a document required by a notice under section 75A to be delivered included references to a return or other document or information required to be provided by or under these Regulations,
- (b) paragraphs (b) and (c) of subsection (2) were omitted, and
- (c) subsection (3), and the reference thereto in subsection

(4), were omitted.

(2) Section 75M of the Law (duties of confidentiality, liens, and self-incrimination) applies in respect of these Regulations as if in subsection (4)(b)(ii)(A) of that section after the words "section 75L(3)" there was inserted "or section 201(1) by virtue of a contravention of section 201(4)".

**Offences by legal persons, etc.**

24. (1) Where an offence under these Regulations is committed by a body corporate or other legal person and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

- (a) any director, manager, secretary or other similar officer of the body corporate or other legal person,
- (b) without prejudice to item (a) -
  - (i) in the case of a limited partnership with legal personality, any general partner,
  - (ii) in the case of a limited liability partnership, any member,
  - (iii) in the case of a foundation, any foundation official, or
- (c) any person purporting to act in any capacity described in item (a) or (b),

he as well as the body corporate or other legal person (as the case may be) is guilty of the offence and may be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate or other legal person are managed by its members, subparagraph (1) applies to a member in connection with his functions of management as if he were a director.

(3) Where an offence under these Regulations is committed by an unincorporated body and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of –

- (a) in the case of -
  - (i) a partnership, any partner thereof, but subject to the provisions of sub-item (ii),
  - (ii) a limited partnership without legal personality, any general partner thereof,
- (b) in the case of any other unincorporated body, any director of that body or other officer thereof who is bound to fulfil any duty of which the offence is a breach or, if there is no such officer, any member of the committee or other similar governing body, or
- (c) any person purporting to act in any capacity described in item (a) or (b),

he as well as the unincorporated body is guilty of the offence and may be proceeded

against and punished accordingly.

(4) Where an offence under these Regulations is alleged to have been committed by an unincorporated body, proceedings for the offence shall, without prejudice to subparagraph (3), be brought in the name of that body and not in the name of any of its members.

(5) A fine imposed on an unincorporated body on its conviction of an offence under these Regulations shall be paid from the funds of that body.

(6) References in this regulation to an offence under these Regulations include references to an offence under the Law as it has effect by virtue of, or in consequence of the enactment of, these Regulations.

#### *Miscellaneous*

#### **Anti-avoidance.**

25. (1) If -

- (a) a person enters into any transaction or series of transactions, and
- (b) the main purpose, or one of the main purposes, of the person in entering into the transaction or series of transactions is to avoid any obligation or liability under these Regulations,

these Regulations have effect as if the transaction or series of transactions had not been entered into.

(2) In paragraph (1) "**transaction**" has the meaning given by subsection (2) of section 67 of the Law (general provision against legal avoidance), as read with subsection (3) of that section, which has effect for the purposes of this regulation accordingly.

(3) Subsection (4) of section 67 of the Law has effect for the purposes of this regulation as if references therein to tax under the Law included references to tax imposed by the laws of the United Kingdom or a Member States of the European Union.

(4) Subsection (5) of section 67 of the Law does not have effect for the purposes of this regulation.

**Guidance notes.**

26. (1) The Director may issue guidance notes -
- (a) in respect of -
    - (i) substance and the adequacy thereof, and
    - (ii) the meaning of expressions used in these Regulations, and
  - (b) generally for the purpose of providing clarification or practical guidance in respect of any provision of, and in connection with the administration, implementation or enforcement of, these Regulations.

(2) Guidance notes -

- (a) shall come into force on such date as the Director may appoint,
- (b) may contain such consequential, incidental, supplementary and transitional provision as may appear to be necessary or expedient,
- (c) may be revoked or revised by subsequent guidance notes,
- (d) shall be published in such manner as the Director considers appropriate, and
- (e) may set out any notices of the Director referred to in paragraphs (1) and (2) of regulation 8.

(3) Guidance notes must be taken into account by the Director in exercising his functions under these Regulations and the Law.

(4) In any legal proceedings, criminal or otherwise, whether or not under the Law or these Regulations (including, for the avoidance of doubt, proceedings before the appropriate body under section 76 of the Law), guidance notes are admissible in evidence, and if any provision of guidance notes appears to the court or other tribunal before which the proceedings are being conducted to be relevant to any question arising in the proceedings, then -

- (a) the provision may be taken into account in determining

that question, and

- (b) the provision may be relied on as tending to support or, as the case may be, defeat any representation or submission of any party to the proceedings.

