

GIB-1 Status and constitution

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Status and constitution

GIB-1 The City of Gibraltar is a dependent territory of Great Britain. The Queen is the source of authority in the territory, who establishes the constitution by prerogative orders made with the advice of Her Privy Council. The constitution contained in the Gibraltar Constitution Order 1969 has been replaced by the Gibraltar Constitution Order 2006 (“the Constitution”).

The Constitution contains provisions for the protection of the fundamental rights and freedoms of individuals, based on the European Convention of Human Rights. The Constitution also establishes the legislature, the executive, and the judicature and requires that there be appointed a principal auditor, an ombudsman, a clerk to the parliament and other officers having such powers as might be prescribed by Act.

Footnotes

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GIB-2 The legislature

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The legislature

GIB-2 The legislature of Gibraltar consists of Her Majesty and the Gibraltar Parliament, which replaces the House of Assembly established under the 1969 Constitution. An enactment of parliament is now called an “Act” instead of an “Ordinance”.

The Gibraltar Parliament consists of a speaker and at least 17 elected members or such greater number as might be approved by a two-thirds majority in parliament. The attorney general and the financial secretary, who were ex officio members of the legislature, are no longer members of parliament.

As a dependent legislature, the Gibraltar Parliament is fully sovereign within the parameters of the Constitution which reserves special defined legislative powers to the governor, as well as the right of the Queen represented in Gibraltar by the governor, to legislate without parliament or to revoke the Constitution. The reserve powers of the governor, previously undefined under the 1969 Constitution, are now defined in the New Constitution and are limited to:

- external affairs, on which, as far as practicable, the governor acts in consultation with the chief minister;
- defence;
- internal security, including the Gibraltar Police Authority under a commissioner appointed by the governor;
- such functions in relation to appointments to public offices and related matters as are conferred on him by the Constitution.

The executive authority of Gibraltar vests in Her Majesty, who may exercise her authority by the government of Gibraltar consisting of a council of not less than four ministers and Her Majesty represented in Gibraltar by the governor.

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GIB-3 The judiciary

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The judiciary

GIB-3 The judiciary of Gibraltar is constituted (in ascending order) by the Magistrates' Court, the Supreme Court, the Gibraltar Court of Appeal and the Privy Council.

The Magistrates' Court is presided over by the stipendiary magistrate and lay justices of the peace. It exercises jurisdiction as conferred by statute in respect of offences triable summarily. It has also a general civil jurisdiction as may be conferred upon it by any other law. The Magistrates' Court has jurisdiction to hear any complaint relating to anything done within Gibraltar or anything left undone that ought to have been done in Gibraltar, or relates to any other matter arising within Gibraltar.

The Supreme Court is a court of plenary jurisdiction in civil and criminal matters constituted by the chief justice and such number of puisne judges as may be prescribed by law. The Supreme Court also exercises appellate jurisdiction from the Magistrates' Court and inferior statutory tribunals.

The Constitution provides for appeals from the Supreme Court to the Court of Appeal and finally to the Privy Council. The Court of Appeal is constituted by the president and two justices of appeal or such greater number of justices of appeal as the governor acting with the advice of the chief minister may prescribe. In addition, the chief justice is an ex officio member of the Court of Appeal "for all purposes except for the purpose of constituting the Court of Appeal for the hearing and determination of an appeal from his own decision".¹ Other than the chief justice, the justices of appeal are normally retired justices of the English Court of Appeal who are visiting Gibraltar as required.

Footnotes

1 Section 61(2)(b) of the Constitution.

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GIB-4 Relations with the European Union

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Relations with the European Union ¹

GIB-4 Under the provisions of art.299 (4) (ex 227) of the Treaty establishing the Union, Gibraltar, as a European territory whose foreign affairs are the responsibility of Great Britain, is part of the EU territory. However, s.28 of the Treaty of Adherence of the UK excludes the application to Gibraltar of the Common Agricultural Policy and Value Added Taxes. Accordingly, Gibraltar is not part of the customs territory.

The exclusion of Gibraltar from the customs territory of the EU causes a measure of difficulty as to the extent of the application to Gibraltar of EU legislation affecting goods. In *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (C30/01) [2003] OJ C275/5* it was held that:

"[T]he exclusion of Gibraltar from the customs territory of the Community by virtue of the Act of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland implies that neither the Treaty rules on free movement of goods nor the rules of secondary Community legislation intended, as regards free circulation of goods, to ensure approximation of the laws, regulations and administrative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it."

In relation to financial services, there is no doubt that EU law applies to Gibraltar. EU requirements and standards are transcribed into the laws of Gibraltar under various acts and the Financial Services Commission, consisting of an executive officer and seven members, regulates financial services and ensures compliance with the required standards.

In addition, the commissioner of banking and the banking supervisor regulate banking and the commissioner of insurance and insurance supervisor regulate insurance business.

Investor compensation schemes have been established in accordance with EU Directives. Under “Post Box” arrangements made between the UK and other Member States, firms that are duly licensed in Gibraltar have the right to passport their banking, investment and insurance services throughout the EU and the European Economic Area. In relation to regulatory enquiries and investigations, the Financial Services Commission shares information with other regulators

The UK bears the final responsibility for Gibraltar’s compliance with EU standards. Of all financial centres within the EU, Gibraltar alone offers the flexibility of the English administrative and judicial systems, grounded in common law, combined with a natural bilingual and bicultural professional service.

The position of Gibraltar in relation to the EU was clouded for a time by an attempt made by the European Commission, supported by Spain, to prevent Gibraltar from enacting laws which established its own independent fiscal regime, different to that of the UK. The Government of Gibraltar was proposing to introduce a system of taxation which consisted of a payroll tax, a business property occupation and a requirement to make a profit taxation upon which would be capped at 15 per cent. The Commission and Spain questioned the autonomy of Gibraltar’s fiscal regime and therefore challenged the proposal on the basis of both regional selectivity and material selectivity, contrary to the principles of the EU. The Court of First Instance of the European Communities (Third Chamber, Extended Composition) in a judgment delivered on 18 December 2008 rejected these contentions.

The Commission appealed against this decision on the single ground that the proposals in question contained features which favoured offshore companies and were therefore materially selective. Spain appealed the decision both on the ground of material selectivity and regional selectivity. In a judgment of the Grand Chamber of 15 November 2011, the finding of the Court of First Instance to the effect that the tax system proposed did not offend the rules of material selectivity was reversed, and the Court therefore found it unnecessary to consider the challenge based on regional selectivity upon which the ruling of the Court of First Instance remains in force.

The judgment of the Court of First Instance on the question of regional selectivity was based on the reasoning of the European Court of Justice in *Portugal v Commission of the European Communities (C-88/03) [2006] E.C.R. I-7115*. In that case, the ECJ ruled that the Azores had no fiscal autonomy because the Portuguese government afforded the government of the Azores financial assistance by compensating revenues lost by reason of tax concessions granted in the Azores. The UK government affords no assistance to the government of Gibraltar and it would therefore seem that the favourable decision obtained by Gibraltar in a case in which the Azores decision was considered and confirmed will be difficult to overturn.

Footnotes

- 1 This section is current as at September 2018 and does not take account of the outcome of the Brexit negotiations.

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GIB-5 Financial year and currency

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Financial year and currency

GIB-5 The financial year of Gibraltar consists of 12 months ending on 31 December or as might be prescribed by the governor or chief minister under the New Constitution.

The currency of Gibraltar is the pound sterling (GBP £). Under the Currency Notes Act the Government of Gibraltar has the power to issue sterling notes which are legal tender in Gibraltar.

GIB-6 Sources of law

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Sources of law

GIB-6 The sources of the law of Gibraltar are the following:

- English common law and principles of equity.
- English statute law up to 1883, so far as is applicable to the circumstances of Gibraltar. The Application of English Law Act sets out a list of the English enactments that apply to Gibraltar.
- English statutes having direct application to Gibraltar (e.g. Nationality Acts and Merchant Shipping Acts).
- Acts of the Gibraltar Parliament.

Subject to the provisions of the [Colonial Laws Validity Act 1865](#), an Act of the Gibraltar Parliament displaces the common law, or English statutes previously applicable, as does statutory law in England. Many Gibraltar Acts re-enact or adopt English statutes wholly or in part.

