

CERTIFICATE

In accordance with section 56(2) of the Jamaica (Constitution) Order in Council 1962, I hereby certify that this Bill shortly entitled "The Income Tax (Amendment) Act, 2015" is a Money Bill.

MICHAEL A. PEART
Speaker.

ABILL

ENTITLED

ANACT further to Amend the Income Tax Act.

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BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

1. This Act may be cited as the Income Tax (Amendment) (No. 2) Act, 2015, and shall be read and construed as one with the Income Tax Act (hereinafter referred to as the "principal Act") and all amendments thereto."

Short title
and
construction.

2. Section 2 of the principal Act is amended—

(a) in subsection (1), by inserting the following definitions in the appropriate alphabetical sequence—

Amendment
of section 2
of principal
Act.

““actuarial reserves” means the amount set aside to ensure that promised benefits and future expenses

associated with life and health insurance and annuity contracts can be paid by the company;

“business organization” means—

- (a) a company or a body of persons; or
- (b) a partnership, or an individual, carrying on a business;

“permanent establishment” shall be construed in accordance with subsections (4), (5), (6) and (7);” and

(b) by inserting the following next after subsection (3)—

“ (4) For the purposes of this section, “permanent establishment” means, subject to subsections (5), (6) and (7), a fixed place of business through which the business of a business organization is wholly or partly carried on, and includes—

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop; and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources,

but does not include—

- (g) a building site or construction or installation project that does not last for more than three months;
- (h) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the business organization;

- (i) the maintenance of a stock of goods or merchandise belonging to the business organization solely for the purpose of storage, display or delivery;
- (j) the maintenance of a stock of goods or merchandise belonging to the business organization solely for the purpose of processing by another business organization;
- (k) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the business organization;
- (l) the maintenance of a fixed place of business solely for the purpose of carrying on, for the business organization, any other activity of a preparatory or auxiliary character;
- (m) the maintenance of a fixed place of business solely for any combination of activities mentioned in paragraphs (h) to (l), if the overall activity of the fixed place of business resulting from that combination is of a preparatory or auxiliary character.

(5) Where a person, other than an agent of an independent status referred to in subsection (6), is acting on behalf of a business organization and has, and habitually exercises, in Jamaica an authority to conclude contracts in the name of the business organization, that business organization shall be deemed to have a permanent establishment in Jamaica in respect of any activities which that person undertakes for the business organization, unless the activities of that person are limited to those mentioned in paragraphs (h) to (m) of subsection (4) which, if exercised through a fixed place of business, would not make the fixed place of business a permanent establishment under the provisions of those paragraphs.

(6) A business organization shall not be deemed to have a permanent establishment in Jamaica merely because it carries on business in Jamaica through a broker, general commission agent or any other agent of an independent status, if any such broker or agent is acting in the ordinary course of the business of that broker or agent.

(7) The fact that a business organization that is resident in Jamaica controls or is controlled by a business organization that is resident outside Jamaica, or carries on business outside Jamaica (whether through a permanent establishment or otherwise), shall not of itself constitute either business organization as a permanent establishment of the other.”.

Amendment
of section 5
of principal
Act.

3. Section 5 of the principal Act is amended—

(a) in subsection (1)(a), by—

- (i) deleting the word “and” appearing at the end of sub-paragraph (ii); and
- (ii) inserting the word “and” at the end of sub-paragraph (iii); and
- (iii) inserting next after sub-paragraph (iii) the following—
 - “(iv) to any business organization that has a permanent establishment in Jamaica;”;
 - and

(b) by inserting next after subsection (7) the following—

“ (8) Subject to subsection (9), for the year of assessment 2015, life assurance companies, whether mutual or proprietary, shall be taxable in respect of all income, profits or gains including any reduction in the actuarial services.

(9) The release of accumulated actuarial reserves that were made in respect of premium taxes and

investment taxes in the accounts of life assurance companies prior the year of assessment 2015 shall not be taxable.”.

4. Section 17 of the principal Act is repealed and the following substituted therefor—

Repeal and replacement of section 17 of principal Act.

“Determina-
tion of arm’s
length
consider-
ation
(transfer
pricing).

