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## **Personal Tax: Offshore Anti-Avoidance legislation – Call for Evidence**

### **Response by the Chartered Institute of Taxation**

#### **1. Executive Summary**

- 1.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 20,000 members, and extensive volunteer network, in providing our response.
- 1.2. The CIOT believes that the current offshore anti-avoidance provisions are disjointed, confusing and hopelessly outdated in a modern global economy. The various legislative provisions, with differing defences and applications should be unified into one anti-avoidance code applying to income and capital gains from international trusts and companies alike along with a single motive defence at corporate level; an accompanying clearance procedure for that defence should provide the necessary certainty.

#### **2. About us**

- 2.1. 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. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2. 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.
- 2.3. 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.

- 2.4. Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

### **3. Introduction**

- 3.1. This paper is in response to a Call for Evidence titled ‘Personal Tax Offshore Anti-Avoidance legislation’ which was published on 30 October 2024. In addition, this paper also includes a model (single) anti-avoidance code, based on our recommendations, which we would advise be used as a guide when formulating new legislation on this matter.

- 3.2. Our stated objective for the tax systems include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

### **4. The existing legislation**

- 4.1. The existing income tax legislation principally comprises:

- (1) ITTOIA ss 619 – 648 (‘the Settlement code’).
- (2) ITA 2007 ss 714 – 751 (‘the TOAA code’).

- 4.2. Offshore Funds (Tax) Regulations 2009 reg 21 which applies aspects of the TOAA code to offshore income gains (OIGs) on non-reporting funds (‘the OIG Rules’). The Settlement code was primarily designed with UK trusts in mind. However, it also applies to non-UK resident trusts and with tax rates at their present levels its main economic significance is to non-resident trusts. It attributes income to the settlor if the settlor (or their spouse/civil partner) has an interest in the settlement, has received a capital sum (for example a loan or the repayment of a loan) or where income would otherwise be taxed on the settlor’s minor child (potentially at a lower tax rate).

- 4.3. Since 2018, the settlement code has also included a limited provision applying only to certain non-UK trusts which taxes income on a settlor or close family member who has received a benefit from the trust (ITTOIA 2005 ss 643A – 643N).

- 4.4. The TOAA code potentially applies in any situation where income arises to a non-UK resident as a result of a transfer of assets. It commonly applies where there has been a transfer to non-resident trustees and so there is significant overlap between the TOAA code and the Settlement code. However, the TOAA code also applies to transfers to non-UK companies.

- 4.5. There are two limbs to the TOAA Code. The first (known as the transferor charge) treats the income of the non-resident as the income of the transferor if the transferor has some ability to enjoy the income of the non-resident or has received (or is entitled to receive) a capital sum from the non-resident.

- 4.6. The second limb of the TOAA code (the benefits charge) is a charge on individuals who receive benefits following the transfer of assets. If there is income which has not been taxed under the transferor charge, that income can be treated as arising to the individual who has received the benefit (ITA 2007 ss 731 – 735C).

- 4.7. The TOAA code does not apply if it can be shown that the avoidance of UK tax was not one of the purposes of the transfer (or any associated operations) or that all relevant transactions were commercial (ITA 2007 ss 736 – 742). These purpose defences do not apply to the Settlement code.
- 4.8. The existing CGT legislation principally comprises:
- (1) TCGA 1992 s 86 and Schs 4B and 5 ('s 86').
  - (2) TCGA 1992 ss 87 – 98 and Sch 4C ('the CGT capital payments code').
  - (3) TCGA 1992 ss 3 – 3G and s 79B ('Section 3').
  - (4) TCGA 1992 s 86 (beneficial interests).
  - (5) Offshore Funds (Tax) Regulations 2009 regulation 20 which applies aspects of the CGT capital payments code to OIGs

These capital gains tax provisions have a similar purpose to the income tax provisions but work in a very different way.

