

*Draft Order laid before the House of Commons under section 173(7) of the Finance Act 2006 for
approval by resolution of that House*

DRAFT STATUTORY INSTRUMENTS

2008 No.

TAXES

The International Tax Enforcement (Bermuda) Order 2008

Made - - - - *****

At the Court at Buckingham Palace, the ***** day of *****

Present,

The Queen's Most Excellent Majesty in Council

A draft of this Order was laid before the House of Commons in accordance with section 173(7) of the Finance Act 2006(1) and approved by a resolution of that House.

Accordingly, Her Majesty, in exercise of the powers conferred upon Her by section 173(1) of the Finance Act 2006, by and with the advice of Her Privy Council, orders as follows—

Citation

1. This Order may be cited as the International Tax Enforcement (Bermuda) Order 2008.

Tax information exchange arrangements to have effect

2. —(1) It is declared that—
 - (a) the arrangements specified in the Exchange of Letters set out in Part 1 of the Schedule to this Order and in the Arrangement set out in Part 2 of that Schedule have been made with the Government of Bermuda with a view to the exchange of information foreseeably relevant to the administration or enforcement or recovery of the taxes, and debts relating to the taxes, covered by the arrangements; and
 - (b) it is expedient that those arrangements should have effect.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a UK
Statutory Instrument: *The International Tax Enforcement (Bermuda) Order 2008 No. 1789*

Clerk of the Privy Council

SCHEDULE

Article 2

PART 1
EXCHANGE OF LETTERS
BETWEEN THE UNITED KINGDOM AND BERMUDA
CONCERNING A TAX INFORMATION EXCHANGE ARRANGEMENT

Letter from the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office

Madam,

Having regard to the wish of our respective governments to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes, and respecting the constitutional relationship between the United Kingdom of Great Britain and Northern Ireland and Bermuda, I have the honour

- to propose to you the provisions contained in the Arrangement set out in the Appendix to this letter;
- to propose that the said provisions may come into force on the date mentioned in Paragraph 12 of the Arrangement;
- to propose our mutual commitment to undertake at the earliest date any internal legislative formalities necessary for the coming into force of the Arrangement and to notify each other without delay when such formalities are completed.

The Government of the United Kingdom welcomes the conclusion of this Arrangement with the Government of Bermuda, which represents an important step in delivering the commitment it made to the OECD in 2000 to respect the principles of transparency and exchange of information. The Government of the United Kingdom considers that this Arrangement demonstrates Bermuda's commitment to high standards for effective exchange of information with respect to both criminal and civil taxation matters within an acceptable timeline, consistent with the aims and objectives of the OECD Global Forum on Taxation.

The Government of the United Kingdom also recognises the important progress that Bermuda has made in negotiation of TIEAs with other countries and recognises that Bermuda is committed to combating tax abuse by putting in place mechanisms which enhance transparency.

In the event that a Territory applies prejudicial or restrictive measures based on harmful tax practices to residents or nationals of the other Territory, it is understood that that other Territory may suspend the operation of this Arrangement for so long as such measures apply.

For these purposes, a prejudicial or restrictive measure based on harmful tax practices means a measure applied by one Territory to residents or nationals of either Territory on the basis that the other Territory does not engage in effective exchange of information or because it lacks transparency in the operation of its laws, regulations or administrative practices, or on the basis of no or nominal taxes and one of the preceding criteria.

Without limiting the generality of the term "prejudicial or restrictive measures" it includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements. Such measures are not limited solely to taxation matters. However, they

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do not include any generally applicable measure, applied by either Territory against, amongst others, members of the OECD generally.

In the light of the experience of operating the Arrangement, or to reflect changing circumstances, either Government may wish to propose a variation in the terms of this Arrangement. If so, it is understood the other Government will agree to hold timely discussions with a view to revising the terms of the Arrangement to enhance its effectiveness.

I have the honour to confirm that, if the above is acceptable to your Government, this letter together with its Appendix and your confirmation will together constitute our mutual acceptance of the provisions of the Arrangement.

Please accept, Madam, the assurance of our highest consideration,

Meg Munn MP,
Parliamentary Under-Secretary of State, Foreign and Commonwealth Office
For the Government of the United Kingdom
Signed in London on 4th December 2007

Reply by the Deputy Premier and Minister of Finance of Bermuda

Madam,

I have the honour to acknowledge receipt of your letter dated 4th December 2007, which reads as follows:

“Madam,

Having regard to the wish of our respective governments to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes, and respecting the constitutional relationship between the United Kingdom of Great Britain and Northern Ireland and Bermuda, I have the honour

- to propose to you the provisions contained in the Arrangement set out in the Appendix to this letter;
- to propose that the said provisions may come into force on the date mentioned in Paragraph 12 of the Arrangement;
- to propose our mutual commitment to undertake at the earliest date any internal legislative formalities necessary for the coming into force of the Arrangement and to notify each other without delay when such formalities are completed.