17.—(1) For the purposes of this section, sections 17A and 17B, and the Eighth Schedule—

“arm’s length consideration”, in relation to a connected transaction—

(a) means the consideration that would have been obtained if the connected transaction had been a comparable independent transaction; and

(b) shall be determined in accordance with the Eighth Schedule;

“comparable independent transaction”, means an independent transaction that is determined in accordance with the Eighth Schedule to be an appropriate transaction to compare with a particular connected transaction;

“connected person”, in relation to a participant in a transaction, means a person who is treated as being connected, in accordance with section 2(2), with another participant in the transaction;

“connected transaction” means a trans-
action between connected persons;

“consideration” in relation to a transaction, means all of the terms and conditions applicable to the transaction, and includes, but is not limited to, the price, profit margin and profit share, terms of payment, security for payment, and any other commercially significant aspects of the transaction;

“independent person”, in relation to a participant in a transaction, means a person who is not treated as being connected, in accordance with section 2(2), with any other participant in the transaction;

“independent transaction” means a transaction between independent persons.

(2) In each true and correct return which shall be delivered to the Commissioner General by every person liable to pay income tax in respect of any year of assessment, the person whose income the return relates to shall—

- (a) state the arm’s length consideration (and no other consideration) in respect of any connected transaction in which the person participated in that year of assessment; and
- (b) use the arm’s length consideration (and no other consideration) in computing the tax chargeable on the person’s income for that year of assessment.

(3) If—

- (a) the consideration in respect of a connected transaction is not arm's length consideration; and
- (b) the taxable income that would have accrued to any connected person who participates in that transaction, if the consideration for that transaction had been arm's length consideration, has not so accrued,

then, for the purposes of determining the taxable income derived from that transaction by any of those connected persons, the consideration in respect of that transaction shall be treated as that which would have been obtained if the transaction had been arm's length consideration.

(4) Where a return of income is submitted to the Commissioner General under this Act, the person in respect of whose income it is submitted shall certify whether to his knowledge the accounts or information upon which the return is based include particulars of any transactions carried out between connected persons and if so what those particulars are.

“(5) With effect from the year of assessment 2016, if any person fails to certify as required by subsection (4) or provides an incorrect or incomplete certificate or return due to the taxpayer's negligent or fraudulent conduct, he shall be liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars and, in default of payment thereof, to imprisonment for a term not exceeding twelve months.”;

(6) The Commissioner General may require a person who participates in a transaction to confirm to the Commissioner General what, in the person's opinion, is the arm's length consideration for the transaction.

(7) For the purposes of determining whether a person who participates in a transaction is a connected person or whether the transaction is a connected transaction, the Commissioner General may request that person to provide information or documentation regarding—

- (a) the relationship of that person to any other person who participates in the transaction; and
- (b) the consideration for the transaction, including the terms and conditions of the transaction.

(8) If a person fails to provide, to the satisfaction of the Commissioner General, any information or documentation requested by the Commissioner General under subsection (7) in respect of a transaction or in respect of the relationship of the person to any other person who participates in the transaction, then the Commissioner General shall—

- (a) treat the person as a connected person in relation to any other person who participates in the transaction and treat the transaction as a connected transaction; and
- (b) determine the arm's length consideration for the transaction accordingly.

(9) Where a person (“person A”) is a participant in a transaction with another person (“person B”) who is resident in a jurisdiction other than Jamaica, as described in subsection (10), then the Commissioner General shall—

- (a) treat person A as being a connected person in relation to person B and treat the transaction as a connected transaction; and
- (b) require person A to determine the arm’s length consideration for the transaction accordingly.

(10) Subsection (9) applies in respect of a jurisdiction other than Jamaica that, in the opinion of the Commissioner General, is one in which either—

- (a) no tax is payable on the income, profits or gains of person B; or
- (b) the rate of tax applicable to the income, profits or gains of person B is less than one half of the rate of tax that would be applicable under this Act to the income, profits or gains of person B if person B were resident in Jamaica.

(11) Person A referred to in subsection (9) shall not be required to provide documentation on the determination of the arm's length consideration in the transaction with person B, provided person A satisfies the Commissioner General with the relevant information and evidence that person B is not a connected person.

(12) For the purposes of any assessment, objection or appeal under this Act, the onus shall be on a person who alleges that the consideration for a transaction is arm's length consideration to prove that the consideration is arm's length consideration."

Insertion of new sections 17A and 17B in principal Act.

5. The principal Act is amended by inserting next after section 17 the following as sections 17A and 17B—

"Transfer pricing agreement.

17A.—(1) The Commissioner General may, upon application by any person who is liable to pay tax under this Act, enter into an agreement with that person (hereinafter referred to as a "transfer pricing agreement") regarding the manner of determining the arm's length consideration for connected transactions by that person.

(2) Where a person has entered into a transfer pricing agreement with the Commissioner General, the arm's length consideration for connected transactions by that person that are within the scope of the agreement shall be determined in accordance with the agreement, unless the consideration for any such transaction is inconsistent with the agreement.

