

TAXATION (INTERNATIONAL AND OTHER PROVISIONS) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Schedule 6: UK representatives of non-UK residents

Part 1: New Chapters 2B and 2C of Part 14 of ITA 2007

Chapter 2B: UK representative of non-UK resident

Overview

1190. This new Chapter of Part 14 of ITA determines the extent to which and the period for which a branch or agency in the United Kingdom through which a non-UK resident carries on a trade, profession or vocation is the UK representative of the non-UK resident in relation to the non-UK resident's income from the trade, profession or vocation.
1191. The Chapter does not apply if the non-UK resident is a company, except to the extent that the income accrues to the non-UK resident company in the capacity of trustee.

Section 835C: Overview of Chapter

1192. This section introduces the Chapter and provides a signpost to Chapter 2C. It is new.

Section 835D: Income tax chargeable on company's income: application

1193. This section provides that the Chapter does not apply to income tax chargeable on a company otherwise than as a trustee. It is based on section 126(10) of FA 1995.
1194. If a non-UK resident company trades in the United Kingdom through a permanent establishment here, it is chargeable to corporation tax on its "chargeable profits". Section 19 of CTA 2009 defines "chargeable profits" as the trading income arising directly or indirectly through or from the permanent establishment and the other income and chargeable gains referred to in section 19(3) attributable to the permanent establishment in accordance with sections 20 to 32 of that Act.
1195. Section 148 of, and Schedule 26 to, FA 2003, which determine what constitutes a permanent establishment of a company, are rewritten in Chapter 2 of Part 24 of CTA 2010. Section 150 of FA 2003, which imposes obligations and liabilities on a permanent establishment in the United Kingdom as the UK representative of the non-UK resident company in relation to the chargeable profits attributable to the permanent establishment, is rewritten in Chapter 6 of Part 22 of CTA 2010.
1196. If a non-UK resident company is chargeable to tax in respect of any other income from a United Kingdom source, it is charged to income tax and its liability is limited in accordance with Chapter 1 of Part 14 of ITA. The extent to which the non-UK resident

company is chargeable to tax in respect of such income may be limited by the terms of any applicable DTA. But in any event the non-UK resident company will not have a UK representative in relation to any of that income to which it is beneficially entitled.

Section 835E: Branch or agency treated as UK representative

1197. This section provides that a branch or agency in the United Kingdom through which a non-UK resident carries on a trade, profession or vocation is the non-UK resident's UK representative in relation to the amount of any income of the non-UK resident from the trade, profession or vocation arising through or from the branch or agency. It is based on section 126(2), (3), (4) and (5) of FA 1995.
1198. *Subsection (2)* sets out the amounts of income of a non-UK resident in relation to which a branch or agent in the United Kingdom through which the non-UK resident carries on a trade, profession or vocation is the UK representative of the non-UK resident.
1199. If a branch or agency in the United Kingdom of a non-UK resident ceases to be the non-UK resident's branch or agency, the branch or agency nevertheless continues thereafter to be the UK representative of the non-UK resident in relation to the amounts of income of the non-UK resident mentioned in subsection (2). See *Rule 2* in *subsection (3)*.
1200. *Subsection (5)* introduces sections 835G to 835K which provide exceptions to the general rule in subsection (2) that a branch or agency in the United Kingdom through which a non-UK resident carries on a trade, profession or vocation is the UK representative of the non-UK resident in relation to the amounts of income mentioned in subsection (2).

Section 835F: Trade or profession carried on in partnership

1201. This section contains special rules to deal with the case where the non-UK resident carries on a trade or profession in partnership. It is based on section 126(6), (7) and (7A) of FA 1995.
1202. *Subsections (1)* and *(2)* provide that, if a partnership carries on a trade or profession in the United Kingdom through a branch or agency, the branch or agency is treated as the UK representative of any non-UK resident partner in relation to that partner's share of the United Kingdom profits.
1203. *Subsections (3)* and *(4)* provide that section 835E also applies if a partnership which includes both UK resident and non-UK resident members carries on a trade or profession in the United Kingdom, whether it does so itself or through a branch or agency.
1204. In this case, the partnership itself is treated as the UK representative of the non-UK resident partner in relation to that partner's share of the United Kingdom profits, notwithstanding that there may also be a branch or agency which is the non-UK resident partner's UK representative in respect of those profits. All the partners are as a consequence jointly liable for tax on the non-UK resident partner's share of the United Kingdom profits.