The Government of the United Kingdom welcomes the conclusion of this Arrangement with the Government of Bermuda, which represents an important step in delivering the commitment it made to the OECD in 2000 to respect the principles of transparency and exchange of information. The Government of the United Kingdom considers that this Arrangement demonstrates Bermuda’s commitment to high standards for effective exchange of information with respect to both criminal and civil taxation matters within an acceptable timeline, consistent with the aims and objectives of the OECD Global Forum on Taxation.

The Government of the United Kingdom also recognises the important progress that Bermuda has made in negotiation of TIEAs with other countries and recognises that Bermuda is committed to combating tax abuse by putting in place mechanisms which enhance transparency.

In the event that a Territory applies prejudicial or restrictive measures based on harmful tax practices to residents or nationals of the other Territory, it is understood that that other Territory may suspend the operation of this Arrangement for so long as such measures apply.

For these purposes, a prejudicial or restrictive measure based on harmful tax practices means a measure applied by one Territory to residents or nationals of either Territory on the basis that the other Territory does not engage in effective exchange of information or because it lacks transparency in the operation of its laws, regulations or administrative practices, or on the basis of no or nominal taxes and one of the preceding criteria.

Without limiting the generality of the term "prejudicial or restrictive measures" it includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements. Such measures are not limited solely to taxation matters. However, they do not include any generally applicable measure, applied by either Territory against, amongst others, members of the OECD generally.

In the light of the experience of operating the Arrangement, or to reflect changing circumstances, either Government may wish to propose a variation in the terms of this Arrangement. If so, it is understood the other Government will agree to hold timely discussions with a view to revising the terms of the Arrangement to enhance its effectiveness.

I have the honour to confirm that, if the above is acceptable to your Government, this letter together with its Appendix and your confirmation will together constitute our mutual acceptance of the provisions of the Arrangement.

Please accept, Madam, the assurance of our highest consideration,"

I am able to confirm that the contents of your letter dated 4th December 2007 are acceptable to the Government of Bermuda, and therefore that this letter together with your letter and its Appendix constitutes our mutual acceptance of the provisions of the Tax Information Exchange Arrangement between Bermuda and the United Kingdom of Great Britain and Northern Ireland.

Please accept, Madam, the assurance of my highest consideration.

The Honourable Paula A Cox, JP, MP
Deputy Premier
Minister of Finance
For the Government of Bermuda
Signed in London on 4th December 2007.

PART 2

ARRANGEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF BERMUDA ON THE EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Bermuda,

Desiring to facilitate the exchange of information with respect to taxes,

Have arranged as follows:

PARAGRAPH 1

Object and scope of the Arrangement

The competent authorities of the Territories shall provide assistance through exchange of information that is relevant to the administration or enforcement of the domestic laws of the Territories concerning taxes covered by this Arrangement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Arrangement and shall be treated as confidential in the manner provided in Paragraph 8.

PARAGRAPH 2

Jurisdiction

A requested Territory is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

PARAGRAPH 3

Taxes covered

1. The existing taxes which are the subject of this Arrangement are taxes of every kind and description imposed in the Territories.
2. This Arrangement shall also apply to any identical or substantially similar taxes imposed after the date of signature of this Arrangement in addition to, or in place of, the existing taxes. The competent authorities of the Territories shall notify each other of any substantial changes to the taxation and related information gathering measures covered by this Arrangement.

PARAGRAPH 4

Definitions

1. For the purposes of this Arrangement, unless otherwise defined:
 - (a) "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom designated under its laws concerning the Continental Shelf and in accordance with international law as an area within which the rights of the United Kingdom with respect to the seabed and sub-soil and their natural resources may be exercised;
 - (b) "Bermuda" means the Islands of Bermuda;
 - (c) "applicant Territory" means the Territory requesting information;
 - (d) "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;
 - (e) "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

