

TAXATION (INTERNATIONAL AND OTHER PROVISIONS) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transfer pricing

Chapter 4: Position, if only one affected person potentially advantaged, of other affected person

Overview

356. This Chapter provides for claims to be made by the person whose profits have increased or losses decreased (the disadvantaged person) as a result of another person's profits decreasing (the advantaged person). The claim prevents double taxation and is only relevant where both the advantaged and disadvantaged persons are liable to UK taxation.
357. Suppose company A sells goods to connected company B for an amount less than an arm's length price would require. While this reduces A's profits it increases B's profits by the same amount. B may therefore make a claim to reduce its profits by the same amount by which A's are increased to avoid double taxation on the arm's length differential which would otherwise arise.

Section 174: Claim by the affected person who is not potentially advantaged

358. This section allows the affected person who is not potentially advantaged to make a claim to calculate profits in accordance with the arm's length provision imposed on the advantaged person. It is based on paragraphs 6(1) and (2) and 6A(1) of Schedule 28AA to ICTA and paragraph 5(1) of Schedule 2 to CTA 2009.
359. "For the purposes of this paragraph" in paragraph 6(2) of Schedule 28AA has not been rewritten on the grounds that it was unnecessary to do so since the person making the claim can be expected to identify the purpose for which the claim is made. This omission is consistent with the approach taken in paragraph 6C(2) of Schedule 28AA to ICTA.
360. Paragraph 6(2) of Schedule 28AA makes a claim subject to paragraph 8 of the Schedule. *Subsection (4)* of this section recognises that paragraph 8 is rewritten Parts 5 (loan relationships) and 7 (derivative contracts) of CTA 2009.
361. *Subsection (4)* provides that *subsection (2)* is subject to section 180 (which rewrites the trading stock rules in paragraph 6A of Schedule 28AA). Although paragraph 6A was not listed in the opening words of paragraph 6(2) of Schedule 28AA, the opening words of paragraph 6A achieve the same result as would have been achieved by such listing.

Section 175: Claims under section 174 where actual provision relates to a security

362. This section prevents a claim from being made under section 174 where the participatory condition is satisfied as a result of indirect participation of a kind within sections 161 and 162 and a guarantee has been issued in respect of a security. It is based on paragraphs 1A(7), (9) and (10) and 6(4A) and (4B) of Schedule 28AA to ICTA.

Section 176: Claims under section 174: advantaged person must have made return

363. As a result of this section a claim under section 174 may not be made by the disadvantaged person unless an arm's length calculation of the advantaged person's profits has been made and the claim is in accordance with that calculation. It is based on paragraph 6(3) and (4) of Schedule 28AA to ICTA.

Section 177: Time for making, or amending, claim under section 174

364. This section provides the time limit for making or amending claims under section 174. It is based on paragraph 6(5) and (6) of Schedule 28AA to ICTA.

Section 178: Meaning of "return" in sections 176 and 177

365. This section provides the interpretation of "return" in sections 176 and 177. It is based on paragraph 6(7) of Schedule 28AA of ICTA.

Section 179: Compensating payment if advantaged person is controlled foreign company

366. This section provides for a compensating adjustment to be made to the disadvantaged company where the advantaged company is a non-UK resident company whose profits have been apportioned to UK residents under the controlled foreign company (CFC) provisions in Chapter 4 of Part 17 of ICTA. It is based on paragraph 6B of Schedule 28AA to ICTA.

367. Because the CFC's profits on which the adjustment is made are not those of a person on whom a potential advantage in relation to United Kingdom taxation is conferred, the "advantaged person" does not fall within section 174(1). There is no advantage to the CFC in relation to United Kingdom taxation.

368. Special provision is therefore required to allow a claim under section 174. This is done by treating the CFC as if it fell within that section.

369. "Chargeable profits" in *subsection (1)(b)* is the term used by the controlled foreign company legislation for the CFC's taxable profits (section 747(6) of ICTA).

370. In *subsection (3)* the amended readings to sections 174 to 178 are necessary because the return of the chargeable profits of the CFC is not made by the "advantaged person" (the CFC) but by the company which controls that company and on whom the apportionment of chargeable profits will be made. Likewise the relevant notice will be given to the same company.

Section 180: Application of section 174(2)(a) in relation to transfers of trading stock etc

371. This section provides for a broad timing match between the adjustments arising on the advantaged and disadvantaged company where there is a transfer of stock between the two. It is based on paragraph 6A of Schedule 28AA to ICTA.