The social, commercial, legal and political institutions of Gibraltar are modelled on those of England. The Constitution guarantees freedom of assembly and association, in particular to form or belong to trade unions or other associations for the protection of a person's interests. Freedom of association enables association for religious, social, charitable, political, business and all other lawful purposes. The liberty of the subject is guaranteed by the common law and by the Constitution which contains provisions similar to those of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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Legal persons and organisations

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GIB-7 The laws of Gibraltar recognise corporate bodies as legal persons having capacity and rights as natural persons to the extent that is permitted by their constitution.

GIB-8 Companies

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Companies

GIB-8 The Companies Act of Gibraltar is based on the [Companies Act 1929](#) of England, with substantial but selective updates based on the English Companies Acts of 1948, 1967 and 1985. The state of company law in Gibraltar tends to reflect that Gibraltar has few public companies and no stock exchange. The Act contains provisions which transpose EU Directives on companies with limited liability. In particular, the Companies Act incorporates the EU concept of corporate capacity, which substitutes the common law doctrine of ultra vires. The Act confers powers of investigation of the affairs of a company similar to those contained under [Pt XIV of the English Companies Act 1985](#). The Government of Gibraltar currently undertook the task of redrafting the Companies Acts with a view to bringing them up to date with modern practice in England. The new Companies Act 2014 came into force on 1 November 2014.

GIB-9 Investment schemes and Alternative Investment Funds

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Investment schemes and Alternative Investment Funds

GIB-9 Collective investment schemes are regulated under the Financial Services (Collective Investment Schemes) Act 2011 which transposes EU Directives on open-ended units of collective investment in transferable securities (UCITS). A collective investment scheme can be established either in the form of a trust or as an open-ended investment company.

Gibraltar implemented the Alternative Investment Fund Managers Directive 2011/61/EU (the AIFMD) on 22 July 2013 through the Financial Services (Alternative Investment Fund Managers) Regulations 2013 (the AIFM Regulations). The AIFM Regulations and AIFMD apply to managers who manage portfolios of alternative investment funds (AIFs) whose assets under management, including any assets acquired through the use of leverage, in total do not exceed a threshold of €100 million or €500 million in the case of certain closed-ended unleveraged AIFs (Small AIFMs).

On Thursday 11 December 2014, by legal notice No.249 of 2014, the Financial Services (Alternative Investment Fund Managers)(Amendment) Regulations 2014 were published which amended the AIFM Regulations. Of particular note is the creation of a national private placement regime (NPPR) for fund managers wishing to promote, in Gibraltar, the funds they manage.

HM Government of Gibraltar has announced its intention to consolidate all existing financial services legislation into one Act of Parliament and subsidiary legislation. While at this stage this is prospective legislation, on our present understanding, this is not anticipated to have a material impact on the regulatory regime in Gibraltar and is intended to allow for further efficiencies.

GIB-10 Partnerships

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Partnerships

GIB-10 The Partnership Act substantially re-enacts the English Partnership Act 1890. In addition, the Limited Partnership Act, based on the English Limited Partnership Act 1907, enables the establishment of partnerships in which at least one partner has unlimited liability, and the others who cannot take part in the management of the business of the partnership have limited personal liability.

Neither the Partnership Act nor the Limited Partnership Act contains any provision which requires partnerships to publish accounts. However, the Partnership and Unlimited Companies (Accounts) Regulations, which transposes EC Directive 90/605 into the law of Gibraltar, requires limited companies who are members of a partnership each of whose partners is a limited company, or of an unlimited company each of whose members is a limited company, to prepare and have audited annual accounts of the partnership as if the partnership were a company and to append a copy of the accounts and auditors' report to the annual accounts to be delivered to the Registrar.

The Limited Liability Partnerships Act 2009, based on the English Limited Liability Partnerships Act 2000, which was enacted and received the Governor's assent on 15 January 2009, came into force on 24 March 2016.

GIB-10A Foundations

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Foundations

GIB-10A The Private Foundations Act 2017 came into force on 11 April 2017. The Act determines the legal status of a foundation and restricts the purposes for which such foundations may be established and regulates the creation, operation and management thereof.

GIB-11 Introduction

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Forms of ownership

Introduction

GIB-11 The concept of ownership under the law of Gibraltar is the same as that under English common law and the principles of equity. Property can be held by a single person or company, or jointly, or in common with others, or in trust for others. Trustees can be individuals or companies. The conduct of trust business is an activity requiring a licence under the Financial Services Act.

GIB-12 Land law

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Forms of ownership

Land law

GIB-12 English statute law on real property up to 1883 is applicable to Gibraltar. The real property legislation of 1925 of England has not been adopted. As a result, there are important differences between conveyancing practice in Gibraltar and that of England. Although the law requires deeds which convey an interest in land to be registered, in a manner that assists investigation of title to land, there is no system of registered land by which title can be transferred or certified by recourse to a land titles registry.

GIB-13 Equity and trusts

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Forms of ownership

Equity and trusts

GIB-13 As a common law jurisdiction, Gibraltar law recognises and enforces English principles of equity and trusts. The courts of Gibraltar are fully familiar with the administration of trusts. In particular, discretionary and protective trusts are well known to the law and practice of Gibraltar.

The Trustee Act of Gibraltar is based on the [Trustee Acts of 1893](#) and 1894 of England. It further incorporates the powers of advancement contained in [s.32 of the Trustee Act 1925](#) of England, and the powers of delegation by trustees contained in [s.9 of the Powers of Attorney Act 1971](#) of England. Moreover, the Trustee Act substantially incorporates the provisions of the [Trustee Investments Act 1961](#) of England. The [Variation of Trusts Act 1958](#) of England has been applied to Gibraltar under the Application of English Law Act.

The doctrines of equity afford an inherent flexibility in matters of property ownership and more generally, in matters concerning the protection and enforcement of equitable rights and obligations, which is not available under the continental system of law. In addition, the courts of Gibraltar exercise the same flexible jurisdiction in the grant of interim relief as do the courts of England and Wales. These interim remedies, available to protect property and rights from breaches of duty which often fall short of actual fraud, make remedies and court redress more accessible than is the case in jurisdictions governed by civil law.

In July of 2015 the Gibraltar Parliament passed the Private Trusts Company Acts 2015 and the Purpose Trusts Acts. The former Act puts private trust companies on a statutory footing whilst the latter introduced purpose trusts for non-charitable purposes. Further legislation is intended to permit the establishment of Foundations.

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GIB-14 Married women

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Married women

GIB-14 The law of Gibraltar affords a married woman the right to her separate property and full capacity to deal with and dispose of it as if she were single. There is no concept of matrimonial or community property, other than as might arise under particular arrangements for joint ownership or ownership in common. In its matrimonial jurisdiction, the Supreme Court has power to give financial relief to the partners of a failed marriage, and for this purpose will examine what contributions in money, exertion or otherwise, have been made towards the acquisition of property by a husband and wife respectively.

GIB-15 Introduction

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Lifetime gifts

Introduction

GIB-15 The grant of a legal interest in land, whether by way of gift or otherwise, must be effected by deed. As under English law, Gibraltar law requires that a legal assignment of a chose in action be in writing and that notice be given to the debtor or other obligee. Shares, stocks and other choses in action which are registered must be transferred in accordance with their terms of issue.

Otherwise, a gift of chattels inter vivos can be made by manual delivery that is either physical or symbolic, as for example, by the transfer of a key or other means of control over the subject of the gift, with the intention of making a gift. Other than as explained above, there is no necessity for any written document to effect a transfer of movable property, although there are naturally cases in which written evidence of a gift is desirable and expedient for the purpose of clarity and avoidance of doubt as to the intention and purpose for which a transfer is made.

A person domiciled in Gibraltar is not subject to provisions for forced heirship. There are no restrictions on the power of an individual who is an absolute owner to make a gift of his property or any part thereof, or to create third party rights in relation thereto. However, the Inheritance (Provision for Family and Dependents) Act enables family and dependents of a deceased person, i.e. a spouse or former spouse, and child or other dependent for whom no proper provision has been made, to make an application for such provision to the court in similar manner to the law of England under the [Law Reform \(Miscellaneous Provisions\) Act 1970 \(1970 c.33\)](#) and the [Inheritance \(Provision for Family and Dependents\) Act 1975 \(1975 c.63\)](#) from which the Gibraltar Act is derived.

