

Hybrids and other mismatches – draft HMRC guidance for consultation Comments by the Chartered Institute of Taxation

1 Introduction

- 1.1 We refer to the draft guidance on the rules for hybrids and other mismatches published for consultation in December 2016. We set out below some comments on this draft guidance.
- 1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 1.3 Our stated objectives for the tax system include:
- greater simplicity and clarity, so businesses can understand how much tax they should be paying and why;
 - greater certainty, so businesses can plan ahead with confidence and
 - responsive and competent tax administration, with a minimum of bureaucracy.
- 1.4 In this context good guidance, particularly for such a complex set of rules such as those for hybrids and other mismatches, is vitally important.

2 Example in INTM551200

- 2.1 We understand that you are aware that the conclusion of the example on INTM551200 on page 102 is incorrect (because it does not take account of s259CC(3)(c)) and we understand that this will be amended.
- 2.2 However, there is also a wider point here. This is that the exemption in s259CC(3) (as applied by 259CB(3)) only applies where the borrower is within the charge to UK

tax. If the borrower is not within the charge to UK tax, but the lender is, and the release is treated as non-taxable in the hands of the borrower under its domestic legislation, it seems that a charge can arise on the lender. It would be useful to understand whether there is a policy reason for this distinction.

3 Example of a commercial supply chain

- 3.1 The examples used in the draft guidance generally refer to structures which have some tax planning or avoidance design or motive. However, the rules can catch situations where a supply chain is not designed with tax in mind, but is designed to fit with commercial requirements.
- 3.2 Such an example that might occur in a multinational group is a supply chain within the group that crosses national borders:
- a PE in jurisdiction A supplies a group company (Q) in jurisdiction B,
 - The group company (Q) in jurisdiction B supplies a group company (R) in jurisdiction C
 - The group company (R) in jurisdiction C supplies a group company (S) in jurisdiction D

Assume there is substance to the operations in each jurisdiction A, B, C and D and that the supply chain has been set up to fit with commercial requirements.

- 3.3 If jurisdiction D is the UK and the company (S) in the UK is charged an amount for the supply from the company (R) in jurisdiction C, there appears to be a need for (S) to consider whether Chapter 8 (as applied by Chapter 11) means there is a multinational payee deduction non-inclusion mismatch.
- 3.4 We suggest that the above supply chain would be a good example to include in the guidance (assuming it is something that is meant to be caught by the UK legislation) as it would demonstrate the scope of the rules and their potential application to commercial situations, where there are nonetheless indirect payments to PEs.

4 Availability of information

- 4.1 The example in paragraph 3 above also highlights an issue which may face many UK companies; that is obtaining the necessary information from the overseas parent or the wider group. In the above example, company (S) in jurisdiction D (the UK company in this example) is a subsidiary of a foreign parent group, thus it will require the relevant information to check the tax position in the supply chain. Whilst it might be expected that, ordinarily, the information will be obtainable from the overseas parent, there is a risk that the information is not supplied. This is not unique to this example and applies to all of the scenarios to which the hybrid and other mismatches rules could apply, as it is always necessary to determine how much is taxed and what the different treatments are in each overseas jurisdiction.
- 4.2 There does not seem to be any specific guidance on what to do when a UK taxpayer cannot get the relevant information. The guidance does refer to HMRC using JITSIC to get the information it needs (see page 287), but not what the group company does, as it seems to be assumed the information will be available.

- 4.3 Since this may not always be the case, it would be very helpful to have something in the guidance similar to what is in the current worldwide debt cap manuals about being pragmatic, if this is what HMRC intend.
- 4.4 The legislation does refer to '*reasonable to suppose*', and the guidance at INTM555060 on page 272 (covering Chapter 7) touches on this. However, this guidance suggests that the use of this phrase means that it does not require either party to know how the transaction has actually been treated by the counterparty, but only that it might give a mismatch. However, this does not help decide the amount of the mismatch if it is concluded that it is reasonable that a mismatch might arise.

5 Interaction with the CFC rules

- 5.1 There does not appear to be anything in the guidance on the interaction of the hybrid and other mismatches rules and, specifically, the finance company exemption in the CFC rules. Although the circumstances where this might be relevant will probably be quite limited, we suggest that it would be useful for the guidance to have something in it on whether the full or partial exemption for qualifying loan relationships (TIOPA s371IB or s371ID), could cause a mismatch that would be counteracted by the hybrid and other mismatches rules.

6 Errors in the text

- 6.1 During our review, we spotted the following typos:
- 6.2 Page 149 – third paragraph under heading 'Case 1 – permitted taxable period': 'This ~~should~~ is intended to ensure'
- 6.3 Page 262, penultimate paragraph, third/fourth line: ' and the parent jurisdiction may, therefore, ~~not any~~ recognise any dealings between the head office and the PE.'
- 6.4 Page 348, first paragraph under heading 'Relevant multinational company', third line: 'but is not resident in that jurisdiction,'
- 6.5 Page 359, paragraphs under the heading 'Counteraction where the UK is in the position of Country X (parent jurisdiction)': we suggest that this heading is referring to application of s259JC and not, as stated in the second line of the first paragraph s259JB. However, the second paragraph under this heading does correctly deal with an aspect of s259JB and correctly refers to s259JB(4). It might be clearer to move this second paragraph to the part of the guidance dealing with s259JB.
- 6.6 Page 394, final paragraph under the heading 'Exceptions': we think that the reference should be to 'the application of s259LA'.

7 Acknowledgement of submission

- 7.1 We would be grateful if you could acknowledge safe receipt of these comments.

8 The Chartered Institute of Taxation

- 8.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
9 March 2017