Section 835G: Agents

1205. This section provides that an agent in the United Kingdom who, when carrying out a transaction on behalf of a non-UK resident, does not act in the course of a regular agency for the non-UK resident is not the UK representative of the non-UK resident in respect of income of the non-UK resident arising from or as a result of the transaction. It is based on section 127(1) and (15) of FA 1995.

Section 835H: Brokers

1206. This section sets out the circumstances in which and the extent to which a broker in the United Kingdom through whom a non-UK resident carries on business is not the UK representative of the non-UK resident in respect of income of the non-UK resident arising from or as a result of transactions carried out through the broker. It is based on section 127(1), (2) and (15) of FA 1995.
1207. *Subsection (2)(b)* provides that the only circumstances in which the broker will not be a UK representative in respect of the income arising from or as a result of such a transaction is if the independent broker conditions in section 835L are met in relation to the transaction. See the commentary on section 835L.

Section 835I: Investment managers

1208. This section sets out the circumstances in which and the extent to which an investment manager in the United Kingdom through whom a non-UK resident carries on business is not the UK representative of the non-UK resident in respect of income of the non-UK resident arising from or as a result of transactions carried out through the investment manager. It is based on section 127(1), (3) and (15) of FA 1995.
1209. *Subsection (2)* provides that the only circumstances in which the investment manager will not be a UK representative in respect of the income arising from or as a result of such a transaction is if the transaction is an investment transaction and the independent investment manager conditions in section 835M are met in relation to the transaction. See the commentary on section 835M.
1210. “Investment manager” and “investment transaction” are defined in section 835S.

Section 835J: Persons acting under alternative finance arrangements

1211. This section provides that, if a non-UK resident is party to certain alternative finance arrangements, neither the counter-party to the arrangements nor any other person acting for the non-UK resident in relation to the arrangements is the UK representative in respect of amounts within section 835E(2) which consist of the non-UK resident’s alternative finance return. It is based on section 127(1) of FA 1995.

Section 835K: Lloyd’s agents

1212. This section provides that a person in the United Kingdom who has acted as the members’ agent of a non-UK resident member of Lloyd’s or as the managing agent of the syndicate of which the non-UK resident was a member is not a UK representative of the non-UK resident in relation to income of the non-UK resident from the non-UK resident’s underwriting business at Lloyd’s. It is based on section 127(1) and (16) of FA 1995.
1213. The reference in section 127(16)(a) of FA 1995 to a corporate member of Lloyd’s within the meaning of Chapter 5 of Part 4 of FA 1994 has been omitted. Corporate members of Lloyd’s are chargeable to corporation tax. Following the amendment of section 126 of FA 1995 by FA 2003 so that it ceased to apply for corporation tax purposes, the reference is unnecessary. Similarly the provision in section 127(16)(b) of FA 1995 construing members’ agent and managing agent (in relation to corporate members of Lloyd’s) in accordance with section 230 of FA 1994 has been omitted.

Section 835L: The independent broker conditions

1214. This section sets out the conditions to be met if, in accordance with section 835H, a broker in the United Kingdom is not to be the UK representative of a non-UK resident in relation to a transaction carried out on behalf of the non-UK resident by the broker. It is based on section 127(2) of FA 1995.

Section 835M: The independent investment manager conditions

1215. This section sets out the conditions to be met if, in accordance with section 835I, an investment manager in the United Kingdom is not to be the UK representative of a non-UK resident in relation to an investment transaction carried out on behalf of the non-UK resident by the investment manager. It is based on section 127(3) and (18) of FA 1995.

