



FALKLAND ISLANDS

Taxes (Amendment) (No. 2) Ordinance 2019

(ORDINANCE No. 17 OF 2019)

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FALKLAND ISLANDS

Taxes (Amendment) (No. 2) Ordinance 2019

(assented to: 7 November 2019)
(commencement: in accordance with section 2)
(published: 11 November 2019)

AN ORDINANCE

To amend the Taxes Ordinance 1997.

ENACTED by the Legislature of the Falkland Islands —

1. Title

This Ordinance is the Taxes (Amendment) (No. 2) Ordinance 2019.

2. Commencement

This Ordinance is deemed to have come into force on 1 January 2019.

3. Amendment of Taxes Ordinance 1997

This Ordinance amends the Taxes Ordinance 1997.

4. Section 34A revoked and replaced (Deduction of tax)

Revoke section 34A and replace it with —

“34A. Deduction of tax

(1) In this section —

“**company resident in a territory**” means a company which —

- (a) by reason of the law of the territory relating to domicile, residence or place of management, is within the charge to tax in the territory; or

- (b) if the territory does not have a law referred to in paragraph (a) or the territory has such a law but the law does not apply to the company, is incorporated in the territory;

“overseas payee company” means a company —

- (a) to which interest is paid or credited; and
- (b) which, in a corporation tax year, is not resident in the Falkland Islands and is not carrying on business through a branch or agency in the Falkland Islands to which the interest income is attributable.

“payer company” means a company which —

- (a) pays or credits interest to an overseas payee company; and
- (b) is resident in the Falkland Islands or is carrying on a business through a branch or agency in the Falkland Islands to which the interest is attributable;

“payment of interest” means a payment of interest paid or credited to an overseas payee company by a payer company to which this section applies.

(2) This section applies if, in a corporation tax year, a payer company pays interest or credits interest to an overseas payee company.

(3) This section does not apply if —

- (a) the overseas payee company —
 - (i) is resident in a territory specified in Schedule A1 and the interest income is not attributable to a branch or agency in another territory through which the company is carrying on a business; or
 - (ii) is carrying on a business through a branch or agency in a territory specified in Schedule A1 and the interest income is attributable to that branch or agency; and
- (b) the overseas payee company or branch or agency of the overseas payee company is —
 - (i) the beneficial owner of the interest;
 - (ii) subject to tax on the interest income in the territory specified in Schedule A1; and
 - (iii) not involved in any arrangement the main purpose, or one of the main purposes, of which is to obtain an advantage in relation to Falkland Islands tax for the overseas payee company, the branch or agency or any other person.

(4) Subject to subsection (5), a payment of interest is charged to tax under this section at the rate of 10% of the amount of the payment.

(5) Subsection (4) does not apply in relation to a payment of interest if the Commissioner gives notice to the payer company that tax will not be charged on that payment.

(6) Tax charged on a payment of interest must be —

- (a) deducted from the gross amount of the payment by the payer company;
- (b) credited by and recoverable from the payer company; and
- (c) due and payable to the Commissioner by the payer company within 30 days after the end of the month in which the payer company makes the payment of interest.

(7) The payer company must —

- (a) submit, together with the amount of tax deducted under subsection (6), a return to the Commissioner that specifies the following —
 - (i) the gross amount of the payment of interest;
 - (ii) the date when the payment of interest was paid or credited;
 - (iii) the identity of the overseas payee company, by specifying at least the name and registered address of the overseas payee company;
 - (iv) if the interest was paid to the overseas payee company, the account into which the interest was paid;
 - (v) the amount of the tax deducted;
- (b) certify on the return that the return is correct; and
- (c) send a copy of the return to the overseas payee company within one month of the date referred to in paragraph (a)(ii).

(8) Part IX applies to and in relation to a payer company who makes a payment of interest with the following modifications —

- (a) an assessment to tax may be made on the payer company under sections 172, 173 and 174;
- (b) the payer company may object under section 175 to the assessment;
- (c) a notice may be served on the payer company under section 176(1);
- (d) the payer company may appeal against the assessment to the Tax Appeal Tribunal under section 181;
- (e) references in the Part to a return on income include references to a return made under subsection (7); and
- (f) any other necessary modifications.

(9) The overseas payee company (or any other person who is the beneficial owner of the interest) is not entitled to recover any tax paid under this section from any person.”