- 4.9. Section 3 attributes gains of a non-UK close company to the participators of the company in proportion to their interests. The effect of this is that any UK resident participators pay tax on their share of the gain realised by the non-UK company. There is no tax liability if a participator's share of the gain is 25% or less. In addition, there is no tax if the avoidance of capital gains or corporation tax was not one of the main purposes of the arrangements.
- 4.10. Section 86 and the CGT capital payments code deal with the attribution of gains realised by offshore trusts either to the settlor or to the beneficiaries.
- 4.11. Section 86 applies where the settlor has an interest in the trust. However, this is much wider than the equivalent income tax provisions as the settlor is treated as having an interest if their children or grandchildren, their respective spouses and certain connected companies can benefit from the trust. Section 86 has historically not applied where the settlor of the trust is non-UK domiciled. However, with the abolition of the concept of domicile from 6 April 2025, Section 86 will no longer have this limitation.
- 4.12. Where Section 86 does not apply (for example if the settlor is non-resident or dead), the CGT capital payments code attributes gains of the trustees to UK resident beneficiaries who receive benefits from the trust. There is an increase in the rate of tax if the benefit is matched with gains which were realised by the trustees earlier than the year before that in which the benefit is provided. There is no similar increase in tax under the TOAA benefits charge.
- 4.13. Gains which can be attributed to a settlor under Section 86 or to a beneficiary under the CGT capital payments code include any gains realised by non-UK companies in which the trustees have an interest and which are attributed to the trustees under Section 3. There are no purpose defences which apply in the case of attribution of gains from a trust to a settlor or beneficiary under either Section 86 or the CGT capital payments code.
- 4.14. The OIG Rules are very complicated, which is unfortunate given the number of investment products they cover. As seen above, the two regulations cross-apply aspects of both the CGT and income tax concepts which creates very real issues of overlap and duplication and also creates what many would regard as loopholes. The duplication in the OIG Rules clearly illustrates why a single code is vital.

## 5. What is wrong with the existing legislation

- 5.1. The principal technical respect in which the existing legislation is unsatisfactory is that different wording, concepts and definitions address essentially the same fact patterns. Thus:
- (1) Attribution of trust income or gains on an arising basis is dealt with by three quite different codes namely:
    - (a) TOAA code transferor charge.
    - (b) Settlement code.
    - (c) Section 86.
  - (2) Attribution of company income or gains on an arising basis is dealt with by two codes namely:
    - (a) TOAA Code transferor charge.
    - (b) Section 3.
  - (3) Taxation on a benefits basis is dealt with by three codes, namely:
    - (a) TOAA benefits charge.
    - (b) Settlement code benefits charge (ITTOIA 2005 ss 643A – 643M).
    - (c) The CGT capital payments code.
  - (4) Purpose defences are represented by:
    - (a) TOAA defence (ITA 2007 ss 736 – 42).
    - (b) CGT defence (TCGA 1992 s 3A).
  - (5) The OIG Rules cross-apply both the TOAA code and the CGT capital payments code and further provisions are then needed to sort out the conflict between them.
- 5.2. The principal substantive respect in which the legislation is defective is that almost all the legislation dates back to a time when resident UK domiciliaries used artificial offshore structures to shelter income and gains from tax while remaining UK resident and yet retaining the ability to access the funds. Tax avoidance was thus the objective at the outset and sometimes secrecy meant this shaded into evasion. Such structures and behaviours were the target of the legislation.
- 5.3. Now by contrast most affected structures are set up by individuals with no or limited fiscal connection with the UK. The latter included resident non-domiciliaries, many of whose trusts are being brought fully within scope on 6 April 2025. Often the primary purpose behind these structures do not include UK tax considerations and, even if they do, such considerations frequently do not cross the line into tax avoidance. To attack these structures with legislation designed to counter aggressive tax avoidance of a different era will increasingly prove a deterrent to foreigners coming to or remaining in the UK.
- 5.4. At a more specific level the TOAA code is particularly unsatisfactory. It dates back to 1936, a very different world when Neville Chamberlain was Chancellor, air travel was in its infancy and modern communications non-existent. It was a world in which discretionary trusts were virtually unknown and the primary role in offshore sheltering was performed by companies.
- 5.5. Even when allowance is made for its antiquity, the language of the TOAA code is in many respects obscure, obscurity if anything enhanced by the 2007 rewrite. Its focus is on an event, namely the relevant transfer rather than a state of affairs. It has generated a significant volume of case law, some of it going to the House of Lords or the Supreme Court. Around half the cases that have reached that body have resulted in defeat for HMRC. Legislation that is so difficult for HMRC itself to correctly construe may of its nature be regarded as inherently unsatisfactory.