- (f) "competent authority" means, in the case of the United Kingdom, the Commissioners for Her Majesty's Revenue and Customs or their authorised representative and, in the case of Bermuda, the Minister of Finance or an authorised representative of the Minister;
- (g) "Territory" means the United Kingdom or Bermuda as the context requires;
- (h) "information" means any fact, statement or record in any form whatever;
- (i) "information-gathering measures" means laws and administrative or judicial procedures that enable a Territory to obtain and provide the requested information;
- (j) "national" means:
 - (i) in the case of the United Kingdom,
 - (A) any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided he has the right of abode in the United Kingdom, and
 - (B) any legal person, partnership, association or other entity deriving its status as such from the laws in force in the United Kingdom; and
 - (ii) in the case of Bermuda, any legal person, partnership, company, trust, state, association or other entity deriving its status as such from the laws in force in Bermuda;
- (k) "person" includes an individual, a company and any other body of persons;
- (l) "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;
- (m) "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- (n) "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Territories;
- (o) "requested Territory" means the Territory requested to provide information;
- (p) "resident" means:
 - (i) in the case of the United Kingdom, a person who is a resident in the United Kingdom for the purposes of taxation in the United Kingdom and
 - (ii) in the case of Bermuda, an individual who has the status of a legal resident of Bermuda; and a company, partnership, trust or association created under the laws of Bermuda;
- (q) "serious tax evasion" means wilfully, with dishonest intent to defraud the public revenue, evading or attempting to evade any tax liability where an affirmative act or omission constituting an evasion or attempted evasion has occurred. It also includes intentionally obstructing, hindering, intimidating or resisting public officials. The tax liability must be of a significant or substantial amount, either as an absolute amount or in relation to an annual tax liability, and the conduct involved must either constitute a systematic effort or pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities of either Territory, or constitute falsifying or concealing identity. The competent authorities shall agree on the scope and extent of matters falling within this definition; and
- (r) "tax" means any tax to which this Arrangement applies.

2. The term "relevant" wherever used in the Arrangement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant notwithstanding that a definite assessment of the pertinence of the information to an on-going investigation could only be made following the receipt of the information.

3. As regards the application of this Arrangement at any time by a Territory, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at the time under

the law of that Territory, any meaning under the applicable tax laws of that Territory prevailing over a meaning given to the term under other laws of that Territory.

PARAGRAPH 5

Exchange of information upon request

1. The competent authority of the requested Territory shall provide upon request information for the purposes referred to in Paragraph 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Territory if such conduct occurred in the requested Territory.
2. If the information in the possession of the competent authority of the requested Territory is not sufficient to enable it to comply with the request for information, the requested Territory shall use all relevant information gathering measures to provide the applicant Territory with the information requested, notwithstanding that the requested Territory may not need such information for its own tax purposes.
3. If specifically requested by the competent authority of the applicant Territory, the competent authority of the requested Territory shall provide information under this Paragraph, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.
4. Each Territory shall ensure that its competent authority, for the purposes of this Arrangement, has the authority to obtain and provide upon request:
 - (a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
 - (b) information regarding the ownership of companies, partnerships and other persons, including, within the constraints of Paragraph 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees, beneficiaries and the position in an ownership chain.
5. This Arrangement does not create an obligation on the Territories to obtain or provide:
 - (a) ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties;
 - (b) information that is not present in the Territory;
 - (c) information relating to a period more than six years prior to the tax period under consideration;
 - (d) information unless the applicant Territory has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties;
 - (e) information in the possession or control of a person other than the taxpayer that does not directly relate to the taxpayer.
6. If information is requested that also relates to a person that is not a resident, nor a national, nor carrying on business in one or other of the Territories, it also shall be established to the satisfaction of the competent authority of the requested Territory that such information is necessary for the proper administration and enforcement of the fiscal laws of the applicant Territory.
7. The competent authority of the applicant Territory shall provide the following information to the competent authority of the requested Territory when making a request for information under this Arrangement to demonstrate the relevance of the information sought to the request:
 - (a) the identity of the taxpayer under examination or investigation;
 - (b) the nature and type of the information requested, including a description of the specific evidence, information or other assistance sought and the form, if practicable, in which the applicant Territory prefers to receive the information;

- (c) the tax purposes for which the information is sought and why it is relevant to the determination of the tax liability of a taxpayer under the laws of the applicant Territory;
 - (d) evidence that such taxpayer is a resident in, or national of, or carrying on business in, one of the Territories, or that it is necessary for the determination of the tax liability of a taxpayer under the laws of the applicant Territory;
 - (e) the period of time with respect to which the information is required for the tax purposes;
 - (f) grounds for believing that the information requested is present in the jurisdiction of the requested Territory or is in the possession or control of a person subject to the jurisdiction of the requested Territory;
 - (g) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
 - (h) a statement that the request conforms to the law and administrative practice of the applicant territory and would be obtainable by the applicant territory under its laws in similar circumstances, both for its own tax purposes and in response to a valid request from the requested Territory under this Arrangement;
 - (i) a statement that the applicant Territory has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.
8. The competent authority of the requested Territory shall forward the requested information as promptly as possible to the applicant Territory. To ensure a prompt response, the competent authority of the requested Territory shall:
- (a) confirm receipt of a request in writing to the competent authority of the applicant Territory and shall notify the competent authority of the applicant Territory of deficiencies in the request, if any, within 60 days of the receipt of the request; and
 - (b) if the competent authority of the requested Territory has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Territory, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.
9. For the purposes of subparagraph 7(d), a taxpayer shall be regarded as carrying on business:
- (a) in the United Kingdom if that business is carried on through a permanent establishment;
 - (b) in Bermuda, if that business is carried on by an overseas entity which is issued a permit under the Companies Act 1981 or under the Overseas Partnership Act 1995.