(3) The Commissioner General may make rules regarding transfer pricing agreements, including rules in respect of any or all of the following matters—

- (a) the criteria for a person to be eligible to apply for such an agreement to be entered into;
- (b) the form and manner for applying for such an agreement to be entered into, and the information to be provided by an applicant;
- (c) the terms and conditions that are to be included in such agreements, including

provisions for their duration, suspension and termination;

- (d) such other matters as the Commissioner General considers necessary or desirable for the better carrying out of the provisions of this section.

Adjustment to prevent double taxation.

17B.—(1) This section applies in circumstances where—

- (a) an adjustment to the consideration in respect of a connected transaction is made by a tax authority of a country other than Jamaica;
- (b) the adjustment referred to in paragraph (a) results in the tax authority in that other country making an increase to the taxable base in that country, by a connected person who is a participant in the connected transaction, on an amount of income in respect of which the connected person is liable to pay tax in Jamaica; and
- (c) the country referred to in paragraph (a) has a treaty with Jamaica that provides for relief from double taxation.

(2) Where the circumstances described in subsection (1) apply, a person referred to in subsection (1)(b) may request the Commissioner General to examine and determine whether the consideration, after an adjustment referred to in subsection (1)(a), is consistent with arm's length consideration.

(3) Upon receipt of a request under subsection (2), the Commissioner General shall carry out the examination requested, in consultation with the tax authority of the other country referred to in subsection (1)(c) if necessary.

(4) If, after an examination under subsection (3), the Commissioner General determines that—

- (a) the consideration in respect of a connected transaction, after an adjustment referred to in subsection (1)(a) has been made by the tax authority of another country, is consistent with arm's length consideration for that transaction; and
- (b) an adjustment referred to in subsection (1)(b) has been made by the taxing authority of the other country to the taxable income in that country by the connected person,

then the Commissioner General shall make a corresponding adjustment to the amount of taxable income in Jamaica by that connected person, unless the Commissioner General considers that the adjustment of taxable income in the other country has been made as a result of fraud or wilful default.”.

“Insertion of new clause 5A in principal Act.

5A. The principal Act is amended by inserting next after section 17B the following—

“Duty to keep prescribed documentation.

17C. Every person who engages in a transaction to which section 17A applies shall prepare and keep the prescribed documentation.

Regulations on transfer pricing.

17D.—(1) The Minister may make regulations generally in relation to transfer pricing, and in particular but without prejudice to the generality of the foregoing, may make regulations—

- (a) determining the size of enterprises to which the provisions of this Act relating to transfer pricing shall relate; and
- (b) specifying the size and nature of transactions to which the provisions of

this Act relating to transfer pricing shall relate.

(2) Regulations made under subsection

(1)—

- (a) may be given retroactive effect to a date not earlier than January 1, 2015; and
- (b) shall be subject to affirmative resolution of the House of Representatives.”.

6. Section 93(2) of the principal Act is amended by deleting the words “or Sixth” and substituting the words “Sixth, Seventh or Eighth”.

Amendment of section 93 of principal Act.

7. The principal Act is amended by inserting next after the Seventh Schedule the following as the Eighth Schedule—

Insertion of new Eighth Schedule in principal Act.

“ EIGHTH SCHEDULE (Section 17)

Transfer Pricing

1. In this Schedule—

“financial indicator” includes indicators such as price, profit margin and profit share;

“transfer pricing method” means a transfer pricing method described in paragraph 5.

2. The arm’s length consideration in respect of a connected transaction shall be determined by application of a transfer pricing method, or other method authorized under this Schedule, to the connected transaction and to comparable independent transactions.

3. In determining whether a transaction is an appropriate transaction for the purposes of the definition of a comparable independent transaction, the following matters shall be considered—

- (a) whether there are economically relevant characteristics of the transaction, in relation to—
 - (i) the characteristics of the property or services transferred by way of the transaction;
 - (ii) the functions performed by persons with respect to the transaction, taking into account assets used and risks assumed;

- (iii) the terms and conditions, including the consideration, for the transaction;
 - (iv) the economic and market circumstances in which the transaction takes place; and
 - (v) the business strategies pursued by persons in relation to the transaction; and
- (b) whether there is any significant difference between the transaction and the connected transaction with which it is to be compared that could materially affect the financial indicator being examined under a transfer pricing method or other method, and, if there is such difference, whether a reasonably accurate adjustment may be made to the relevant financial indicator being examined in order to eliminate the effect of the difference on the comparison.