- 5.6. One of the reasons why the TOAA code is so difficult to construe is that if read literally its consequences can be draconian. An example is the capital sum charge on the transferor (ITA 2007 s 727). Read literally a miniscule loan or capital distribution to the settlor can result in all the income of the person abroad being taxable on him indefinitely even if the sum is paid when he is non-resident and even if he is excluded from any possibility of benefit or (in the case of a distribution) is excluded subsequently. Everybody can agree that such a draconian result cannot be right. But on the legislation as it stands it is impossible to know what the right meaning should be.
- 5.7. A particular problem with the TOAA code is its purpose (motive) defence. In one sense this is highly restrictive as any tax avoidance purpose (no matter how incidental) can prevent the broader defence applying and all taxes are considered, even those as far removed as betting duty. In another sense the defence is very wide as the Courts have given 'avoidance' a narrow meaning, distinguished from mitigation.
- 5.8. The result is long running enquiries and investigations, resulting in significant wasteful allocation of HMRC and taxpayer resources. At the extreme end of the consequences are that those who may be considering investing in or coming to the UK may be deterred by anecdotal evidence of endless stressful investigations suffered by others. Provisions in a tax system that have this result cannot be fit for purpose, particularly as investigations can be initiated many years after the events in question.

## 6. What should be done

- 6.1. It may be suggested that today's world requires a composite regime dealing with the tax consequences of non UK companies and trusts (or corresponding foreign equivalents). In this era of global mobility and footloose capital the regime needs to be not anti-avoidance but instead a balanced approach to ensure the taxation of the relevant fact patterns is proportionate and effective but not penal. Indeed in this day and age even the word 'offshore' is anachronistic given that many of the affected trusts and companies are not based in low tax jurisdictions at all. Trusts formed by US citizens as part of their US estate planning are the most obvious example. In the light of this, CIOT considers the correct word to use is 'international' rather than 'offshore'.
- 6.2. In light of this, it is suggested the correct approach to the taxation of income and gains of non-UK structures is to have a single code with the following elements:
- (1) What is taxed has common definitions across the board, namely income or gains that would be taxable on the assumption that the non-resident recipient were UK resident.
  - (2) A single set of rules determining when such income and gains are taxed as they arise, one subset applicable to trusts and the other to companies.
  - (3) A single set of rules taxing the income and gains of trusts on a benefits basis insofar as they fall outside the arising basis.
  - (4) OIGs treated as income.
  - (5) Recognition that a motive or purpose defence is not appropriate for trusts provided disproportionate features of the present rules are removed. But such a defence is appropriate for companies given the genuine commercial purpose for which most companies exist.
  - (6) An optional advance clearance procedure for which those taxpayers who opt for it pay the reasonable time costs of HMRC.
  - (7) Common definitions wherever possible.
- 6.3. Implicit in the proposal is that overseas entities can be characterised as either nominee ships, trusts or companies. In general, it is considered case law determines how this should be done. One point which emerges from the case law is that it cannot be said that all overseas entities with the same name must have a single UK equivalent. In each case, it will depend on the attributes of the entity in question. But a review of whether

there should be statutory guidelines or criteria for categorising overseas entities could form part of a wider project.

- 6.4. The attached draft clauses and three schedules illustrate a structure by which the above objectives could be achieved. It should be stressed that the draft clauses/schedules are intended to illustrate in very general terms how a new regime for taxing income and gains of non-UK structures could work in a way which is coherent, consistent as between income and gains and which is significantly simpler and more certain than the multiplicity of existing overlapping (and sometime conflicting) regimes.
- 6.5. CIOT recognises that there will be many inconsistencies and points of detail and definitions which will need to be ironed out. Policy decisions will need to be made as to the precise circumstances in which tax liabilities should arise both on the arising basis and on the recipients of benefits. The attached draft has deliberately not tried to deal with every aspect of the new regime but only enough to demonstrate its feasibility.
- 6.6. If the proposals outlined above are taken forward the result would be all the existing legislation referred to in paras 1 and 9 above could be repealed. Some provisions of the UK settlement code would however be needed to deal with income of minor children deriving from the parent and resident interest in possession settlements.