There are no gift taxes in Gibraltar but a gift of land is required to be in writing upon which stamp duty is payable.

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GIB-16 Asset protection and the Bankruptcy (Amendment) Act 1990

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Asset protection and the Bankruptcy (Amendment) Act 1990

GIB-16 The law of Gibraltar applies the old English statute known as the Statute of Elizabeth 1571 (now contained in s.238 of the UK Insolvency Act 1986) under which a settlement or gift made in fraud of creditors can be set aside at any time on proof of the fraud. In addition, s.42 of the Gibraltar Bankruptcy Act (equivalent to s.42 of the old English Bankruptcy Act 1914) enables a voluntary disposition to be set aside if the transferor becomes bankrupt within two years or within 10 years, if the transferor cannot prove his solvency at the time of the settlement or gift.

The Gibraltar Bankruptcy (Amendment) Act 1990 enables dispositions made by a person who establishes his solvency to be registered under that Act, and provides that a registered disposition cannot thereafter be challenged on the ground that it is made in fraud of creditors under the Statute of Elizabeth, or set aside because bankruptcy follows its registration.

In *Hess v Line Trust Corporation Limited (Civil Appeal No.17 of 1997)* the Gibraltar Court of Appeal cast doubt as to the application of the Statute of Elizabeth in respect of transfers made abroad, by persons not resident or domiciled, in respect of property not in Gibraltar. It is important to note that in addition to the issue raised in *Hess* as to whether the Statute of Elizabeth applied, the decision related to other matters apart from that of fraud. The transfer under challenge, in that case, was alleged to have been made not in fraud of creditors, but to defeat the claims of a wife in a matrimonial suit, already the subject of proceedings in the US. Thus the decision concerned also questions of jurisdiction and forum conveniens. While the Supreme Court has followed *Hess* in an interlocutory decision in a subsequent case, *Conway v Seamark Trust Company*, that decision was subject to appeal to the *Gibraltar Court of Appeal (Civil Appeal No.11 of 1999)* when the case was settled.

The author is of the view that the Statute of Elizabeth is not limited territorially, and that such a limitation is contrary to the reasoning of the Court of Appeal in *Re Paramount Airways Limited [1993] 3 All E.R 1*, a case in which it was held that s.238 of the UK Insolvency Act 1986 of relating to the avoidance of sales by a company at an undervalue, was not subject to any territorial limitation.

Further firewalls in an endeavour to secure assets have been introduced by HM Government for Gibraltar in the form of the new Trusts (Private International Law) Act 2015 which seeks to protect dispositions made to a trust from challenges made in proceedings in a matrimonial dispute, succession or forced heirship claim and/or insolvency context grounded on foreign law. The author believes that there are limits to the benefits of these additional firewalls in that s.7(b) specifically provides that the applicability of the Act shall be subject to “any EU regulation, EU Directive or international convention by which Gibraltar is bound, or may become bound, which in relation to particular matters, contains rules as to jurisdiction or the recognition or enforcements of judgments”. Additionally the re-cast Brussels Regulation (EU Regulation 1215/2012) requires automatic recognition and enforcement of EU judgments with no review as to substance. Whilst the regulation applies to “civil and commercial” matters it does not apply to rights in property arising out of matrimonial relationships, insolvency, wills or succession; is a foreign judgment for return of assets based on forced heirship a matter of succession by Gibraltar or some other foreign law?

GIB-17 Gifts by trustees

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Gifts by trustees

GIB-17 A trustee of property can make an appointment which takes effect as a gift by the settlor, in accordance with the terms of the trust which governs the property.

GIB-18 Company gifts

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Company gifts

GIB-18 A company can make gifts if its objects permit the making of the gift and the directors, in the exercise of their fiduciary duties to the company, are satisfied that an exercise of a power to make a gift is a proper exercise of such powers. Gifts by corporate non-profit making or charitable institutions may fall easily within the objects set out in the constitutive documents. However, the directors of a company having commercial objects must ensure that the intended gift is both a proper one and one made in the interests of the company.

GIB-19 Wills

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Estates of deceased individuals

Wills

GIB-19 The formal requirements of validity of a will executed in Gibraltar are that the will be intended as a testamentary document and is so subscribed by the testator at the foot thereof in the presence of two other persons who in the presence of the testator and in the presence of each other, also subscribe their names at the foot of the document as witnesses.

Essential validity

As in England, in respect of movables, the essential validity of a will is governed by the testator's domicile and in respect of immovables by the law of the country where the immovables are situated.

Formal validity

A will shall be treated by the courts of Gibraltar as being properly executed if its execution conforms to the internal law of the place of execution, or the internal laws of the country of nationality, domicile or habitual residence of the testator.

GIB-20 Intestate succession

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Estates of deceased individuals

Intestate succession

GIB-20 Matters of succession of a deceased individual are governed by the law of the domicile of the deceased or the law applied to the deceased by such law, frequently that of his nationality.

Letters of administration will be granted to the persons entrusted or entitled to be entrusted with the administration of the estate of the deceased by the laws of his domicile or the laws which the domicile would apply.

Gibraltar law recognises the rules of succession, including the forced heirship laws, of the country of the domicile of the deceased to the extent that the internal laws of that country are applicable to the deceased as a person domiciled in that country or otherwise. Most civil law countries have forced heirship laws. However, the connecting factor in civil law countries is usually the law of the nationality and not the law of the domicile. As a result subject to the EU Regulation referred to below, if, for example, a British national is domiciled in Spain, Spanish law will not apply its forced heirship rules because a British national is not subject to forced heirship rules under the laws of England, being the country of his nationality.

EU Regulation 650/2012 on succession which came into effect on 19 August 2015 does not apply to the UK (nor as a consequence Gibraltar) under the UK opt out provisions. The scheme of this regulation is to harmonise EU law on successions with cross border elements by imposing a presumption that the law of the country of habitual residence of the deceased is the applicable law of succession. This presumption completely overturns the well-established and heretofore universally accepted maxim of private international law that the law of succession is determined by the nationality and/or domicile of the deceased. The effect of the new Regulation will accordingly

be to impose the rules of succession of the territory of residence upon all unsuspecting foreign nationals resident in that territory.

The fact that the Regulation does not apply in the UK or Gibraltar means only that. The Regulation will apply to UK citizens resident in any EU territory in which the Regulation applies (i.e. all EU states save the UK, Ireland and Denmark).

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GIB-21 Probate of a will and intestate succession

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Estates of deceased individuals

Probate of a will and intestate succession

GIB-21 As under English law and practice, Gibraltar has no system of registration of the wills of living persons. A will is by its nature revocable until death. However, the law recognises mutual wills, and testamentary obligations by which the testator might have become bound.

Estate Duty having been abolished, there are no fiscal obligations arising by reason of death. In the absence of any challenge to the validity of the will, the executors named in the will can immediately proceed to prove the will in common form. This requires an affidavit filed in the Probate Division of the Supreme Court of Gibraltar. The affidavit must state the age, domicile, place and date of death of the deceased, and exhibit the will. It must also contain an oath by the executors to administer the estate of the deceased in accordance with the law, and state the gross value of the estate in Gibraltar which determines the probate fees payable to the court in respect of the grant.

This oath leads to the issue of probate. If the testator was domiciled abroad, an affidavit of foreign law will be required to prove the validity of the will under the foreign law applicable.

If the will is challenged then it must be proved in solemn form, a formal litigious procedure which involves preliminary notices and counter notices, pleadings and a full trial at which witnesses are examined and cross-examined.

GIB-22 Administering the estate of the deceased

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Estates of deceased individuals

Administering the estate of the deceased

GIB-22 If the deceased leaves no will, it will be necessary to seek a grant of letters of administration of the estate of the deceased from the probate division of the Supreme Court of Gibraltar. The persons entitled to seek letters of administration under Gibraltar law are the next of kin. If the deceased is domiciled abroad, letters of administration are issued in favour of those to whom the law of the domicile of the deceased entrusts the administration of the estate. Matters of foreign law, if they arise, are established by affidavit evidence of a legal practitioner in the relevant jurisdiction. An affidavit of foreign law may be required in cases of a non-British deceased person domiciled abroad. In the case of intestacy, the affidavit will state the persons who by the law of the domicile of the deceased are entitled to administer the estate of the deceased. A grant will be made in favour of those persons.