PARAGRAPH 6

Tax examinations abroad

1. The requested Territory may allow, to the extent permitted under its domestic law, representatives of the competent authority of the applicant Territory to enter the territory of the requested Territory to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the applicant Territory shall notify the competent authority of the requested Territory of the time and place of the meeting with the individuals concerned.
2. At the request of the competent authority of the applicant Territory, the competent authority of the requested Territory may allow representatives of the competent authority of the applicant Territory to be present at the appropriate part of a tax examination in the requested Territory.
3. If the request referred to in sub-paragraph 2 is acceded to, the competent authority of the requested Territory conducting the examination shall, as soon as possible, notify the competent authority of the applicant Territory about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the requested Territory for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the requested Territory conducting the examination.

PARAGRAPH 7

Possibility of declining a request

1. The competent authority of the requested Territory may decline to assist where:
 - (a) the request is not made in conformity with this Arrangement;
 - (b) the disclosure of the information requested would be contrary to the public policy of the requested Territory;
 - (c) the applicant Territory would not be able to obtain the information
 - (i) under its own laws for purposes of administration or enforcement of its own tax laws or
 - (ii) in response to a valid request from the requested Territory under this Arrangement.
2. The provisions of this Arrangement shall not impose on a Territory the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in sub-paragraph 4 of Paragraph 5 shall not be treated as such a secret or trade process merely because it meets the criteria in that sub-paragraph.
3. The provisions of this Arrangement shall not impose on a Territory the obligation to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications:
 - (a) are communications between a professional legal adviser and a client made in connection with the giving of legal advice to the client;
 - (b) are communications between a professional legal adviser and a client, professional legal adviser acting for the client and another person, or the client and another person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
 - (c) include items enclosed with or referred to in such communications and made:
 - (i) in connection with the giving of legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when the items are in the possession of a person who is entitled to possession of them.
4. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.
5. The requested Territory may decline a request for information if the information is requested by the applicant Territory to administer or enforce a provision of the tax law of the applicant Territory, or any requirement connected therewith, which discriminates against a national of the requested Territory as compared with a national of the applicant Territory in the same circumstances.

PARAGRAPH 8

Confidentiality

Any information received by a Territory under this Arrangement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Territory concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Arrangement, and to persons concerned with the regulation of disclosure and use of information. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Territory.

PARAGRAPH 9

Safeguards

The rights and safeguards secured to persons by the laws or administrative practices of the requested Territory remain applicable. The rights and safeguards may not be applied by the requested Territory in a manner that unduly prevents or delays effective exchange of information.

PARAGRAPH 10

Costs

Incidence of costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be agreed by the competent authorities of the Territories.

PARAGRAPH 11

Mutual Agreement Procedure

1. The competent authorities of the Territories shall jointly endeavour to resolve any difficulties or doubts arising as to the interpretation or application of this Arrangement.
2. In addition to the endeavours referred to in sub-paragraph 1, the competent authorities of the Territories may mutually determine the procedures to be used under Paragraphs 5 and 6.
3. The competent authorities of the Territories may communicate with each other directly for the purposes of this Paragraph.

PARAGRAPH 12

Entry into Force

Each of the Territories shall notify to the other the completion of the procedures required by its law for the bringing into force of this Arrangement. This Arrangement shall enter into force on the date of the later notification, and shall have effect twelve months following the date that the Government of Bermuda confirms by letter their mutual acceptance and making of this Arrangement.

PARAGRAPH 13

Termination

1. Either Territory may terminate the Arrangement by serving a notice of termination on the other Territory.
2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Territory.
3. In the event of termination, both Territories shall remain bound by the provisions of Paragraph 8 with respect to any information obtained under the Arrangement.

EXPLANATORY NOTE

(This note is not part of the Order)

An Arrangement dealing with the exchange of information for tax purposes between the United Kingdom and the British Overseas Territory of Bermuda (“the Arrangement”) is set out in the Schedule to this Order.

Article 2 makes a declaration as to the effect and content of arrangements set out in the Exchange of Notes contained in Part 1 of the Schedule to the Order and in the Arrangement contained in Part 2 of that Schedule and that it is expedient that those arrangements should have effect.

A detailed explanation of the Arrangement can be found in the Explanatory Memorandum published with the Arrangement and which may be accessed on the web site of the Office of Public Sector Information at <http://www.opsi.gov.uk/stat.htm>.

The Arrangement will enter into force on the date of the later of the notifications by each country of the completion of its legislative procedures and will take effect from 4th December 2008.

The date of entry into force will, in due course, be published in the *London, Edinburgh and Belfast Gazettes*.

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.