## **7. Next steps**

- 7.1. Should there be interest in taking the proposal forward, CIOT would be very happy to discuss any policy issues or points of detail. In the light of this proposal CIOT's response to the specific points raised in the Call for Evidence is:
  - (1) The only realistic way of simplifying the existing legislation is to recast it as a coherent whole
  - (2) Recasting the legislation in this way is the only practical means of removing the many inconsistencies and misalignments in the existing legislation
  - (3) The motive or purpose defence should be ended at trust level provided the unreasonable or inconsistent applications of the present rules are removed
  - (4) The legislation should not be referred to as 'offshore' and the rules should not be referred to as 'anti-avoidance' and the best means of approaching the topic is to recast the legislation
  - (5) Personal portfolio bonds and possibly some IHT definitions could be looked as part of a general review of other existing anti-avoidance legislation.

## **8. Acknowledgement of submission**

- 8.1. We would be grateful if you could acknowledge safe receipt of this submission and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

19 February 2025

**Draft code: dealing with international trusts and  
privately owned international companies**

**Trust income and gains**

- 1(1) Subject to sub section (6) this section applies to a settlement for a tax year (“the relevant tax year”) if there is no time in that year when the trustees are resident in the United Kingdom.
- (2) There shall be computed for the relevant tax year:
  - (a) The sum which would be the total income of the trustees of the settlement for the purposes of step 1 of ITA 2007 s 23 if they were UK resident in the relevant tax year (“the s 23 amount”).
  - (b) The amount upon which the trustees of the settlement would be chargeable to capital gains tax under TCGA 1992 s 1(3) if they were UK resident in the relevant tax year (“the s 1(3) amount”).
- (3) Where the conditions in section 2 are satisfied in the relevant tax year:
  - (a) The income comprised in the s 23 amount shall be treated for all tax purposes as arising to the settlor in the relevant tax year.
  - (b) Each chargeable gain and allowable loss which constitutes the s 1(3) amount shall be treated for all tax purposes as accruing to the settlor in the relevant tax year.
- (4) Section 3 shall apply to the s 23 amount and the s 3 amount of any tax year if and insofar as the conditions in section 2 are not satisfied.
- (5) In computing the s 23 amount and the s 1(3) amount the assumptions specified in schedule A shall be made.
- (6) Where the trustees are resident in the UK for part only of the relevant tax year sub section(2)(a) shall apply on the basis the relevant tax year comprised only the part of the tax year during which the trustees are not UK resident.
- (7) Where the conditions in section 3 are satisfied during part only of the relevant tax year sections 2 and 3 shall apply as if the part of the tax year during which those conditions are satisfied is one relevant tax year and the remainder of the tax year a separate relevant tax year.

**Trust income and gains attributed to the settlor**

- 2(1) The conditions referred to in section 1(3) are:
  - (a) The beneficiaries of the settlement comprise or include either or both of:
    - (i) The settlor;
    - (ii) Any person who is his spouse at any time during the relevant tax year; and
  - (b) The settlor is UK resident in the relevant tax year.
- (2) For the purposes of sub section(1) a person is a beneficiary of the settlement if:
  - (a) He is an actual or potential beneficiary of the settlement; or
  - (b) He could become such a beneficiary of the settlement in exercise of one or more powers conferred on the trustees or on any other person (whether any such power is personal or fiduciary); or