Under the Probates (Resealing) Act there is provision for the re-sealing in Gibraltar of grants of probate or administration issued in the UK or British Possession.

GIB-23 International estate planning issues

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Estates of deceased individuals

International estate planning issues

GIB-23 Gibraltar law allows total freedom of disposition of property both inter vivos and by will. However, it must always be borne in mind that in Gibraltar as in England, the law applicable to matters of succession of personal property are the laws of the domicile of the deceased. Where domicile is in a civil law country, these might include forced heirship provisions.

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GIB-24 Introduction

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Part II Taxation

Taxes

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Introduction

GIB-24 Gibraltar embarked on the development of a financial centre in 1967 when legislation was first enacted to establish concessionary tax regimes. Gibraltar thus became not only a financial centre but a tax haven. As the European Common Market became the EU and widened its areas of competency, tax havens became increasingly unpopular. As a result of a complaint made by the EU Commission in the year 2001 that concessionary tax regimes constituted a form of “state aid” contrary to the provisions of art.87 EC, the UK and European Commission with the consent of the Gibraltar Government agreed that Gibraltar would cease concessionary tax regimes under the Companies (Taxation and Concessions) Ordinance and the Income Tax (Qualifying Company) regulations by 31 December 2010 at the latest. This was announced in Brussels on the 18 February 2005 (IP/05/201). No new exemptions have been allowed after 30 June 2006. Gibraltar’s agreement marked the change of status from an offshore tax haven to an inshore European financial centre.

The concessionary regimes for companies are no longer available and are therefore no longer relevant to this work. The tax regime of Gibraltar has been re-structured in a way that is intended to retain for Gibraltar its activity as a finance centre in a low tax area within the EU, and will result in Gibraltar no longer being considered or treated as a tax haven. It is particularly important to Gibraltar that it ceases to be regarded as a tax haven in relation to business with Spain, whose legislation is prejudicial to tax heaven territories. Gibraltar’s finance centre will retain its attraction because of its easy accessibility within Europe, where it is the only bilingual financial centre governed by the flexibility of the common law rather than the Civil Code. The Government of Gibraltar has pledged that it will have Gibraltar included in the OECD white list of

countries of tax transparency. With this in mind, Gibraltar has signed Tax Information Exchange Agreements (“TIEA”) with 27 tax jurisdictions (*see* [para.70](#)) and a TIEA with Spain is still under discussion. In addition, Gibraltar has implemented the OECD’s Convention on Mutual Assistance in Tax Matters by enacting the International Co-operation (Improvement of International Tax Compliance) Regulations 2016 providing for mandatory automatic exchange of information in the field of taxation.

Taxes levied in Gibraltar are the following:

- income tax
- stamp duty
- import duties.

Estate duty has been abolished in respect of a death occurring on or after 1 April 1997. There are no value added taxes or capital gains taxes.

Footnotes

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GIB-25 The Income Tax Act 2010

European Cross-Border Estate Planning

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The Income Tax Act 2010

GIB-25 The Income Tax Act 2010 (“the Act”) repeals previous income tax legislation subject to transitional provisions and establishes a new basis of charge. The Act makes due provision for administration, confidentiality subject to provisions for co-operation and disclosure as required by Council Directive 77/799/EEC or obligations under TIEAs. Its transitional provisions ensure continuity of the system.

GIB-26 The charge to tax (section 11 and Schedule 1)

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Part II Taxation

Taxes

The charge to tax (section 11 and Schedule 1)

GIB-26 Under s.11(1) of the Act, tax is payable by every person on income accruing in or derived from Gibraltar from the following sources listed under Tables “A”, “B” and “C” of Sch.1 of the Act, i.e.:

Under Table “A”

- o Trade business or vocation;
- o Income from property.

Under Table “B”

- o Employment and self-employment including benefits in kind specified in Sch.7.

Under Table “C”

- o Dividends other than those paid to another company, a person not ordinarily resident or paid by a company listed on a recognised stock exchange;
- o Inter-company loan interest which exceeds £100,000 per annum;
- o Funds income except from a fund marketed to the general public;
- o Income from taxable dividends and funds.

In addition to the charge under s.11(1), s.11(2) charges a person ordinarily resident in Gibraltar, other than a company with tax on the income specified in Tables “B” and “C” accruing in or derived from any place outside Gibraltar.

Section 74 (Interpretation) defines “ordinarily resident”:

- when applied to an individual as meaning a person present in Gibraltar on at least 183 days or any part of a day in any year of assessment, or in excess of 300 days over three consecutive years;
- when applied to a company as meaning a company whose management and control is in Gibraltar, or exercised outside Gibraltar by persons who are ordinarily resident in Gibraltar for the purposes of this Act; and
- when applied to an investment company as including an investment company wherever resident of which control is exercised by a person ordinarily resident in Gibraltar, who has power to secure that the affairs of the company are conducted in accordance with the wishes of that person.

Occasional presence in Gibraltar

GIB-27 Section 19 provides that no tax shall be charged on the emoluments of office or employment, directors fees or remuneration from any trade profession business or vocation, trade service, consultation or advice, paid by a person ordinarily resident to a person present in Gibraltar on less than 30 days in the aggregate in any year.

GIB-28 Interest

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Part II Taxation

Taxes

Interest

GIB-28 Schedule 1 of the Act contains no charge of interest to tax. However s.15, under Pt III of Sch.3 setting out the Rules for ascertaining profits or gains, provides that where interest is derived from a money lending or deposit taking activity, it must be included as trading income in the computation of the profits or gains of that business. Additionally in June of 2013, the Income Tax Act was amended so that interest on inter-company loans would be chargeable to income tax provided that the interest earned was in excess of £100,000 per annum. Accordingly, interest which is not a trading receipt or interest accruing from an inter-company loan below the aforesaid threshold is no longer taxable.

GIB-29 Capital Gains

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Part II Taxation

Taxes

Capital Gains

GIB-29 It should also be noted that while there is no capital gains tax, income tax is charged on the profits of trading in capital assets. Accordingly, the absence of capital gains tax does not lessen the need to distinguish between a gain from realisation of a capital asset, and a gain from trading with capital assets.

In his letter of 28 July 2005, addressed to the Chairman of the Finance Centre Council, the Commissioner explains inter alia the criteria that he will apply, based on his interpretation of two authorities, *Salt v Chamberlain*¹ and *Lewis Emanuel & Son Ltd v White*² on the issue. The Commissioner sets out his views as follows:

"*Salt v Chamberlain* illustrates that the frequency of trades undertaken is not relevant to the issue of whether or not the activities amount to trade. *Emanuel (Lewis) v White* indicates that where professional organisation is applied to the purchase and sale, the activities can amount to a trade.

My view is that such activities will only amount to a trade where there is a strong element of professional organisation in respect of the activities. In those instances where an individual buys and sells stocks and shares on his own account, either as an individual or through a corporate entity of his, where there is no professional organisation akin to the level in *Emanuel (Lewis) v White* confirm that it is my view that no matter what the level of turnover, the activities will not amount to a trade."

While this letter precedes the Act of 2011, the Act does not alter or affect the principles it adopts.

Footnotes

- 1 *[1979] STC 750.*
- 2 *[1965] 42 TC 369.*

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GIB-30 “Accrued and Derived”

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“Accrued and Derived”

GIB-30 Section 74 (Interpretation) defines “Accrued and Derived” by reference to the location of the activities or the preponderance of activities which give rise to the profit. The preponderance of activities of a business that requires a licence and regulation under any law of Gibraltar, or one which is carried on in Gibraltar pursuant to passporting rights is regarded as one the preponderance of whose activities is deemed to take place in Gibraltar.

Section 17 provides that gains or profits derived from employment exercised in Gibraltar shall be deemed to be derived from Gibraltar.