5. Section 114 amended (Demolition and abandonment costs)

(1) In section 114(8) —

- (a) insert in paragraph (b) “or within the further period that the Commissioner allows,” after “that trade,”; and
- (b) omit “the 3 year period referred to in paragraph (b) above” and replace it with “the period referred to in paragraph (b)”.

(2) In section 114(10), omit “the 3 immediately” and replace it with “the 10 immediately”.

6. Section 124A revoked and replaced (Restriction of writing down allowance by reference to asset value in accounts)

Revoke section 124A and replace it with —

“124A. Restriction of writing down allowance by reference to asset value in accounts

(1) In this section —

“**person’s accounts**” means the accounts of a person or a connected person of the person;

“**connected person**” means a person who is connected with another person for the purpose of the other person’s business;

“**temporary period**” means the period, not exceeding 2 years, for which a person uses plant or machinery in the Falkland Islands in connection with the person’s business;

“**Falkland Islands**” includes controlled waters;

“**ordinary reduction**” means a reduction, made in accordance with an accounting depreciation policy that accords with generally accepted accounting principles, as it would operate without extraordinary upward revaluations in contemplation of the use of plant and machinery in the Falkland Islands or extraordinary downward revaluations referable to a period of use in the Falkland Islands;

“**person**” means a person who is —

- (a) carrying on a business in the Falkland Islands; or
- (b) resident in the Falkland Islands.

(2) This section applies if a person claims a writing down allowance under this Chapter in respect of plant or machinery that is —

- (a) brought into the Falkland Islands in connection with the person’s business;
- (b) in the Falkland Islands for a temporary period; and
- (c) used by the person in circumstances in which it is reasonable to expect that the person or a connected person of the person will use the plant or machinery outside the Falkland Islands after the temporary period ends.

(3) A writing down allowance for a chargeable period must not exceed the ordinary reduction in the value of the plant or machinery that is specified in the person's accounts attributable to the chargeable period and to the period of use of the plant or machinery in connection with the person's business in the Falkland Islands during the chargeable period.

(4) The Commissioner may direct that this section applies in relation to the plant and machinery specified in the person's accounts with the modifications specified by the Commissioner in the direction (if any) if the Commissioner is not satisfied that —

- (a) the treatment of the plant or machinery in the person's accounts is in accordance with accounting policies generally operated by the person and, if applicable, the connected person;
- (b) those accounting policies reflect generally accepted accounting practice; and
- (c) the treatment of the plant or machinery in the accounts reflects ordinary reductions.

(5) The person or the connected person must comply with the Commissioner's direction made under subsection (4).

(6) If more than one chargeable period occurs in the person's accounting period, the reduction in value of plant or machinery used by the person in the Falkland Islands during the accounting period is to be apportioned on a just and reasonable basis between those chargeable periods.”.

7. Section 152 amended (Payments of interest)

In section 152, revoke subsection (6) and replace it with —

“(6) In the case of a contractor within the meaning of section 150(11), interest is allowable as a deduction in accordance with this section only in so far as attributable (through just and reasonable apportionment if necessary) to assets used in the Falkland Islands.”.

8. Heading to Part VI, Chapter IV revoked and replaced (Miscellaneous costs and expenses)

The heading to Part VI, Chapter IV is revoked and replaced with—

“CHAPTER IV MISCELLANEOUS COSTS AND EXPENSES”.

9. Section 155 amended (Finance costs: deductibility)

(1) In section 155(2), omit paragraph (b) and replace it with —

“(b) one of the following applies —

- (i) C has a special relationship with one or more of the parties to the transaction (“SR”);
- (ii) it appears to the Commissioner that the financial transaction has a main purpose of securing a tax advantage.”.

(2) Revoke section 155(2B).

(3) Revoke section 155(2C) and replace it with —

“(2C) If this section applies to a person who is referred to in section 150(11) as a contractor for a person who carries on a ring-fence trade, finance charges are deductible in accordance with this section only in so far as attributable (through just and reasonable apportionment if necessary) to assets used in the Falkland Islands.”.

(4) In section 155(3) —

(a) omit “Where” and replace it with “To the extent”;

(b) omit “above” (in each place it occurs); and

(c) omit “section 104 or section 152(3)” (in each place it occurs) and replace it with “section 104, 152(3) or 152C”.