- (c) The trustees of the settlement have power to appoint or transfer all or any part of the trust fund to a settlement in relation to which any of the conditions in paragraph (a) (b) or (c) of this sub section are or could be met; or
  - (d) He has lent money or any other asset to the settlement otherwise than on arms' length terms and the loan is still outstanding.
- (3) Sub section(2)(b) shall not apply to a person if when the settlement was made and at all times thereafter neither the trustees nor any relevant power holder of the settlement in question has had any intention that that person should ever be or become a beneficiary of the settlement or of any other settlement to which all or any part of the trust fund might directly or indirectly be appointed or transferred.
  - (4) For the purposes of this section the term "spouse" shall:
    - (a) Include civil partner.
    - (b) Exclude any person to whom the settlor is not married but might become so in the future.
    - (c) Exclude any person to whom the settlor has been married but is no longer married.
  - (5) In applying sub section(2)(b) and sub section(6) the fact that a beneficiary might assign any interest he has under the settlement shall be ignored.
  - (6) For the purposes of this section an individual shall be treated as a beneficiary of a settlement if any part of the property or income which is or may be become comprised in the settlement is or will or may become payable to a living minor child of the individual at a time when that child is a minor.
  - (7) In a case where an individual who is not otherwise a beneficiary of a settlement is so treated by virtue of sub section(2)(d) s 1(3) shall only apply to such part of the s 23 amount and the s 1(3) amount as on a just and reasonable basis is attributable to the money or other asset he has lent.
  - (8) Where the condition in one or more of (2)(a), (b) or (c) is satisfied in respect only of a sub fund or share in the settlement s 1(3) shall apply only to such part of the s 23 amount and the s 1(3) amount as on a just and reasonable basis is attributable to that sub fund or share.

### **Trust income and gains matched with capital payments**

- 3(1) This section applies in any tax year ("the tax year of receipt") in which an individual who is resident in the UK ("the relevant recipient") receives a capital payment from the trustees of the settlement ("the capital payment").
- (2) The capital payment shall be matched with the available s 23 amount and the available s 1(3) amount of the tax year of receipt and each prior tax year on a last in first out basis so that:
  - (a) The available s 23 amount and s 1(3) amount of a later tax year shall be matched before those amounts of any earlier tax year;
  - (b) The available s 23 amount of any particular tax year shall be matched before the s 1(3) amount of that tax year;
  - (c) the available s 1(3) amount of any particular tax year shall be matched before the available s 23 amount of prior tax year; and
  - (d) Insofar as all or part of the available s 23 amount or the available s 1(3) amount of a particular tax year is not matched it shall remain available for matching against future capital payments.

- (3) The part of the capital payment matched with s 23 amounts or (where the whole capital payment is matched with s 23 amounts) the entire capital payment shall be treated as income arising to the relevant recipient.
- (4) The part of the capital payment matched with s 1(3) amounts or (where the whole capital payment is matched with s 1(3) amounts) the entire capital payment shall be treated as chargeable gains accruing to the relevant recipient.
- (5) Where more than one capital payment to which this section applies is or is treated as applying is made in a tax year all shall be treated as made at the same time on the last day of the tax year and the actual capital payments comprised in any such aggregate capital payment shall be matched pro rata insofar as they exceed an available s 23 amount or s 1(3) amount.
- (6) A s 23 amount or a s 1(3) amount is not available for matching:
  - (a) If and to the extent it has previously been matched to a capital payment received or treated as received by the relevant recipient or any other UK resident recipient; or
  - (b) The relevant recipient was non UK resident in the tax year that is the relevant tax year for the purposes of s 1(1) in relation to that s 23 or s 1(3) amount.
  - (c) If and insofar as the conditions in s 2 are met in the tax year that is the relevant tax year in relation to the s 23 or s 1(3) amount.
- (7) If and insofar as a capital payment is not matched to available s 23 or s 1(3) amounts in the year of receipt it shall be carried forward and treated as received in any future tax year in which:
  - (a) There is a s 23 and/or a s 1(3) amount for the settlement; and
  - (b) The relevant beneficiary is UK resident.
- (8) In such a tax year the brought forward capital payment shall be matched after any capital payments received in that tax year or in the intervening period since the tax year of actual receipt (capital payments accordingly being matched on a last in first out basis)
- (9) For the purposes of this section Part 1 of Schedule B shall apply in addition to Schedule A in computing the s 23 and s 1(3) amounts and Part 2 of that Schedule shall apply in relation to certain loans.
- (10) This section shall apply to a capital payment received by a recipient who is a temporary non-resident as if the year of return were the tax year of receipt.