(5) The powers conferred by paragraph (1) are without prejudice to any power conferred by the Law to issue statements of practice.

(6) Section 203A(2) of the Law applies in respect of guidance notes as it applies in respect of Regulations.

**Application of provisions as to service of notice.**

27. Without prejudice to the provisions of regulation 8(1) and (2), section 68(1AAA) of the Law (giving of notice from Director) applies in relation to a notice of the Director under regulation 8(1) or (2) or otherwise given by the Director under or for the purposes of these Regulations, as it applies in relation to a notice of the Director requiring a person to deliver a return as to income, and references (however expressed) in these Regulations to the giving or receipt of such a notice shall be construed accordingly.

**Application of duty to submit in electronic form and by electronic means.**

28. Section 68AA of the Law ("returns to be submitted in electronic form and by electronic means") applies in respect of these Regulations as if -

- (a) references in subsections (1) and (2) of that section to section 68 included references to these Regulations,
- (b) references in subsection (1) of that section to a return as

to a person's income included references to a return or other document or information required or authorised to be provided by, under or for the purposes of these Regulations, and

- (c) paragraph (a) of subsection (1) of that section and, in paragraph (b) the words "in the case of a company", were omitted.

**General modification of provisions of Law.**

29. For the purposes of these Regulations, and without prejudice to any other provision of these Regulations -

- (a) any reference in the Law to the Law (whether by use of the expression "**this Law**" or otherwise) or any provision thereof has effect as if the reference were to the Law or that provision as modified in its application by these Regulations, and
- (b) the provisions of the Law shall be construed and shall have effect subject to those modifications.

**Amendment of Companies Laws.**

30. (1) After section 355(1)(e) of the Companies (Guernsey) Law, 2008<sup>d</sup> insert the following paragraph -

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<sup>d</sup> Order in Council No. VIII of 2008; there are amendments not material to these Regulations.

"or (f) the Registrar has received notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default).".

(2) After section 355(8) of the Companies (Guernsey) Law, 2008 insert the following subsection -

“(8A) Where this section applies in relation to a company by virtue of subsection (1)(f), the company shall not be considered to have shown cause to the contrary within the meaning of this section unless the Registrar is satisfied, after consultation with the Director of the Revenue Service, that the company would, if not struck off, comply with the substance requirements applicable to it by virtue of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018.”.

(3) After section 370(5)(a) of the Companies (Guernsey) Law, 2008 insert the following paragraph -

“(aa) the Director of the Revenue Service in respect of a company struck off pursuant to notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default),”.

(4) After section 371(1)(a) of the Companies (Guernsey) Law, 2008 insert the following paragraph -

"(aa) the Director of the Revenue Service in respect of a company struck off pursuant to notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default),".

(5) After section 371(2)(a) of the Companies (Guernsey) Law, 2008 insert the following paragraph -

"(aa) that the company would, in the case of a company struck off pursuant to notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default), if reinstated, comply with the substance requirements applicable to it by virtue of those regulations,".

(6) In section 371(10)(a) of the Companies (Guernsey) Law, 2008 after "Her Majesty's Receiver General" insert ", the Director of the Revenue Service in the case of a company struck off pursuant to notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met

- fourth accounting period of default)".

(7) After section 107(1)(d) of the Companies (Alderney) Law, 1994<sup>e</sup> insert the following paragraph -

"or (e) the Registrar has received notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default).".

(8) After section 107(8) of the Companies (Alderney) Law, 1994 insert the following subsection -

"(8A) When this section applies in relation to a company by virtue of subsection (1)(e), the company shall not be considered to have shown cause to the contrary within the meaning of this section unless the Registrar is satisfied, after consultation with the Director of the Revenue Service, that the company would, if not struck off, comply with the substance requirements applicable to it by virtue of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018."

(9) After section 108(1)(a) of the Companies (Alderney) Law, 1994 insert the following paragraph -

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<sup>e</sup> Ordres en Conseil Vol. XXXV(2), p. 777 ; there are amendments not material to these Regulations.

"(aa) in the case of a company struck off pursuant to a notice from the Director of the Revenue Service under regulation 13 of the Income Tax (Substance Requirements) (Implementation) Regulations, 2018 (penalties where substance requirements not met - fourth accounting period of default), that the company would, if reinstated, comply with the substance requirements applicable to it by virtue of those regulations, or".