4. The arm's length consideration in respect of a connected transaction shall be determined by applying the most appropriate transfer pricing method to the circumstances of the case, taking into consideration the following criteria—

- (a) the relative strengths and weaknesses of the various methods;
- (b) the appropriateness of a particular method in view of the nature of the connected transaction, determined in particular through an analysis of the functions undertaken by each person who participates in the connected transaction (taking into account assets used and risks assumed);
- (c) the availability of reliable information necessary for the proper application of a particular method; and
- (d) the degree of comparability between the connected transaction and independent transaction, including the reliability of comparability adjustments, if any, that may be required to eliminate differences in the comparison of the transactions.

5. The following are the transfer pricing methods that , subject to paragraph 10 may be applied in determining the arm's length consideration in respect of a connected transaction, as well as the manner of applying them—

(a) Comparable Uncontrolled Price Method—

the comparable uncontrolled price method consists in comparing the price charged for property or services transferred in a connected transaction to the price charged for property or services transferred in a comparable independent transaction;

(b) Resale Price Method—

the resale price method consists in comparing the resale margin that a purchaser of property in a connected transaction earns from reselling that property with the resale margin that is earned in a comparable independent transaction involving the purchase and resale of commercially equivalent property;

(c) Cost Plus Method—

the cost plus method consists in comparing the mark up on those costs directly and indirectly incurred in the supply of property or services in a connected transaction with the mark up on such costs directly and indirectly incurred in the supply of property or services in a comparable independent transaction;

(d) Transactional Net Margin Method—

the transactional net margin method consists in comparing the net profit margin relative to an appropriate base (such as costs, sales or assets) that a person achieves in a connected transaction with the net profit margin relative to the same base achieved in a comparable independent transaction;

(e) Transactional Profit Split Method—

(i) the transactional profit split method consists in allocating to each connected person participating in a connected transaction the portion of common profit (or loss) derived from such transaction, such allocation being made in accordance with comparable allocations in the case of independent transactions; and

- (ii) when it is possible to determine the arm's length consideration for some, but not other, functions performed by connected persons participating in a connected transaction using the methods described in subparagraphs (a) to (d), the transactional profit split method shall be applied to determine the arm's length consideration for the other functions so performed, based on the common residual profit derived from the other functions.

6. Where, taking account of the criteria described in paragraph 4, a transfer pricing method described in paragraph 5(a) and a transfer pricing method described in paragraph 5(b) to (e) can be applied with equal reliability, the transfer pricing method described in paragraph 5(a) shall be applied.

7. Where, taking account of the criteria described in paragraph 4, a transfer pricing method described in paragraph 5(a) to (c) and a transfer pricing method described in paragraph 5(d) to (e) can be applied with equal reliability, one of the transfer pricing methods described in paragraph 5(a) to (c) shall be applied.

8. It shall not be necessary to apply more than one transfer pricing method in respect of a particular connected transaction.

9. Notwithstanding paragraph 5, another method (other than a transfer pricing method) may be applied by a person for determining arm's length consideration in respect of a connected transaction if the Commissioner General is satisfied that—

- (a) none of the transfer pricing methods can reasonably be applied to determine the arm's length consideration in respect of the connected transaction; and
- (b) the other method to be applied yields a result consistent with that which would be achieved by persons participating in a comparable independent transaction.

10. Notwithstanding paragraph 8 and 9, the Commissioner General may apply a method (other than one that has been used by a connected person and whether or not it is a method provided by paragraph 5) to establish arm's length consideration in respect of a connected transaction if the Commissioner General is satisfied that the method to be applied is consistent with that paragraph 4.

11. If a connected person participates, under the same or similar circumstances, in two or more connected transactions that are closely linked to one another economically, or that form a continuum such that they cannot reliably be analyzed separately, the transactions may be combined for the purposes of—

- (a) determining a comparable independent transaction in relation to those connected transactions; and
- (b) applying an appropriate transfer pricing method in relation to those connected transactions.

12.—(1) Where the actual consideration for a connected transaction (or for a number of such transactions that are combined under paragraph (11)) is within the arm's length range, the actual consideration shall be treated as the arm's length consideration for such transaction or combined transactions.

(2) Where the actual consideration for a connected transaction (or for a number of such transactions that are combined under paragraph 11) is not within the arm's length range, the median in the arm's length range shall be treated as the arm's length consideration for such transaction or combined transactions.

(3) For the purposes of this paragraph, the arm's length range in relation to a connected transaction is a range of financial indicators produced by the application of the most appropriate transfer pricing method to a number of independent transactions that are reasonably comparable to the connected transaction.