### **Company income and gains**

- 4(1) Sections 5 and 8 apply to a company ("the relevant company") for a financial year ("the relevant financial year") if:
  - (a) There is no time in that year when the company is resident in the United Kingdom;
  - (b) The company is controlled by 5 or fewer persons;
  - (c) Section 6 does not prevent section 5 from applying.
- (2) ITA 2007 s 995 shall apply in determining the meaning of control but in applying that section a person shall be treated as holding any shares or possessing any powers held or possessed by a person with whom he is connected.
- (3) ITA 2007 s 993 shall apply in determining whether a person is connected with another person with the omission of sub section(4) and (7).

### **Apportionment of company income and gains**

- 5(1) There shall be computed for the relevant financial year:
  - (a) The profits on which corporation tax would be charged for the relevant financial year were the relevant company UK resident (“the CT profits”);
  - (b) Such part of those profits as is chargeable gains (“the CGT amount”); and
  - (c) Such part of those profits as is not chargeable gains (“the IT amount”).
- (2) The CT profits the CGT amount and the IT amount shall each be apportioned to persons who hold shares or possess voting powers in the relevant company any such person being referred to as a relevant person.
- (3) The amount apportioned to any person shall correspond on a just and reasonable basis to the proportion of shares he holds or voting power he possesses (shares and powers held by connected persons being disregarded for this purpose).
- (4) Where the relevant person is a UK individual or the trustees of a UK resident settlement:
  - (a) The apportioned CGT amount shall be treated as chargeable gains accruing to him.
  - (b) The IT amount shall be treated as income arising to him.
- (5) Where the relevant person is a UK resident company the apportioned CT profits shall be included in the company’s total profits chargeable to corporation tax.
- (6) Where the relevant person is a non UK resident company the apportioned IT amount shall be included in that company’s IT amount and the apportioned CGT amount shall be included in its CGT amount.
- (7) Where the relevant person is the trustees of a non UK resident settlement, the apportioned CGT amount shall be included in the s 1(3) amount of the settlement and the apportioned IT amount shall be included in the s 23 amount of the settlement.
- (8) Sub section(4) – (7) shall not apply where the CT amount apportioned to the relevant person is less than [10%] of the total CT profits for the relevant financial period.
- (9) Schedule C shall apply in computing the CT profits the CGT amount and the IT amount.

### **Purpose defence**

- 6(1) Section 5 shall not apply unless the CT profits are connected to tax avoidance.
- (2) Where some only of the CT profits are connected to tax avoidance section 5 shall not apply to such part of the CT profits as are not so connected.
- (3) CT profits are connected to tax avoidance if any of the matters specified in sub section(4) formed part of a scheme or arrangements one of whose main purposes is or was the avoidance of corporation tax, income tax, or capital gains tax.
- (4) The matters referred to in sub section(3) are:
  - (a) The acquisition or incorporation of the relevant company.
  - (b) In the case of the CGT amount the acquisition or disposal of the asset giving rise to the gain.
  - (c) In the case of the IT amount the activities giving rise to that amount.
- (5) The following shall be deemed not to be connected to tax avoidance:
  - (a) CT profits resulting from trading activities carried on on a commercial basis with a view to the generation of profits and dividends and interest directly or indirectly derived therefrom.
  - (b) Gains realised on the disposal of assets held or used for the purposes of such trading activities.