Despite these statutory definitions, the location of activities, or preponderance of activity in case of business not subject to licensing or regulation might be a difficult one. Ultimately, it is the courts that have the task of judicial interpretation.

GIB-31 Trusts

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Taxes

Trusts

GIB-31 For a person ordinarily resident in Gibraltar income from a trust is charged under s.12. In the case of a discretionary or accumulation trust, the charge will be on income from a source chargeable to tax, received by the beneficiary or applied on his direction, or for the benefit of a beneficiary. In the case of any other trust it includes the income to which a beneficiary is entitled.

Under s.13, the trustees of a resident trust are chargeable to tax at the standard rate for persons other than companies. A trust is resident where the class of beneficiaries other than persons irrevocably excluded from benefit include or may include a person who is ordinarily resident in Gibraltar or the issue of such person.

Where a non-resident trust has received income accrued or derived from Gibraltar which has suffered tax, it shall not be liable to further tax.

GIB-32 Foundations

European Cross-Border Estate Planning

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Part II Taxation

Taxes

Foundations

GIB-32 Foundations are deemed resident in Gibraltar unless persons resident in Gibraltar are irrevocably excluded from receiving any benefit for the Foundation. A resident Foundation is taxable on a worldwide basis whilst a non-resident foundation is taxed only on the profits which accrue in or derive in Gibraltar.

GIB-33 Ascertainment of Profits and Gains

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Part II Taxation

Taxes

Ascertainment of Profits and Gains

GIB-33 Section 24 confers power on the Minister to prescribe the rates of tax payable on taxable income, which must be laid before Parliament. Different rules may be prescribed for different descriptions of persons, different bandings of taxable income and different descriptions of income.

The amount of profits or gains is ascertained in accordance with the provisions of the 3rd Sch. under s.25. The 3rd Sch. details deductions not allowable, items to be included in net profits and regulates capital allowances in respect of industrial buildings, plant and machinery.

Presently, rates of tax are established under the Rates of Tax Rules 1989, amended as from 1 July 2011 by the Rates of Tax (Amendment) Rules 2011. Prior to the Rates of Tax (Amendment) Rules 2011, the Rates of Taxes Rules 1989 were last amended on 1 July 2010, before the Income Tax Act 2010 came into force on 5 May 2011, These rules continue in force as amended, by virtue of Pt III of the Transitional Provisions under Sch.9.

Section 15 provides that the assessable profits of any person other than a company shall be the profits or gains computed from 1 July or the date of commencement to 30 June or the date of cessation.

Section 16 provides that the assessable profits or gains of a company shall be the full amount of profits or gains for any accounting period of the company as from the date the company comes within the charge. The section requires every person other than a company to make full and complete return before the 30 November in respect of his taxable income from 1 July to 30 June. The Commissioner has power to dispense with this requirement if, by reason of unilateral tax relief under s.37 on income accruing outside Gibraltar, tax liability will be reduced to nil.

Trade losses

- GIB-34 Section 20 makes provision for trade losses in an activity the profits of which would have been chargeable to tax, to be carried forward against future profits.

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GIB-35 Loans to Connected Persons

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Taxes

Loans to Connected Persons

GIB-35 Under s.22, the Commissioner has power to treat an advance or payment to a connected person as a distribution or income.

Paragraph 9 of Sch.4 provides that an individual person is connected with another if that person is the husband or wife living together, or a relative of either or a man and woman living together.

Under the legislation, the amount of any loan by a company to a director is taxable as earnings, irrespective of whether interest is charged, or repayment made. The 2014 budget confirmed that where a company made a loan to a director on arm's length commercial terms including a commercial interest rate and this was approved by the Commissioner of Income Tax, then no tax would be payable. The amendments mean that a director is treated the same as any other employee.

GIB-36 Rates of Tax Rules 1989 (as amended 1 July 2011)

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Part II Taxation

Rates of tax

Rates of Tax Rules 1989 (as amended 1 July 2011)

GIB-36 Rates of income tax are as follows:

- Individuals (Rule 2) (otherwise than as stated below) in accordance with the following bandings:

Assessable income	Percentage (%)
First £4000	14
Next £12,000	37
The remainder	39

- Non-residents not entitled to allowances are charged at the following rates:

First £16,000	30
The remainder	40

GIB-37 Gross income based system

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Part II Taxation

Rates of tax

Gross income based system

GIB-37 In respect of individuals who have elected to be assessed under the Gross Income Based System, whereby tax is charged on gross income without the benefit of allowances, the Rates of Tax Rules 1989 as amended by the Rates of Tax Rules 2010 established rates of tax set out below.

Assessable Income up to £25,000

Under the amended r.3A (1), tax may be charged on the assessable income of an individual whose election of the Gross system has been approved in accordance with the following bandings:

- First £10,000 6%;
- Next £7,000 20%;
- The remainder 28%.

Assessable Income over £25,000

Under the amended r.3(1)(A) tax for individuals who have elected to pay under the Gross Income Based System, tax may be charged in accordance with the following bandings:

- First £17,000 of assessable income at the rate of 16%;
- Next £8,000 of assessable income at the rate of 19%;
- Next £15,000 of assessable income at the rate of 25%;

- Next £65,000 of assessable income at the rate of 28%;
- Next £395,000 of assessable income at the rate of 25%;
- Next £200,000 of assessable income at the rate of 18 %;
- The remainder of assessable income at the rate of 5 %.

Under r.3(3) the Commissioner shall disregard an election to be charged under the Gross Income Based System if the tax payable by the individual under that system would exceed that otherwise payable.

GIB-38 Income from Development Bonds (Rule 8)

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Part II Taxation

Rates of tax

Income from Development Bonds (Rule 8)

GIB-38 Under r.8, income from development bonds (as defined in reg.2 of the Savings Bank (Development Bonds) Regulations 1993) is taxed at the rate of 25 per cent, no account being taken of any exemption or allowance otherwise available. The income shall not form part of the assessable income of the recipient. This rule charges income from a Development Bond at the rate of 25 per cent gross paid by deduction, without reliefs (personal or otherwise) exemptions or allowances. Income from this source does not form part of assessable income and is not refundable. However, Sch.9 of the Act repeals the Savings Bank (Development Bonds) (Exemption) Regulations 1991 which previously exempted this income. Whilst, at first sight, the repeal of the exemption might be thought to have brought back a liability to tax on Savings Bond interest, this would be an extraordinary result bearing in mind that Bank interest and interest payable by the Gibraltar Savings Bank were specifically excluded from liability under the old charging s.6(8) of the previous Act, and that there is no present charge on interest. The author believes that whilst the Rates of Tax Rules were last amended on the day that the Act came into force, r.8 was overlooked. It must be doubted whether a Rule which operates under transitional provisions of a new Act can make a charge on income which the Act does not charge.

Standard rate of tax under r.4 shall be 30 per cent.

GIB-39 Exclusions from Rule 2

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Part II Taxation

Rates of tax

Exclusions from Rule 2

GIB-39 Rule 2 excludes from the application of the rates of tax there laid down those taxpayers who have a special status under the Act. The Rules make provision for the excluded categories, either directly or by reference to other Rules which govern the special status. Other than persons who have elected to be charged on the basis of their gross income, dealt with above, the provisions governing the exclusions are dealt with below.

GIB-40 Corporation tax

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Rates of tax

Corporation tax

GIB-40 Under r.6, corporation tax is generally payable at 10 per cent. However, under Sch.6 r.1, a utility company and a company which in the opinion of the Commissioner has abused its dominant position is charged at a higher rate of 20 per cent.

GIB-41 Building societies

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Rates of tax

Building societies

GIB-41 Under r.7, building societies pay at a rate of 10 per cent.

GIB-42 High Executive Possessing Specialist Skills Rules 2008

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Part II Taxation

Rates of tax

High Executive Possessing Specialist Skills Rules 2008

GIB-42 On application to the Finance Centre Director by a company or statutory body, a certificate can be issued to a person who qualifies under the Rules as a high executive possessing specialist skills, the holder of which will be charged tax limited to the first £120,000 of his assessable income under the gross income-based system i.e. £29,940. An application for a certificate must be accompanied by a non-refundable fee of £1,000.