*Supplementary*

**Interpretation.**

31. (1) In these Regulations -

"**approved international agreement**" means an agreement or arrangement providing for the obtaining, delivery, making available, furnishing and/or exchanging of documents and information in relation to tax or taxation, which is made between the States of Guernsey and the government of another territory, or which is otherwise binding upon Guernsey and governed by international law (including, without limitation, an agreement or arrangement which has been acceded to or ratified by the United Kingdom on behalf of Guernsey), and which is specified for the purposes of the Law by Ordinance of the States,

"**banking**" means deposit-taking business within the meaning of the Banking Supervision (Bailiwick of Guernsey) Law, 1994 carried on by a licensed institution within the meaning of that Law,

"**beneficial owner**" has the meaning it has for the purposes of the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017 or (as the case may be) the Beneficial Ownership of Legal Persons (Alderney) Law, 2017,

"**business documents**" : see regulation 17,

"**business premises**" : see regulation 17,

"**carry on**" includes undertake (and related expressions shall be construed accordingly),

"**competent authority**" means a person, body or authority designated as a competent authority by the Director in respect of -

- (a) the United Kingdom or any Member State of the European Union in which country the immediate or ultimate parent company, or the beneficial owner, of the relevant company is resident, or
- (b) where the relevant company is not a company registered in the Register of Companies within the meaning of section 496 of the Companies (Guernsey) Law, 2008 or a company the memorandum and articles of which are registered in the Register of Companies within the meaning of section 163(1) of the Companies (Alderney) Law, 1994, the territory in which the company is registered or otherwise incorporated,

for the purposes of -

- (i) an approved international agreement or international tax measure, or
- (ii) these Regulations,

and includes a competent authority within the meaning of section 75C of the Law,

"**contravention**" includes failure to comply (and related expressions shall be construed accordingly),

"**core income-generating activity**" : see regulation 7,

"**Director**" means the Director of the Revenue Service,

"**distribution and service centre**" means a business the sole or main activity of which is -

- (a) to purchase raw materials and finished products from other members of the same group which are non-resident and to re-sell them for a small percentage of profits, or
- (b) the provision of services to other members of the same group which are non-resident,

but does not include any business or activity falling within the definition of banking, insurance, fund management, financing and leasing, shipping or headquartering,

"**document**" : see section 75O of the Law,

"**electronic form**" : see section 75O of the Law,

"**financing and leasing**" means the provision of credit facilities of any kind for consideration to any person (a "**customer**"), and for the purposes of this definition -

- (a) consideration includes consideration by way of interest,
- (b) the provision of credit may be by way of instalments for which a separate charge is made and disclosed to the customer in connection with -
  - (i) the supply of goods by hire purchase,
  - (ii) financial leasing (excluding land and interests in land), or
  - (iii) conditional sale or credit sale, and
- (c) where any credit repayable by a customer to a person is assigned to another person, that other person shall be considered to be the person providing the credit facility,

but any activities falling within the definitions of banking, insurance or fund management do not constitute financing and leasing for the purposes of these Regulations,

"**fund management**" means "management" within the meaning of paragraph 5 of Schedule 2 to the Protection of Investors (Bailiwick of Guernsey) Law, 1987, when carried on in connection with a collective investment scheme within the meaning of that Law under the authority of a licence issued under section 4 of that Law,

"**headquartering**" means the provision of any of the following services to non-resident intra group persons of the resident company -

- (a) the provision of senior management,
- (b) the assumption or control of material risk for activities carried out by, or assets owned by, any of those intra group persons, and
- (c) the provision of substantive advice in relation to the assumption or control of risk for such activities or assets,

but does not include -

- (i) any business or activity falling within the definition of banking, insurance, fund management, financing and leasing, shipping, or a distribution and service centre, or

- (ii) the business of holding intellectual property assets,

"**high risk IP company**" means an IP company which either falls within subparagraph (a) or (b) below -

- (a) a company which –

- (i) holds intellectual property assets,
- (ii) did not create the intellectual property in the intellectual property assets which it holds,
- (iii) acquired the intellectual property assets -
  - (A) from an intra group person, or
  - (B) in consideration of funding research and development by another person situated in a territory other than Guernsey, and
- (iv) licences the intellectual property asset to one or more non-resident intra group persons or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by non-resident intra group persons, or

- (b) a company which holds intellectual property assets but does not conduct, in Guernsey, either of the core income generating activities defined in regulations 7(h)(i) or 7(h)(ii),