(5) Revoke section 155(4) and replace it with —

“(4) If C enters into a financial transaction under which the finance charges may exceed £50,000 in an accounting period, and to which subsection (2A) applies or may apply, C must, in writing, notify the Commissioner that C has entered into the financial transaction no later than 20 business days after doing so.”.

(6) Revoke section 155(6) and replace it with —

“(6) This section applies to a company carrying on a ring-fence trade.”.

(7) Revoke section 155(7) and replace it with —

“(7) In this section —

“**finance charge**” has the same meaning as in the definition of “finance charge” in section 155A but without the exclusion of the matters referred to in paragraph (c) of that definition;

“**financial transaction**” means a transaction under which a finance charge is to be or may be incurred;

“**securities**” includes securities not creating or evidencing a charge on assets, and interest paid by a company on money advanced without the issue of a security for the advance, or other consideration given by a company for the use of money so advanced, shall be treated as if paid or given in respect of a security issued for the advance by the company;

“**special relationship**” means a relationship as a result of which C and SR are not dealing, or may not be dealing, at arm’s length.

(7A) A direction given by the Commissioner under subsection (2A) may be —

(a) specific;

(b) general;

(c) conditional; or

(d) absolute.

(7B) The Commissioner may publish guidance on the criteria that the Commissioner must consider in determining whether or not to give a direction under subsection (2A).”.

10. New sections 155A to 155G

After section 155, insert —

“155A. Finance charges restriction: interpretation

In this section and sections 155B to 155F —

“**de minimis allowance**” has the meaning it has in section 155D;

“**finance charges**” —

(a) means any of the following —

- (i) interest expenses on debt;
- (ii) costs economically equivalent to interest;
- (iii) expenses and losses incurred in connection with raising finance;

(b) includes the following —

- (i) payments under profit participating loans;
- (ii) imputed interest on instruments such as convertible bonds and zero coupon bonds;
- (iii) alternative finance returns payable under alternative financing arrangements, such as Islamic finance;
- (iv) the finance cost element of finance lease payments or other arrangements accounted for as a financial liability;
- (v) capitalised interest;
- (vi) amounts measured by reference to a funding return under transfer pricing rules where applicable;
- (vii) notional interest amounts under derivative instruments or hedging arrangements related to an entity’s borrowings;
- (viii) guarantee fees for financing arrangements, arrangement fees and similar costs related to the borrowing of funds;
- (ix) fees for letters of credit or other financial guarantees in respect of decommissioning liabilities;

- (x) gains and losses from derivatives which hedge risks associated with the company's finance; and
- (c) does not include the following —
 - (i) foreign exchange gains and losses;
 - (ii) impairment losses and their reversal;
 - (iii) gains and losses from derivatives which hedge risks arising in the ordinary course of a trade where the contract was entered into wholly for reasons unrelated to the capital structure of the company or its group;

“finance charges restriction” means the rules on restriction and reactivation of finance charges specified in sections 155C to 155F;

“finance charges restriction return” has the meaning it has in section 155E;

“net finance charges” means, in relation a company's accounting period, the higher of the following amounts —

- (a) the amount of the company's finance charges that would be deductible before application of the finance charges restriction less the amount of the company's taxable income earned from finance charges;
- (b) zero;

“net finance charges allowance” has the meaning it has in section 155C(2);

“tax-EBITDA” means, in relation to a company's accounting period, the chargeable income (if any) of the company for the accounting period after excluding —

- (a) capital gains and allowable losses under Part VI, Chapter II;
- (b) deductions for finance charges and any taxable income from finance charges;
- (c) depreciation allowances or charges under Part V, Chapter II;
- (d) loss relief under Part V, Chapter III; and
- (e) group relief under Part V, Chapter IV.

155B. Commissioner has power to publish guidance and give directions

(1) The Commissioner may publish guidance, or give directions, for the purpose of ensuring that the finance charges restriction operates on a just and reasonable basis.

(2) Notwithstanding the definitions of “finance charges” and “tax-EBITDA” in section 155A, the Commissioner may exercise the power under subsection (1) to publish guidance or give directions about whether particular classes of amounts are, or are not, finance charges or tax-EBITDA.