Section 835N: Investment managers: the 20% rule

1216. This section sets out the “20% rule” for investment managers. It is based on section 127(4) of FA 1995.
1217. The 20% rule has two requirements. The first requirement is that the investment manager and connected persons must intend that any interest that they may have in the non-UK resident’s “relevant disregarded income” will not exceed 20% of that income. The second requirement applies if that intention is not fulfilled. The 20% rule will continue to be met if the only reason why it is not fulfilled is because of matters outside the control of the investment manager or connected persons despite their having taken reasonable steps to mitigate the effect of those matters.
1218. In *subsection (2)* the term “relevant disregarded income” has been substituted for the term “relevant excluded income” which appears in section 127(4) of FA 1995. The same substitution was made in section 819(2) of ITA which is also based on section 127(4) of FA 1995.

Section 835O: Meaning of “qualifying period”, “relevant disregarded income” and “beneficial entitlement”

1219. This section defines three terms used in section 835N (and also in sections 835P and 835Q, which modify the effect of section 835N in certain cases). It is based on section 127(5), (6) and (7) of FA 1995.
1220. *Subsection (3)* adopts the term “relevant disregarded income” in preference to the term “relevant excluded income” in section 127(5) of FA 1995. Section 821 of ITA, which is also based on section 127(5) of FA 1995, similarly adopts the term “relevant disregarded income”.
1221. In *subsection (3)*, a reference to “the total of the non-UK resident’s income” has been substituted for the reference in section 127(5) of FA 1995 to “the aggregate of such of the profits and gains of the non-resident”. As section 127(5)(b) of FA 1995 requires that this aggregate falls to be treated (apart from the 20% rule) as excluded income, the reference to “such of the profits and gains” is limited by the source legislation to so much of the profits and gains as is income.
1222. In *subsection (3)(b)* the words:
“in relation to which the independent investment manager conditions are met, ignoring the requirements of the 20% rule
are the same as appear in section 821(4)(b) of ITA. They have the same effect as the words cross-referring to Chapter 1 of Part 14 of ITA which were substituted in section 127(5)(b) of FA 1995 by ITA.

Section 835P: Treatment of transactions where 20% rule not met

1223. This section provides that, if the 20% rule is not met but all the other independent investment manager conditions are met, only the income in relation to which the 20% rule is not met is not relevant disregarded income. It is based on section 127(8) of FA 1995.

Section 835Q: Application of 20% rule to collective investment schemes

- 1224. This section modifies the 20% rule where the non-UK resident is a participant in a collective investment scheme. It is based on section 127(9) to (11) and (17) of FA 1995.
- 1225. This section applies at the level of the scheme itself, treating it as if it were a non-UK resident company, see *subsection (3)*.
- 1226. A minor drafting change has been made in subsection (3) by substituting reference to a non-UK resident company for the reference in section 127(10)(a) of FA 1995 to a company resident outside the United Kingdom. This has been done to clarify the assumption and in this context does not change the effect of the law. The same minor drafting change was made in section 824(3) of ITA.
- 1227. *Subsection (4)* applies to a scheme which, if it was assumed to be a non-UK resident company, would *not* be regarded as carrying on a trade in the United Kingdom. The 20% rule is treated as satisfied in relation to such a scheme.
- 1228. *Subsection (5)* applies to a scheme which, if it was assumed to be a non-UK resident company, would be regarded as carrying on a trade in the United Kingdom. The 20% rule applies to such a scheme with the modifications in *subsection (6)*.

Section 835R: Supplementary provision

- 1229. This section explains when a person is to be regarded as carrying out a transaction on behalf of another and makes provision for a person part only of whose business is as a broker or investment manager. It is based on section 127(14) and (15) of FA 1995.

Section 835S: Interpretation of Chapter

- 1230. This section defines terms used in the Chapter. It is based on sections 126(8) and 127(12) and (13) of FA 1995.
- 1231. “Investment manager” is defined by cross-reference to section 827 of ITA in which the definition of that term is itself based on section 127(12) of FA 1995.
- 1232. The transactions currently specified as “investment transactions” are set out in the Investment Manager (Specified Transactions) Regulations 2009 made under the powers in section 127(12) and (13) of FA 1995 and which came into force on 12 May 2009.
- 1233. The provision of section 127(17) of FA 1995 that section 993 of ITA (connected persons) applies for the purposes of section 127 of FA 1995 has not been rewritten. It is not required, as section 1021(1) of ITA applies section 993 for the purposes of ITA unless otherwise indicated.