

British Virgin Islands Economic Substance Requirements – 'Relevant Activity' of 'Holding Business'

For general background on The Economic Substance (Companies and Limited Partnerships) Act, 2018 which came into effect on 1 January 2019 and which was further amended on 30 January 2019 (the "Economic Substance Act"), the related draft International Tax Authority Economic Substance Code that was issued on 22 April 2019 (the "Guidance") and for the meaning of 'legal entity', please click [here](#).

This update assumes that an entity has already been determined to be a 'legal entity' under the Economic Substance Act and that the 'legal entity' is now considering whether it is carrying on one of the nine categories of geographically mobile 'relevant activities' - in particular, under the 'holding business' category.

What is 'Holding Business'?

'Holding business' in the Economic Substance Act is defined to mean 'the business of a pure equity holding entity' which itself is defined to mean a 'legal entity that **only** holds equity participations in other entities and **only** earns dividends and capital gains'.

The Guidance on 'Holding Business'

The Guidance contains some additional sector-specific provisions in respect of 'holding business'. It provides that:

- (a) a legal entity will only fall within the definition if it holds nothing but equity participations, yielding dividends or capital gains. The ownership of any other form of investment (such as an interest bearing bond) will take the legal entity outside this definition;
- (b) equity participation includes shares in a company, but is wide enough to encompass other forms of investment in an entity which give the investor the right to participate in the profits of the entity. The interest of a general partner in a limited partnership will usually be of this quality. The word 'dividends' will be construed broadly to encompass any payments made to an investor in respect of an equity participation;
- (c) entities which own other forms of asset (e.g. bonds, government securities, legal or beneficial interests in real property) will not be pure equity holding entities (even if they also own equity participations) and will not be treated as carrying on holding business;
- (d) because it is possible for an entity to carry on more than one relevant activity, the fact that an entity is a pure equity holding entity does not preclude the possibility that it may carry on one or more other relevant activities; and
- (e) entities which hold assets which consist of or include assets which are not equity

participations will not be pure equity holding companies, but likewise may be found to carry on other relevant activities.

Economic Substance Test

If a 'legal entity' **only** carries on a 'relevant activity' that is the 'business of a pure equity holding company', it will be subject to a reduced economic substance test as set out in Section 8(2) of the Economic Substance Act (the "Reduced Economic Substance Test"). The Reduced Economic Substance Test can be satisfied if the legal entity:

- (a) complies with its statutory obligations under the BVI Business Companies Act, 2004 or the Limited Partnership Act, 2017 (whichever is relevant);
- (b) has, in the British Virgin Islands, adequate employees and premises for holding equity participations and, where it manages those equity participations, has, in the British Virgin Islands, adequate employees and premises for carrying out that management.

The Guidance further provides that condition (a) described above is met by complying with the legislative requirements imposed by the Business Companies Act or the Limited Partnerships Act, as appropriate.

For condition (b), the Guidance provides that what is required for compliance, as with economic substance generally, will be a fact sensitive question, dependent on the nature of the activity being carried on. At one extreme, the requirement for being a pure equity holding entity is simply holding equity participations. If this is all the legal entity does during a given financial period, the relevant activity will be entirely passive

in nature and the requirements for adequate and suitably qualified employees and for appropriate premises will be applied accordingly. Any legal entity will of course retain the services of a registered agent, and the performance of those services will be taken into account when assessing economic substance for pure equity holding entities. On the other hand, the entity may actively manage its equity participations, in which case it should have adequate and suitably qualified employees, and appropriate premises, in the British Virgin Islands to carry out this function.

In addition, the Guidance clarifies that for a pure equity holding entity there is no requirement that the entity is directed or managed in the British Virgin Islands. Nor is there a requirement that the entity carries on core income generating activity in the British Virgin Islands (as there is no core income generating activity relating to holding business).

The Guidance also states that there are no restrictions on the extent to which a pure equity holding entity may outsource its activity. Where activity is outsourced, the extent of the outsourcing will be taken into account in assessing the adequacy of the employees in the British Virgin Islands, but only if the outsourcing is itself to a person operating in the British Virgin Islands.

What to do if a Legal Entity is Carrying on the 'Relevant Activity' of 'Holding Business'

It is worth noting that there are a range of consequences for breaches of the Economic Substance Act (including financial penalties and potential striking-off).

If you have any specific questions in relation to a 'legal entity' conducting 'holding business' or this update, please speak to your usual Maples Group contact or:

British Virgin Islands

Richard May

+1 284 852 3027
richard.may@maples.com

Chris Newton

+1 284 852 3043
chris.newton@maples.com

Ruairi Bourke

+1 284 852 3038
ruairi.bourke@maples.com

Dubai

Philip Ireland

+971 4 360 4073
philip.ireland@maples.com

Hong Kong

Matt Roberts

+852 3690 7405
matt.roberts@maples.com

Richard Spooner

+852 2971 3046
richard.spooner@maples.com

Andrew Wood

+852 3690 7490
andrew.wood@maples.com

London

Matthew Gilbert

+44 7466 1608
matthew.gilbert@maples.com

Singapore

Michael Gagie

+65 6922 8402
michael.gagie@maples.com

James Kinsley

+65 6922 8410
james.kinsley@maples.com

Brandon Doffing

+65 6322 8411
brandon.doffing@maples.com

May 2019

© MAPLES GROUP

This update is intended to provide only general information for the clients and professional contacts of Maples Group. It does not purport to be comprehensive or to render legal advice.