## **Dividends**

- 7(1) Where the relevant company pays a dividend:
  - (a) Tax paid by the relevant person under s 5 shall be a credit against any tax payable on the dividend:
    - (i) If the relevant person is UK resident; and
    - (ii) To the extent the dividend is paid out of the profits apportioned to the relevant person under s 5.
  - (b) The dividend shall not be included in any CT profits or s 23 amount of the relevant person:
    - (i) If relevant person is non UK resident; and
    - (ii) To the extent the dividend is paid out of CT profits.
- (2) For the purposes of sub section(1) dividends paid out of specified profits shall be identified with those profits and otherwise dividends shall be identified on a last in first out basis.
- (3) The amount of CT profits apportioned to a relevant person shall be a deduction in computing any chargeable gain on the disposal by the relevant person of his shares or voting rights in the relevant company.
- (4) Sub section(3) shall not apply insofar as either:
  - (a) The tax paid under s 5 on the CT profits has been a credit under sub section(1)(a); or
  - (b) A dividend within sub section(1)(b) has been paid out of the CT profits.
- (5) For these purposes “dividend” includes other distributions by the relevant company.

## **Capital payments received by companies**

- 8(1) A capital payment received or made by the relevant company in the relevant financial year shall be apportioned to the persons to whom any CT profits of that financial year would be apportioned under section 5 the apportionment being on the same basis as under section 5.
- (2) Such capital payments received by the relevant company as are apportioned to UK resident individuals shall be treated as capital payments received by those individuals.
- (3) Such capital payments made by the relevant company as are apportioned to a settlement to which section 1(1) applies shall be treated as capital payments made by the settlement.
- (4) Any amount apportioned to a company to which section 5 applies shall be treated as a capital payment received or made by that company and this section shall apply again.
- (5) Section 5(8) shall apply for the purposes of this section, but not section 6.

## **Sections to be drafted should inter alia cover:**

- (1) Definition of capital payment (based on TCGA 1992 s 97)
- (2) Definition of settlor (based on ITA 2007 s 467)
- (3) Definition of borrowing

- (4) Trust to trust transfers (based on TCGA 1992 s 90)
- (5) Onward gifts and close family members
- (6) Carve out where CFC rules apply or would apply but for an exemption
- (7) Beneficial interests
- (8) Transitional rules
- (9) Impact of split years
- (10) Interaction with QNR rules
- (11) Valuation of capital payments (based on TCGA 1992 ss 97A – 97C but modified)
- (12) Right of reimbursement
- (13) Loan creditors of companies, particularly where the loan is quasi equity
- (14) Clearance procedure for s 6 based on TCGA 1992 s 138 but with provision for HMRC to charge on a reasonable basis for time spent dealing with the application

## Schedule A

### Part I General rules

1. It shall be assumed the trustees have made any claims or elections (including claims for loss relief) that satisfy the following conditions:
  - (a) The trustees would have been entitled to make the claim or election if UK resident; and
  - (b) Prudent trustees acting reasonably in the interests of the beneficiaries of the settlement would have made the claim or election within the time allowed.
2. Paragraph 1 shall not prevent an actual claim or election made by the trustees from having effect.
3. The s 23 and s 1(3) amounts shall be those amounts computed by accounting period or periods of the settlement where:
  - (a) The accounting period or periods ends in or is coincident with the relevant tax year; and
  - (b) It does not exceed 12 months.
4. Paragraph 5 applies if:
  - (a) The trustees realise a chargeable gain or an offshore income gain on the disposal of an asset ("the material disposal").
  - (b) On a date before the material disposal :
    - (i) The trustees transferred all [or at least 10%] of the trust fund to the trustees of another settlement in circumstances to which [s 90 TCGA] applied ("the material transfer"); and
    - (ii) The trustees borrowed an amount or amounts equal in or in excess of [10%] of the value of the Trust Fund ("the material borrowing").
  - (c) The material disposal, the material transfer and the material borrowing comprised or formed part of a scheme or arrangements ("the scheme").
  - (d) The purpose or one of the main purposes of the scheme was the avoidance of income tax or capital gains tax otherwise payable under section 2 or section 3.
5. Where this paragraph applies section 2 [and s 90 TCGA] shall apply as if the gain realised on the material disposal were comprised in the s 1(3) amount or in the case offshore income gains the s 23 amount of the tax year in which the material transfer occurred and not in that amount of the tax year in which the material disposal takes place.

### Part II Income tax rules

6. The s 23 amount for the relevant tax year shall exclude any income of the settlement:

- (a) On which the trustees are chargeable to income tax; and
- (b) Which is not disregarded income within the meaning of ITA 2007 s 813.