The qualifying conditions are that the employee possesses skills or experience not available in Gibraltar, necessary to promote and sustain economic activity which the government seeks to encourage and who will earn more than £120,000 per annum in Gibraltar. The employee must have approved accommodation available to himself and his dependent family in Gibraltar and (subject to the minister's power to waive this requirement) has not been employed in Gibraltar in any part of the 36-month period immediately preceding the application.

GIB-43 Qualifying (Category 2) Individuals Rules 2004

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Qualifying (Category 2) Individuals Rules 2004

GIB-43 These rules, made under s.41A of the previous Act but remaining in force under the transitional provisions, enable the Finance Centre Director or another public officer designated by the Minister of Trade and Industry (“the Authority”) on application by an individual, to issue a certificate qualifying such individual as a Category 2 Individual. A non-refundable fee of £1000 is payable on application.

The qualifying conditions are that the individual has not been in Gibraltar for more than 183 days in any one of the five years immediately preceding an application, or more than an average of 90 days during the three years preceding such application; acquires approved residential accommodation for the whole year of assessment, and has not been engaged in any trade, business or employment in Gibraltar; during the five year period, other than as a director of an Exempt or Qualifying company or as an incidence of his trade, business or employment based outside Gibraltar.

The Finance Centre Director must be satisfied that an applicant for Category 2 status is of good character and of substantial and sound financial standing, and that the issue of a certificate would not be deleterious to the reputation of Gibraltar. The Rules do not define “substantial” financial standing, but guidance indicates that a minimum net assets of £2 million is required.

A Category 2 Individual is liable to tax on his assessable income at the ordinary rates applicable to individuals but these shall be applied to the first £80,000 of taxable income only. The minimum tax payable is £22,000 for a full year or £1,833.33 per month of residence for which the certificate is in force; the maximum is £27,560. Taxable income is assessed without the benefit of the Income Tax (Allowances Deductions and Exemptions) Rules.

In determining the assessable income of a Category 2 Individual, there is disregarded income accruing outside Gibraltar, capital sums received on retirement from a fund approved by the Commissioner of Income Tax which might otherwise be taxable in the hands of a resident, interest on bank or building society deposits in Gibraltar or from loan stock although issued by an investment company in Gibraltar under the auspices of a Stock Exchange approved by the Commissioner of Income Tax, and income received from a trust created by or on behalf of a non-resident, for the benefit of beneficiaries who would not have been liable to income tax in Gibraltar.

A Category 2 individual may elect to have income which is excluded from his assessable income under the preceding provisions, taken into account in determining his assessable income. A Category 2 Individual can also elect to have the income of a spouse or unmarried child under the age of 18, or receiving full time instruction at an educational establishment or under articles or indentures, and not disqualified from Category 2 status, treated as his own for the purpose of the rules.

A certificate is issued for an indefinite period from the date when the Authority is satisfied that the qualifying conditions have been met, and remains valid from year to year whilst the Authority is satisfied on each anniversary of the issue of the certificate that the conditions of issue continue to be met and that the tax liability has been met. The Certificate may be revoked with immediate effect where a Category 2 Individual fails to satisfy the Authority that any condition has not been met.

GIB-44 Returns

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Part II Taxation

Rates of tax

Returns

GIB-44 Section 28(1) requires every person other than a company to make a full and complete return of his taxable income before the 30 November but under s.28(2). The Commissioner, if satisfied that given the circumstances of an individual and the fact that tax due on income abroad will be reduced to nil through the application of unilateral relief, may in his discretion issue a confirmation that there is no requirement for the individual to make a return.

Section 28(3) provides that a trust, one of whose trustees is a professional trustee licensed under the Financial Services Act 1989 or exempted from the licensing requirement under the Financial Services (Investment and Fiduciary Services) Act 1989, and neither the trust nor its beneficiaries have any liability to tax, shall not be required to make a return.

Obligation of a Company to make a Return

GIB-45 Section 29 requires a company that is registered in Gibraltar or that has assessable income, to make a return within six months of the end of its accounting period. A company which is obliged to submit audited accounts may submit unaudited account within that period but will be required to submit audited accounts within nine months of the end of its accounting period.

GIB-46 Introduction

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Powers of the Commissioner of Income Tax

Introduction

GIB-46 Under s.31, on receipt of a return the Commissioner may either:-

- accept it; or
- if an assessment has previously been made which is the subject of appeal, amend it in accordance with the return, or
- make an additional assessment regulated by s.34, or
- commence an enquiry and exercise powers to require information and compel production of documents contained in s.32, notifying the taxpayer of his reasons for doing so.

The section sets out the relevant procedures in each case.

If no return has been made, s.33 gives the Commissioner power, to be exercised in the case of persons other than companies, after 30 November following a year of assessment, or in the case of companies six months immediately after the end of the month on which the Commissioner believes the accounting period ends, to make a determination of the amount of assessable profits in accordance with the best of his information and belief.

Under s.38, assessments are final and conclusive. Nevertheless under s.34 the Commissioner has power within six years after the expiration of a year of assessment, power to make additional assessments if he discovers that a person has been assessed for a lesser amount than ought to have been charged.

GIB-47 Appeals

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Part II Taxation

Powers of the Commissioner of Income Tax

Appeals

GIB-47 Section 35 and Sch.2 of the Act regulates appeals against assessments.

Appeals are made to a Tribunal established under Sch.2 which provides for the appointment to the Tribunal by the Minister, of not less than two and not more than five members.

The appellant must give notice in writing to the Commissioner within 28 days from the date of service of the notice of assessment. The commissioner has power to extend time.

Under Sch.2, a further appeal by way of case stated is available to the Supreme Court on a point of law. Notice of appeal must be given within 21 days of the Tribunal's decision

Limitation of powers to extend time

GIB-48 Section 36 regulates and strictly limits and controls the powers of the Commissioner to extend time for payment of tax to persons and companies who have appealed against the assessment by notice in writing and requires the applicant for postponement to set out the precise grounds for the application for postponement. It provides for a maximum postponement of three months.

GIB-49 Relief in respect of foreign tax

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Part II Taxation

Powers of the Commissioner of Income Tax

Relief in respect of foreign tax

GIB-49 Section 37 provides for and regulates relief against foreign tax where tax has been paid or there is a liability to pay tax in Gibraltar and also a liability to pay tax elsewhere in respect of the same income, elsewhere. The relief is limited to the lesser of the taxation payable in Gibraltar, or in the other country.

GIB-50 Payment of Tax

European Cross-Border Estate Planning

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Part II Taxation

Powers of the Commissioner of Income Tax

Payment of Tax

GIB-50 Section 39 requires tax to be paid by a company not later than six months after the end of the month in which the accounting period falls, and in the case of others, no later than 30 November in the year following the year of assessment.

A tax payer other than a company, is required to make two equal payments of tax before 31 December and 2 June in each year of assessment each equal to half the tax assessed in respect of the preceding year of assessment. These payments are to be set off against the amount to be paid on the submission of returns or used for the purpose of calculating the amount to be repaid to the taxpayer on the submission of the return. The Commissioner may, on application by a taxpayer who believes that the payment on account will exceed his liability, discharge the obligation to make an advance payment in whole or in part.

GIB-51 Anti-tax avoidance

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Part II Taxation

Powers of the Commissioner of Income Tax

Anti-tax avoidance

GIB-51 Section 40 gives the Commissioner power to avoid artificial or fictitious arrangements which eliminate or reduce the amount of tax. In construing the section there shall be considered, the object of the power in the light of internationally accepted principles for the determination of profit within a multinational group and notably, art.9 of the OECD Model Tax Convention and all OECD publications in respect of their Transfer Pricing Guidelines published either in effect before the date of the Act or brought into force by order of the Minister responsible for public finances. A decision of the Commissioner under s.40 must be notified to the taxpayer with particulars of the person to be assessed, the parts of the arrangement, and the reasons of the Commissioner.

Section 41 requires promoters of “notifiable arrangements” or proposals for arrangements as prescribed by the Minister or which might be expected to enable any person to obtain a tax advantage to provide the Commissioner with prescribed information within 30 days after the earlier of the date on which the promoter makes the notifiable proposal or first becomes aware of it.