372. A mismatch in timing may arise with stock transfers because, while an increase to open market value of the stock transferred will immediately result in an increase to the transferor company's profits, the compensating adjustment will not arise in the case of the transferee company until that stock has been disposed of.

Section 181: Section 182 applies to claims where actual provision relates to a security

373. This and the following three sections relate to claims under section 174 where a security has been issued between companies. This section provides that the claim may be made in accordance with section 182. It is based on paragraphs 1A(9) and (10) and 6C(1) and (2) of Schedule 28AA to ICTA.

Section 182: Making of section 182 claims

374. This section provides the basic requirements for the claim. It is based on paragraph 6C(3) to (5) of Schedule 28AA to ICTA.
375. *Subsection (3)* allows the claim to be made before the calculation of profits has been made by the advantaged person. This allows tax to be deducted from the arm's length sum rather than the actual sum, thus enabling inward investors to obtain certainty on the consequences of loan financing.

Section 183: Giving effect to section 182 claims

376. This section gives rules applicable to a section 182 claim. It is based on paragraph 6C(6) to (9) of Schedule 28AA to ICTA.
377. *Subsection (1)* means that a section 182 claim is made outside the rules applied by Schedule 18 to FA 1998 to company tax returns and assessments as the claim relates to the deduction of tax.
378. Because the claim may be made before a section 176 calculation has been made, *subsection (3)* allows claims to be treated as if they were consistent with the eventual calculation.

Section 184: Amending a section 182 claim if it is followed by relevant notice

379. This section allows either the advantaged or disadvantaged person to amend a section 182 claim where a closure notice or similar has been served on the advantaged person, in the former case the amendment being treated as made on the disadvantaged person's behalf. It is based on paragraph 6C(10) to (12) of Schedule 28AA to ICTA.

Section 185: Notice to potential claimants

380. This section requires an officer of Revenue and Customs, on giving a closure etc notice, to inform a disadvantaged person who appears to be entitled to make or amend a claim for compensating relief or to be party to proceedings on an appeal relating to a transfer pricing adjustment. It is based on section 111(1), (2), (4) and (5) of FA 1998 and section 87(5) of FA 1999.

Section 186: Extending claim period if notice under section 185 not given or given late

381. This section allows the Commissioners for HMRC to extend the time limit for the making or amendment of claims for compensating relief if they consider any person has been prejudiced as the result of a notice under section 185 not being given or being given late. It is based on section 111(3) of FA 1998.

Section 187: Tax treatment if actual interest exceeds arm's length interest

382. This section requires a company not to deduct tax from interest so far as it exceeds interest payable under the arm's length rule. It is based on paragraph 6E of Schedule 28AA to ICTA.

*These notes refer to the Taxation (International and Other Provisions)
Act 2010 (c.8) which received Royal Assent on 18 March 2010*

383. Without this rule tax would be deductible from the whole of the interest notwithstanding that that interest was not allowed in the calculation.

Section 188: Double taxation relief by way of credit for foreign tax

384. This section requires a reduction in the amount of DTR given against United Kingdom tax, whether given unilaterally or by treaty, where a disadvantaged person's profits are reduced as a result of a claim under section 174. It is based on paragraphs 7(1), (2), (5) and (6) and 14(1) and (3) of Schedule 28AA to ICTA.
385. Without the reduction required by this paragraph a UK resident would obtain relief for foreign tax which would exceed the actual foreign tax payable on the reduced profits. The foreign tax is therefore restricted to what would have been payable if the adjusted profits were the actual profits.

Section 189: Double taxation relief by way of deduction for foreign tax

386. This section requires a restriction in foreign tax given as a deduction from United Kingdom profits under section 112 where a disadvantaged person's profits are reduced as a result of a claim under section 174. It is based on paragraph 7(3) to (5) of Schedule 28AA to ICTA.
387. Without the reduction required by this section a UK resident would obtain relief for foreign tax which would exceed the actual foreign tax payable on the reduced profits. The foreign tax is therefore restricted to what would have been payable if the adjusted profits were the actual profits.

Section 190: Meaning of "relevant notice"

388. This section gives the definition of "relevant notice" for the purposes of this Chapter. It is based on paragraphs 6(7) and 6C(10) of Schedule 28AA to ICTA and section 111(6) of FA 1998.