Part III CGT rules

- 7. It shall be assumed the settlement has no annual exempt amount.
- 8. The s 1(3) amount for the relevant tax year shall exclude any chargeable gains accruing to the trustees on which the trustees are chargeable to CGT under TCGA 1992 s 1A(3).

## Schedule B

### Part I computational

1. For the purposes of s 3 the s 23 amount for any tax year shall exclude expenses of the trustees whether charged to income under the express terms of the settlement or otherwise properly chargeable to income.
2. For the purposes of s 3, the s 23 amount for any tax year shall exclude any income of the settlement that before being distributed is the income of any person other than the trustees.
3. There shall also be excluded income which is not within paragraph 2 but is distributed as income in or before the relevant tax year or before 31 January in the next following tax year.
4. In computing s 23 and s 1(3) amounts for the purposes of s 3 no reduction shall be made for any foreign tax paid by the trustees but an amount equal to any such foreign tax shall:
  - (1) Where the conditions in section 2 are met be deducted from the tax payable by the settlor.
  - (2) In other cases shall be deducted from the tax payable by the recipient beneficiary in respect of any relevant capital payment insofar as the same is matched with the income or gains in respect of which the foreign tax was paid.
5. For the purposes of the previous paragraph the income and gains of a tax year or accounting period shall be identified on a last in first out basis, and income for a period shall be treated as arising immediately before the end of the period.

### Part II loans

6. Paragraph 7 shall apply where:
  - (1) The settlement makes a loan to an individual within section 2(1) or to a child at a time when that child is a minor child of the individual;
  - (2) The conditions in section 2 are not satisfied in relation to the settlement or any part thereof in the tax year in which the loan is made or cease to be satisfied in a subsequent tax year (the material tax year); and
  - (3) Where those conditions are not satisfied in relation only to a sub fund or share in the settlement the loan is made or directly or indirectly funded out of that part
7. Where this paragraph applies:

- (i) Section 3 shall apply as if the amount lent were a capital payment received by the individual in receipt of the loan; and
  - (ii) Section 3(6) shall apply as if the s 23 and s 1 (3) amounts available for matching also excluded amounts for which the relevant tax year is a tax before the tax year in which the loan was made or a tax after that in which the loan is repaid.
8. On repayment of the loan the loan or (in the case of partial repayment) the amount repaid shall not be available for matching in any tax year after the tax year of repayment.
  9. Where a loan is partially repaid this section shall apply as if the part repaid had been matched to s 23 and s 1(3) amounts before the part not repaid.
  10. Paragraph 11 shall apply where in a tax year (“the interest year”) interest is paid on the loan.
  11. Where this sub section applies tax payable under this section in respect of the interest year shall be reduced by tax paid charged on the interest.
  12. [Section 97A TCGA] shall not apply to any loan to which para 6 applies.

## Schedule C

1. It shall be assumed the company has made any claims or elections (including claims for loss relief) that satisfy the following conditions:
  - (a) The company would have been entitled to make the claim or election if UK resident; and
  - (b) Prudent directors acting reasonably in the interests of the company would have made the claim or election within the time allowed.
2. Paragraph 1 shall not prevent any actual claim or election made by the company from having effect.
3. In computing the CT profits and the CGT amount no reduction shall be made for any foreign tax paid by the company but an apportioned amount of any such foreign tax shall be treated as paid by any person to whom the CT profits are apportioned.
4. The CT profits shall exclude profits distributed as income in the relevant financial year or before 31 January in the following financial year.
5. The CT for the relevant financial year shall exclude profits:
  - (a) On which the company is chargeable to corporation tax; and
  - (b) Which are not disregarded income within the meaning of ITA 2007 s 813.
6. The CT profits and the CGT amount for the relevant financial year shall exclude any chargeable gains accruing to the company on which the company is chargeable to CGT under TCGA 1992 s 1A(3).
7. Corporation tax provisions relating to groups shall apply on the basis that no UK resident company is a member of the group (other than for the purposes of determining which other non UK resident companies are members of the same group as the relevant company).