“Promoters” are widely defined to include persons who in the course of business are to any extent responsible for the design, organisation or management of the arrangements or proposed arrangement, or makes it available to other persons or assists in doing so, or advises or recommends or introduces it, or howsoever assists in marketing same. If no promoter is resident in Gibraltar a person who enters into a transaction forming part of notifiable arrangements comply with the duties of a promoter.

Relevant Business is defined as any trade or profession that involves advice and services relating to tax, deposit taking, or provision of financial products to reduce taxation.

Information produced for the purpose of seeking or providing legal advice, or use in existing or contemplated proceedings is afforded the protection of legal professional privilege is protected, unless it is held with the intention of furthering an offence. It is specifically provided that legal privilege shall not prevent an attorney, solicitor or barrister from providing the name and address of a client where doing so would not constitute a breach of privilege.

Section 42 provides procedures for clearance of transactions and arrangements in advance.

Schedule 4 contains provisions additional to the general provisions of s.40 which regulate thin capitalisation, transactions with connected persons, and the non-deductibility of loans secured by the borrower or a connected person by cash deposits, investments or the income or gains derived therefrom.

The above anti-avoidance provisions shall not apply where it is shown to the satisfaction of the Commissioner that tax avoidance was not a purpose of the transaction, or that it was a bona fide commercial transaction not designed to avoid tax, and was otherwise reasonable and proportionate to the business of the person who would otherwise be assessable.

The fourth Schedule also contains provision for the prevention of avoidance by the transfer of assets abroad.

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GIB-52 Chargeability of tax through another

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Powers of the Commissioner of Income Tax

Chargeability of tax through another

GIB-52 Under s.44 of the Act, a Receiver appointed by the court, a trustee, a guardian, curator, or committee having direction and control over any property of an incapacitated person is chargeable to tax in like manner as such person.

Under s.45 of the Act, a non-resident is assessable and chargeable to tax through an agent in respect of any income arising through the agent.

Under s.47 an executor (which as defined includes a personal representative) is liable for the tax liability of the deceased.

Under s.48 trustees are chargeable jointly and severally in that capacity with the tax. Under s.49, directors shall be answerable for the doing of all such acts as a company is required to do by virtue of the Act and for the assessment and payment of taxation.

Under s.50 the Commissioner may declare any person to be the agent of any other person and may require such person to pay any taxation due from monies of the other held or due by him. Directors and shadow directors are deemed to be agents of the company for the purposes of this section.

Section 51 indemnifies a person answerable for the payment of tax on behalf of another and entitles him to retain monies coming into his hands in respect of that liability.

Section 52 requires Liquidators of a company to pay taxes due before distributing any of the assets of the company.

GIB-53 Assessment and Withholding

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Part II Taxation

Powers of the Commissioner of Income Tax

Assessment and Withholding

GIB-53 Under s.53, the Commissioner is required to keep a record of all assessments by retaining a copy or by electronic means in the manner identified in s.21 of the Electronic Commerce Act 2001. A copy originating from a copy retained pursuant to the section shall in the absence of manifest error be final and conclusive. Assessments which are correct in substance and effect, cannot be quashed or avoided by reason of a defect of form.

GIB-54 Pay as you earn (PAYE)

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Part II Taxation

Powers of the Commissioner of Income Tax

Pay as you earn (PAYE)

GIB-54 Section 55 empowers the Minister to make regulations in relation to PAYE. However, the Income Tax (Pay As You Earn) Regulations 1989 enacted under the previous Act have not been revoked. Employers may be required to make returns of the names and residence of their employees and of the full amount of remuneration in respect of that employment. The above regulations establish the system of deduction by employers from the earnings of their employees and the personal accountability of employers to the Commissioner in respect of such deductions.

A director of a company that fails to account for PAYE is personally liable for the tax as if he were the company, even if he has not been guilty of negligence or misconduct.

GIB-55 Deductions from Employed Persons not domiciled or ordinarily resident

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Deductions from Employed Persons not domiciled or ordinarily resident

GIB-55 The employer of an individual not domiciled nor ordinarily resident in Gibraltar is required under s.57 to give notice in writing of the employment to the Commissioner, not later than seven days from the commencement of the employment.

GIB-56 The Income Tax (Construction Sub-Contractors) Regulations 1994

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The Income Tax (Construction Sub-Contractors) Regulations 1994

GIB-56 Although s.58 enables the Minister to make regulations on the matter the existing Regulations have not been revoked. They continue to require a building contractor to deduct tax on making a payment to a sub-contractor at the rate of 25 per cent, and to account to the Commissioner therefore unless the Commissioner issues an exemption certificate. The Commissioner may issue an exemption certificate on being satisfied, inter alia, that the sub-contractor has a permanent place of business in Gibraltar and there is no reason to believe that the sub-contractor will not comply with future obligations under the Act. Sub-contractors will be aware that the deduction of 25 per cent of payments gross might well exceed the tax chargeable on the sub-contractor's profits, and will in any event, be a serious burden on the sub-contractor's cash flow, putting the operational solvency of the business at risk.

GIB-57 Returns in respect of Dividends

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Returns in respect of Dividends

GIB-57 Companies declaring dividends in favour of persons ordinarily resident or another company are required to deliver to the Commissioner a return containing the names and addresses of such persons or companies, the dividend declared including tax credit attributable to the dividend, and the allocation of the dividend as between profits subject to tax and profits not subject to tax.

GIB-58 Set off of Tax Credits

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Set off of Tax Credits

GIB-58 Section 60 contains provisions under this heading which are not drafted in a manner that is clear and obvious. However, without attempting any detailed analysis of the wording in which they are framed, the effect of the provision is that a person who has made a return in which a dividend has been grossed up to include the amount of a tax credit attributable to it, will be allowed a set off in the amount of such tax credit against other tax due. A Tax Credit is the amount of tax paid by a company in respect of the company's taxable income applied and attributable to the dividend accruing to each share. Under s.60(3) a Tax Credit is available only for the reduction of tax which is otherwise due. Where no tax is due, the amount of tax suffered by deduction is not recoverable or repayable.

GIB-59 Repayment of tax

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Repayment of tax

GIB-59 Section 61 provides that if it is proved to the satisfaction of the Commissioner that any person has paid tax by deduction or otherwise in excess of the amount with which he is chargeable, such person shall be entitled to a refund in respect of the excess.

GIB-60 Recovery of tax through employers and others

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Recovery of tax through employers and others

GIB-60 Section 62 empowers the Commissioner to require all or particular employers to deduct tax from wages, salary, bonus and pensions. An individual who has suffered tax by deduction under the section has the same right of appeal as if an assessment had been made.

GIB-61

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GIB-61 Penalties and charges under the Act are extraordinarily severe, although under s.66A the Commissioner has power to waive reduce or discharge any penalty imposed on a person whom he considers had no intention to evade or cause a loss of tax, or acted inadvertently, or whom the Commissioner considers did not intend to frustrate the Commissioner in collecting tax due or on the access of information necessary to carry out his duties. Whilst it is true that the Commissioners determinations are subject to appeal or reference to the courts by way of judicial review, It is reasonable to entertain doubts as to whether the original exercise of the powers of the Commissioner referred to below, comply with the requirement of s.8(8) of the Constitution which require courts and authorities empowered to determine the extent of civil rights and obligations to be independent and impartial.

Under s.65(8 and (9), the Commissioner is required to notify a person subject to a penalty in writing and a person receiving such a notification may appeal to the Tribunal within 28 Days of the issue of the notice.

Defaults are made the subject of surcharges and penalties under ss.63 to 66 as tabulated below:

Defaults

Sec	Nature of Default	Surcharge or Penalty
63	Failing to comply with a notice requiring the keeping of adequate books	£500
64	Failure to payment tax in due date	10%
	Further delay after 90 days	20% (tax plus surcharge)
	Further delay	10% per annum.

65(Failure of individuals and/or companies to make returns on due	£50
	Further failure beyond 3 months	£300 (additional)
65(Failure to make returns by an individual after 31 March and by a company after end of 10th month from end of accounting period	150% of tax
65(Failure to give information to the Commissioner under ss.6 or 32, on day of default	£200
	Thereafter daily up to months is an offence	£500
65(Failure to notify a notifiable arrangement under s.41	£100 in day of default; thereafter £50 per day
66	Fraudulent, negligent or reckless delivery of incorrect return or incorrect information	Up to 150% of difference between what is properly due and what was due on the face of the return/information submitted.