**"holding company"** : see section 531 of the Companies (Guernsey) Law, 2008 (but subsections (6) and (7) of that section shall be disregarded),

**"income from intellectual property assets"** includes income or profits derived from, or from the holding, development or exploitation of, intellectual property assets (including, without limitation, royalties, income from franchise agreements and income from licensing such assets),

**"insurance"** means insurance business within the meaning of the Insurance Business (Bailiwick of Guernsey) Law, 2002 carried on by a licensee within the meaning of that Law,

**"intellectual property assets"** includes -

- (a) copyright,
- (b) database rights,
- (c) design rights (registered and unregistered)
- (d) image rights,
- (e) patents and biotechnological inventions,

- (f) performers' rights,
- (g) plant breeders' rights, and
- (h) trade marks,

and rights and interests therein,

**"international tax measure"** means an agreement, arrangement or measure described in paragraph (a) or (b) of section 75CC(1A) of the Law,

**"IP company"** : see regulation 2(b),

**"the Law"** means the Income Tax (Guernsey) Law, 1975,

**"non-resident"**, in the case of any person, means that he is not resident or solely or principally resident within the meaning of section 3 or 4 of the Law, as the case may be,

**"pure equity holding company"** means a company -

- (a) which has as its primary function the acquisition and holding of shares or equitable interests in other companies,
- (b) which carries on no commercial activity, and
- (c) which is a holding company within the meaning of section 531 of the Companies (Guernsey) Law, 2008

(subsections (6) and (7) of that section being disregarded),

**"Registrar of Companies"** means -

- (a) in relation to a company registered in the Register of Companies within the meaning of section 496 of the Companies (Guernsey) Law, 2008, the Registrar of Companies within the meaning of that Law,
- (b) in relation to a company the memorandum and articles of which are registered in the Register of Companies within the meaning of section 163(1) of the Companies (Alderney) Law, 1994, the Alderney Greffier, performing the functions of Registrar under that Law,

**"relevant activities"** : see regulation 2(a),

**"resident company"** : see regulation 1(2),

**"ship"** includes every description of vessel used in navigation but does not include -

- (a) a fishing vessel within the meaning of section 294 of the Merchant Shipping (Bailiwick of Guernsey) Law, 2002,
- (b) vessels of a kind primarily for sport or recreation,
- (c) harbour craft, or

- (d) a small ship within the meaning of section 1 of the Merchant Shipping (Bailiwick of Guernsey) Law, 2002 (a ship less than 24 metres in length),

"**shipping**" means the operation of ships in international traffic for income from the transport of passengers or cargo, and includes any of the following activities where directly connected with, or ancillary to, such operation -

- (a) the rental on a charter basis of ships,
- (b) the sale of tickets or similar documents and the provision of services connected with the sale of tickets or similar documents, either for the enterprise itself or any other enterprise,
- (c) the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used for the transport of goods or merchandise,
- (d) the management of the crew of ships,

"**subsidiary**" : see section 531 of the Companies (Guernsey) Law, 2008 (but subsections (6) and (7) of that section shall be disregarded),

"**substance requirements**" : see regulation 1(1),

and other expressions have the same respective meanings as in the Law.

(2) The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016<sup>f</sup> applies to the interpretation of these Regulations.

(3) Any reference in these Regulations to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

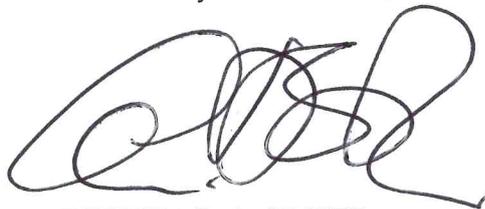
**Citation.**

32. These Regulations may be cited as the Income Tax (Substance Requirements) (Implementation) Regulations, 2018.

**Commencement.**

33. These Regulations shall come into force on the 1<sup>st</sup> day of January, 2019.

Dated this 13<sup>th</sup> day of December, 2018



DEPUTY G. A. ST PIER

President of the Policy & Resources Committee

For and on behalf of the Committee

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<sup>f</sup> Order in Council No. V of 2018; there are amendments not material to these Regulations.

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## EXPLANATORY NOTE

*(This note is not part of the regulations)*

These Regulations implement and enable the administration and enforcement in domestic law of substance requirements in respect of companies which are tax resident, and which carry out relevant activities and other specified classes or descriptions of business or activity, in Guernsey, in order to ensure that real economic activity is being carried on in Guernsey in respect of the profits and income of the companies in question.