155C. Finance charges restriction

(1) This section —

- (a) applies to a company carrying on a ring-fence trade; and
 - (b) provides for —
 - (i) disallowing certain amounts that a company would, apart from this section, be entitled to bring into account for the purposes of corporation tax in respect of finance charges; and
 - (ii) allowing certain amounts disallowed under this section in previous accounting periods to be brought into account in later accounting periods.
- (2) The net finance charges allowance, in respect of a company's accounting period, is the higher of the following —
- (a) 30% of the company's tax-EBITDA;
 - (b) the company's de minimis allowance.
- (3) A company is subject to a disallowance under this section if, in an accounting period, the company's net finance charges before application of the finance charges restriction exceed the company's net finance charges allowance.
- (4) The disallowance applies to a company's finance charges that would be deductible before application of the finance charges restriction in an amount equal to the excess referred to in subsection (3).
- (5) An amount previously disallowed under subsections (3) and (4) may be subsequently reactivated and brought into account by a company as a deduction in an accounting period that ends within 5 years after the end of the accounting period referred to in subsection (3), if and to the extent that —
- (a) in the subsequent accounting period the company's net finance charges are less than 30% of the company's tax-EBITDA; and
 - (b) the amount previously disallowed has not previously been reactivated.

155D. Finance charges restriction: de minimis allowance

- (1) There is a de minimis allowance.
- (2) The maximum value of a de minimis allowance that may be allocated for a company's accounting period is —
 - (a) £500,000; or
 - (b) if a company's accounting period is less than 12 months, £500,000 reduced pro rata.
- (3) To the extent that the de minimis allowance is allocated for a company's accounting period, the de minimis allowance of the company is not available for any other company that is, at any time in an accounting period, connected to the first company.
- (4) For connected companies, the following applies —

- (a) the companies must agree how the maximum de minimis allowance of £500,000 is to be allocated between them and each company must specify how the allowance is allocated between the companies in its finance charges restriction return;
 - (b) if the accounting periods of the connected companies begin or end on different days, each company must adjust its allocation of the allowance agreed to under paragraph (a) as is just and reasonable.
- (5) The Commissioner may, by notice, direct what the value of the de minimis allowance is for a company (which may be nil) if —
- (a) the company has been allocated a de minimis allowance that exceeds the maximum value specified in subsection (2);
 - (b) the allocation of the de minimis allowance for the company or companies connected to the company is not clearly indicated on the company's finance charges restriction return;
 - (c) the company and companies connected to the company appear not to have been able to agree how to allocate the de minimis allowance between them; or
 - (d) the accounting periods of the company and companies connected to the company begin or end on different days and the company or a company connected to the company has not adjusted its allocation of the de minimus allowance agreed between the connected companies as is just and reasonable.

155E. Finance charges restriction: administration

- (1) This section does not apply to a company that —
- (a) does not have net finance charges greater than £500,000 in an accounting period relevant to the corporation tax year; and
 - (b) is not connected with another company within the charge to corporation tax in an accounting period relevant to a corporation tax year.
- (2) A company that is within the charge to corporation tax must deliver to the Commissioner a finance charges restriction return for each corporation tax year.
- (3) The finance charges restriction return —
- (a) must be in the form prescribed by the Commissioner;
 - (b) forms part of the company's return the company delivers to the Commissioner under section 30 for the corporation tax year the finance charges restriction form relates to; and
 - (c) must contain the following information —
 - (i) whether and to what extent an amount of de minimis allowance has been allocated to the company for an accounting period;

- (ii) details of any companies connected with the company that are within the charge to corporation tax, and the extent to which those companies have been allocated an amount of de minimis allowance;
- (iii) for each of the company's accounting periods that is relevant to the corporation tax year, calculation of the following for the company —
 - (A) tax-EBITDA;
 - (B) finance charges that would be deductible before application of the finance charges restriction;
 - (C) company's taxable income from finance charges;
 - (D) net finance charges;
 - (E) net finance charges allowance;
 - (F) finance charges disallowed or reactivated under section 155C; and
 - (G) amounts disallowed under section 155C for previous accounting periods and not yet reactivated.

(4) The Commissioner may, by notice, request a company to provide to the Commissioner information or copies of documents for assessing the compliance of the company and companies connected with the company with the finance charges restriction. The company must comply with the request as soon as practicable after receiving the request.

(5) The information or documents the Commissioner may request under subsection (4) include details of —

- (a) the company's financing and hedging arrangements;
- (b) counterparties to the financing and hedging arrangements; and
- (c) the commercial and tax purposes for entering into the financing or hedging arrangements.