Offences

Sec.	Nature of Offence	Penalty
65(4) (d)	Failure to give information to the Commissioner under ss.6 or 32 after 3 months of default.	On summary conviction to Imprisonment for six months (max)
		On conviction on indictment – max 2 years plus fine or both
67(1)	Knowingly concerned in the fraudulent evasion of tax	
67(2)	Failure by a director or shadow directors to pay to the Commissioner tax due as an agent under s.50; in respect of a non-domiciled non residents under s.57; employer under s. 62; PAYE Regulations made under s.55; or subcontractors under s.58	On summary conviction - imprisonment for 6months (max)
		On indictment 7 years (max) and/or a fine.

Compounding of Offences

Under s.67 (6) and (7), the Commissioner has power, at the request of the person committing an offence, and upon his admission of same, to compound an offence at any time before the commencement of the hearing by any court of any charge in relation thereto by making a Compounding Order and requiring the person committing the offence to pay a sum of money not exceeding the tax, surcharge fine and penalty to which that person would be liable if convicted.

If the offence relates to evasion of tax, the person must agree to publication of his name and business address, details of the offence and of the compounding Order in the Gazette.

Publication of defaults in PAYE and Social Insurance

GIB-63 Section 68 authorises publication of the name, business address and default details of any person who fails:

(a) to make a deduction or payment in respect of of PAYE; or

(b) in respect of obligations under the Social Insurance legislation,

if default is in respect of an amount in excess of £500 persists for a minimum period of three months and the defaulting person fails to respond to a notification of the intended publication for 14 days.

GIB-64 European Union Parent and Subsidiary legislation

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European Union Parent and Subsidiary legislation

GIB-64 Schedule 5 gives effect to the EU Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC).

The Rules apply to parent and their subsidiary companies incorporated or registered in Gibraltar (as a territory of the UK, the Member State) or in another Member State.

The parent must have a minimum or “relevant participation” of 25 per cent in the shares of the subsidiary.

The parent or the subsidiary as the case must be resident in Gibraltar and the other in another country of a Member State.

A parent that meets the requirements is not liable to taxation in respect of the income from the “relevant participation” provided that the relevant participation has been held for a continuous period of four months or more.

Rules

GIB-65 Under s.72 the Minister is empowered to make Rules generally for carrying out the provisions of the Act and to give effect notwithstanding the provisions of this or any other Act to apply EU legislation to Gibraltar.

Rules prescribing rates of taxation (s.24) and anti-avoidance regulations (s.40) must be laid before Parliament at the meeting next ensuing the making of the rule or regulation. Money paid or deducted pursuant to rules or regulations that are annulled by Parliament is recoverable.

Disclosure opportunity

GIB-66 Under s.76, the Minister has power to make regulations empowering the Commissioner prior to 1 July 2012 to compound, settle, reduce, modify or waive any tax liability arising prior to the date of commencement of this Act in consequence of voluntary disclosures made by a taxpayer in respect of his past affairs.

End of Document

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GIB-67 Estate duty

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Offences, Surcharges, Penalties and Miscellaneous

Estate duty

GIB-67 As noted above, estate duty has been abolished in respect of property transferring on any death on or after 1 April 1997. Estate duty was previously payable on all property situated in Gibraltar transferring on the death of any person wherever domiciled. If the deceased was domiciled in Gibraltar, estate duty was payable on all property wherever situated, transferring on death, with the exception of real property outside Gibraltar. Rates were graduated from “nil” on an estate of £20,000 to 25 per cent on estates exceeding £100,000.

GIB-68 Stamp duty

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Stamp duty

GIB-68 The Stamp Duties Act of Gibraltar, previously in substantially the same terms as the Stamp Duties Act 1891, has now been amended in such manner that stamp duty is now payable only in respect of instruments that relate to leasehold and real property in Gibraltar, and in relation to the share and loan capital of corporations, companies and partnerships with limited liability.

Duty is denoted by stamp impressed by means of a dye. The use of adhesive stamps for the payment of duty, previously authorised for certain purposes, has been abolished. Duty is now payable within 40 days of execution of the document subject to duty, irrespective of whether the document is executed in Gibraltar or elsewhere. The penalty for late payment is a minimum of £100 or 10 per cent of the duty payable, whichever is the greater, plus interest at the rate of 5 per cent or as might be prescribed if the unpaid duty exceeds £1,000.

Duty is charged in the sum of £10 on delivery to the Companies Registry of the required statement of share or loan capital or any increase thereof by entities with limited liability.

Agreements for sale of property subject to duty are chargeable as conveyances on sale or if relating to property and not otherwise specifically charged, the sum of £5.

The Act defines “property subject to duty” in such manner that includes real property situated in Gibraltar or any estate, interest or right in or over such real property. The definition also includes a *Gibraltar Real Property Investment* defined as “any investment in a relevant body owning Real Property in Gibraltar”. It further defines “relevant body” as including companies, partnerships, and bodies corporate whether constituted in Gibraltar or elsewhere, and whether under laws of Gibraltar or otherwise. The effect of these provisions is that the transfer on sale of shares in a company owning real property in Gibraltar is subject to stamp duty. The Act specifically provides

that where a Gibraltar real property investment includes property subject to duty in Gibraltar, ad valorem duty is to be charged and paid on the basis that the consideration is a sum equivalent to the value of the real property in Gibraltar as if the property sold were the real property in Gibraltar.

Unusual as these provisions are, they create no difficulty of enforcement in the case of a relevant body resident subject to the territorial jurisdiction of the legislature and courts of Gibraltar. It is difficult to understand how such provisions can be policed or enforced in respect of share transactions in “relevant bodies” which are “Gibraltar Real Property Investments” but which are not subject to the territorial jurisdiction of Gibraltar.

The Act does not presently contain provisions for relief in respect of transactions between parent and subsidiary companies, and company reconstructions. It was originally indicated that such relief might become available by regulation. To date this has not occurred.

GIB-69 International estate planning and financial and commercial management

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International estate planning and financial and commercial management

GIB-69 Gibraltar has become a popular forum in estate financial and commercial planning because it is a common law jurisdiction with a favourable tax climate which can be viably maintained by reason of its size and its autonomous legislature and governance. Confidence in Gibraltar is boosted by the fact that it is one of the best-regulated low tax financial centre jurisdictions.

Established in Gibraltar is a selection of banks and private trustee companies and financial advisers. Financial Services are supported by a large number of firms of professional lawyers and accountants who are keen to ensure the orderly growth and development of Gibraltar's reputation as an international finance centre.

It is particularly suitable for the management of trusts and of companies because income derived from assets situated abroad held for non-resident beneficiaries is not subject to tax in Gibraltar.

Gibraltar also offers the flexibility of a common law jurisdiction which is bilingual and bicultural. Now that the atmosphere between Gibraltar and Spain has changed from that of non-relationship to one of co-operation, avowed to procure and encourage cross-frontier trade and prosperity on both sides, the usefulness of Gibraltar internationally ought to increase, renewing Gibraltar's opportunity of providing the services that international trade with Spain requires on an inward and outward basis. The new climate has resulted in a number of Gibraltar's legal practitioners and law firms establishing offices in Spain.

GIB-70 Tax Information Exchange Agreements and other International requirements

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Tax Information Exchange Agreements and other International requirements

GIB-70 As at 1 December 2015 Gibraltar has:

- signed Tax Information Exchange Agreements (TIEA) with the following 27 tax jurisdictions: Australia, Austria, Belgium, Denmark, Faroe Islands, Finland, France, Germany, Greece, Greenland, Guernsey, Iceland, India, Ireland, Italy, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, South Africa, Sweden, Turkey, UK and USA. A TIEA with Spain is presently under discussion;
- transposed EU Council Regulation 2011/16/EU on administrative cooperation in the field of taxation;
- implemented the OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters;
- entered into Foreign Account Tax Compliance Act (FATCA) intergovernmental agreements with the US and UK; and
- signed as “Early Adopters” a formal commitment to the Common Reporting Standards on automatic exchange of information.