13.—(1) Subject to sub-paragraph (2), the charge for a service between connected persons is considered to be arm's length consideration if —

- (a) it is a charge for a service that is actually rendered;
- (b) the service provides, or is expected to provide, the recipient of the service with economic or commercial value; and
- (c) the amount charged for the service is an amount that an independent person in comparable circumstances would have been willing to pay for the service to be performed by another independent person or for the service to be performed in-house at its own expense.

(2) A charge for a service that is paid by the recipient of a service to a person who is a connected person in relation to the recipient shall not be considered to be at arm's length consideration if it is a charge that is

paid by a shareholder of the recipient solely by virtue of that person being a shareholder of the recipient, including a charge for any of the following services—

- (a) a service rendered in relation to the juridical structure of the parent company of the recipient, for example meetings of shareholders of the parent company, issuing of shares in the parent company and costs of the supervisory board of the parent company;
- (b) a service rendered in relation to reporting requirements of the parent company of the recipient, including the consolidation of reports; except where a reporting requirement arises from a statutory obligation relating to the business of the recipient (in which case sub-paragraph (1) applies);
- (c) a service rendered in relation to the raising of funds for the acquisition of participation in a business; except where the participation is directly or indirectly acquired by the recipient and the acquisition benefits the recipient or is expected to benefit the recipient (in which case sub-paragraph (1) applies).

14.—(1) Subject to sub-paragraph (2), if it is possible to identify a number of specific services provided by or to a connected person, the determination whether the charge for those services is considered to be arm's length consideration shall be made in respect of each specific service.

(2) Where services are provided to more than one connected person and it is not possible to identify the specific services provided to each of those persons, the total charge for the services shall be allocated among those persons according to reasonable allocation criteria based on one or more variables that—

- (a) take into account the nature of the services provided, the circumstances under which they are provided and the benefits obtained or expected to be obtained by the persons to whom the services are provided;
- (b) take into account only charges in respect of independent transactions; and
- (c) are capable of being measured in a reasonably reliable manner.

15.—(1) The determination of arm's length consideration for a connected transaction involving a grant of licence relating to, a sale or

other transfer of intangible property between connected persons shall take into account—

- (a) the perspective of both the transferor and the transferee of the property, including in particular the price which an independent person would be willing to pay for, or accept for, the property in a comparable independent transaction; and
- (b) the value and usefulness of the property to the transferee.

(2) In applying the provisions of paragraph 3 to a transaction involving the grant of licence relating to, the sale or other transfer of, intangible property, any special factors relevant to the comparability of the connected and independent transactions shall be considered, including—

- (a) the benefits expected from the transfer of the property;
- (b) any geographic limitations on the exercise of rights to the property;
- (c) whether the rights to the property are exclusive or non-exclusive; and
- (d) whether the transferee has a right to participate in further development of the property by the transferor of the property.”.

Consequential amendment to *General Consumption Tax Act*.

8. Section 32B(4)(g) of the *General Consumption Tax Act* is amended by deleting the words “twelve months” and substituting therefor the words “three months”.

Consequential amendment of *Revenue Administration Act*.

9. Part VID of the Revenue Administration Act is amended by inserting next after section 17NA the following as section 17NAA—

“Power of Minister to make order declaring international tax agreement with other territory to be in force.

17NAA. If the Minister by order declares that an international tax agreement specified in the order has been made with the Government of any territory outside the Island, and that it is expedient that the agreement should have effect, the agreement shall have effect notwithstanding anything contained in section 83(1) of the *Income Tax Act* or any other enactment.

Passed in the House of Representatives this 10th day of November, 2015 with five (5) amendments.

MICHAEL A. PEART
Speaker.

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to amend the Income Tax Act (the "Act") so as to—

- (a) define "permanent establishment" for the purpose of the liability to tax of a business organization that does business in Jamaica; and
- (b) provide for the determination of arm's length consideration for transactions between connected persons.

The Bill enacts provisions to prevent double taxation of connected persons in circumstances where there is a double taxation agreement with another country.

The Bill enacts a new Schedule to the Act containing details as to how arm's length consideration for transactions between connected persons is to be determined.

Finally, the Bill contains a consequential amendment so as to make the definition of "permanent establishment" in the *General Consumption Tax Act* consistent with the new definition in the Income Tax Act.

PETER PHILLIPS, Ph.D., M.P.
Minister of Finance and Planning.

A BILL

ENTITLED

AN ACT further to Amend the Income Tax Act.

As passed in the Honourable House of Representatives.

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