(6) The Commissioner may amend a company's return delivered under section 30 to the extent the Commissioner considers necessary if —

- (a) the company's finance charges restriction return omits information or contains incomplete or incorrect information or a miscalculation relating to the finance charges restriction; or
- (b) the company fails to provide information or documents requested by the Commissioner under subsection (4).

(7) If the Commissioner amends a company's return under subsection (6), the Commissioner must give written notice to the company of the amendment.

(8) If a company fails to deliver a finance charges restriction return to the Commissioner, section 33 applies as if the reference in that section to a company's accounts for an accounting period were a reference to the company's finance charges restriction return.

155F. Finance charges restriction: anti-avoidance

(1) In this section —

“**tax advantage**” includes —

- (a) additional finance charges being brought into account;
- (b) a reduction in amounts disallowed under section 155C,
- (c) additional amounts being reactivated under section 155C;
- (d) a company or a connected company obtaining a greater de minimis allowance; and
- (e) amounts that are taken into account for the purposes of corporation tax in respect of finance charges earlier or later than they would otherwise be taken into account.

(2) If the Commissioner is satisfied on reasonable grounds that arrangements exist that have as their main purpose, or one of their main purposes, to obtain a tax advantage for or in relation to a company or connected companies, the Commissioner may make the adjustments, as are just and reasonable, to reduce or negate the effect of those arrangements.

155G. Capitalised borrowing costs

(1) This section applies —

- (a) subject to the provisions of this Ordinance that impose tax on or provide relief from taxation for an expense or income referred to in this section; and
- (b) if the following apply —
 - (i) a company carries on a ring-fence trade;
 - (ii) generally accepted accounting practice allows a credit or debit in connection with the company's borrowing for an accounting period to be treated in the company's accounts as an amount brought into account for determining the value of a fixed capital asset or project.

(2) Despite the accounting practice referred to in subsection (1)(b)(ii), the credit or debit must be brought into account as an expense or income for the accounting period in which it is given in the same way as if it were a credit or debit which is brought into account in determining the company's profit or loss for that period in accordance with generally accepted accounting practice.

(3) If a debit is brought into account under subsection (2) —

- (a) no expense may be brought into account in respect of the writing down of so much of the value of the asset or project as is attributable to that debit; and

- (b) no expense may be brought into account in respect of so much of an amortisation or depreciation that represents a writing off of the interest component of the asset or project.”.

11. Schedule A1 revoked and replaced

Schedule A1 is revoked and replaced with —

“SCHEDULE AI

section 34A(3)

TERRITORIES

A

Afghanistan
Argentina
Australia

Algeria
Armenia
Austria

Angola
Aruba
Azerbaijan

B

Bangladesh
Belgium
Bolivia
Brunei

Barbados
Belize
Botswana
Burundi

Belarus
Benin
Brazil

C

Cameroon
Colombia
Czech Republic

Canada
Croatia

China
Cuba

D

Democratic Republic of the Congo

Denmark

Dominican Republic

E

Ecuador

Egypt

El Salvador

F

Faroe Islands
France

Fiji

Finland

G

Gabon
Ghana

Gambia
Greece

Germany
Guyana

H

Honduras

I

Iceland
Iran

India
Israel

Indonesia
Italy

Ivory Coast

J

Jamaica

Japan

K

Kenya

L

Lesotho

Libya

Luxembourg

M

Malawi

Mexico

Malaysia

Monaco

Malta

Morocco

N

Namibia

Nigeria

Netherlands

Norway

New Zealand

P

Pakistan

Peru

Portugal

Panama

Philippines

Puerto Rico

Papua New Guinea

Poland

R

Republic of Korea

Russia

S

Saudi Arabia

Slovakia

South Africa

Swaziland

Senegal

Slovenia

Spain

Sweden

Sierra Leone

Solomon Islands

Sri Lanka

T

Tanzania

Tunisia

Thailand

Turkey

Trinidad and Tobago

U

Uganda

United States of America

Ukraine

Uruguay

United Kingdom

V

Venezuela

Vietnam

Z

Zambia

Zimbabwe".

Passed by the Legislature of the Falkland Islands on 31 October 2019.

CHERIE YVONNE CLIFFORD,
Clerk of the Legislative Assembly.

This printed impression has been carefully compared by me with the Bill which has passed the Legislative Assembly and is found by me to be a true and correctly printed copy of the said Bill.

CHERIE YVONNE CLIFFORD,
Clerk of the Legislative Assembly.