Taxation (International and Other Provisions) Act 2010

2010 CHAPTER 8

PART 4

TRANSFER PRICING

CHAPTER 2

KEY INTERPRETATIVE PROVISIONS

"Indirect participation" in management, control or capital of a person

158 Indirect participation: defined by sections 159 to 162

(1) This section is about how to read the references, in this Part and in some other provisions of this Act, to indirect participation.

(2) For the purposes of sections 148(2)(a) and (3)(a) and 175(2)(a), a person is indirectly participating in the management, control or capital of another person only if section 159, 160 or 161 so provides.

(3) For the purposes of sections 148(2)(b) and (3)(b) and 175(2)(b), a person is indirectly participating in the management, control or capital of another person only if section 159, 160 or 162 so provides.

(4) For the purposes of—

(a) sections 154(5) and 204(4),

(b) in Part 2, section 132(7), and

(c) in Part 5, section 219(2),

a person is indirectly participating in the management, control or capital of another person only if section 159 or 160 so provides.

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159 Indirect participation: potential direct participant

(1) Subsection (2) applies for the purposes of—
- (a) sections 148(2) and (3), 154(5), 175(2) and 204(4),
- (b) in Part 2, section 132(7), and
- (c) in Part 5, section 219(2).

(2) A person ("P") is indirectly participating in the management, control or capital of another person ("A") at a particular time if P would be directly participating in the management, control or capital of A at that time if the rights and powers attributed to P included all the rights and powers mentioned in subsection (3) that are not already attributed to P for the purpose of deciding under section 157 whether P is directly participating in the management, control or capital of A.

(3) The rights and powers referred to in subsection (2) are—
- (a) rights and powers which P is entitled to acquire at a future date,
- (b) rights and powers which P will, at a future date, become entitled to acquire,
- (c) rights and powers of persons other than P so far as they are rights or powers falling within subsection (4),
- (d) rights and powers of any person with whom P is connected (see section 163), and
- (e) rights and powers which would be attributed by subsection (2) to a person with whom P is connected were it being decided under that subsection whether that connected person is indirectly participating in the management, control or capital of A.

(4) Rights and powers fall within this subsection so far as they—
- (a) are required, or may be required, to be exercised in any one or more of the following ways—
  - (i) on behalf of P,
  - (ii) under the direction of P, or
  - (iii) for the benefit of P, and
- (b) are not confined, in a case where a loan has been made by one person to another, to rights and powers conferred in relation to property of the borrower by the terms of any security relating to the loan.

(5) In subsections (3)(c) to (e) and (4), the references to a person's rights and powers include references to any rights or powers which the person either—
- (a) is entitled to acquire at a future date, or
- (b) will, at a future date, become entitled to acquire.

(6) In paragraph (e) of subsection (3), the reference to rights and powers which would be attributed to a connected person includes a reference to rights and powers which, by applying that paragraph wherever one person is connected with another, would be so attributed to the connected person through a number of persons each of whom is connected with at least one of the others.

(7) References in this section—
- (a) to rights and powers of a person, or
- (b) to rights and powers which a person is or will become entitled to acquire,

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include references to rights or powers which are exercisable by that person, or (when acquired by that person) will be exercisable, only jointly with one or more other persons.

160 Indirect participation: one of several major participants

(1) Subsection (2) applies for the purposes of—
- (a) sections 148(2) and (3), 154(5), 175(2) and 204(4),
- (b) in Part 2, section 132(7), and
- (c) in Part 5, section 219(2).

(2) A person is indirectly participating in the management, control or capital of another person at a particular time if the first person is, at that time, one of a number of major participants in that other person's enterprise.

(3) For the purposes of this section, a person ("A") is a major participant in another person's enterprise at a particular time if at that time—
- (a) that other person ("the subordinate") is a body corporate or firm, and
- (b) the 40% test is met in the case of each of two persons—
  - (i) who, taken together, control the subordinate, and
  - (ii) of whom one is A.

(4) For the purposes of this section, the 40% test is met in the case of each of two persons wherever each of them has interests, rights and powers representing at least 40% of the holdings, rights and powers in respect of which the pair of them fall to be taken as controlling the subordinate.

(5) For the purposes of this section—
- (a) the question whether a person is controlled by any two or more persons taken together, and
- (b) any question whether the 40% test is met in the case of a person who is one of two persons,

is to be determined after attributing to each of the persons all the rights and powers which would be attributed by section 159(2) to a person were it being decided under section 159(2) whether that person is indirectly participating in the management, control or capital of another person.

(6) References in this section—
- (a) to rights and powers of a person, or
- (b) to rights and powers which a person is or will become entitled to acquire,

include references to rights or powers which are exercisable by that person, or (when acquired by that person) will be exercisable, only jointly with one or more other persons.

161 Indirect participation: sections 148 and 175: financing cases

(1) Subsection (2) applies for the purposes of sections 148(2)(a) and (3)(a) and 175(2)(a).

(2) A person ("P") is indirectly participating in the management, control or capital of another ("A") at the time of the making or imposition of the actual provision if—
- (a) the actual provision relates, to any extent, to financing arrangements for A,
- (b) A is a body corporate or firm,

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(c) P and other persons acted together in relation to the financing arrangements, and

(d) P would be taken to have control of A if, at any relevant time, there were attributed to P the rights and powers of each of the other persons mentioned in paragraph (c).

(3) It is immaterial for the purposes of subsection (2)(c) whether P and the other persons acting together in relation to the financing arrangements did so at the time of the making or imposition of the actual provision or at some earlier time.

(4) In subsection (2)(d) "relevant time" means—

(a) a time when P and the other persons were acting together in relation to the financing arrangements, or

(b) a time in the period of six months beginning with the day on which they ceased so to act.

(5) In determining for the purposes of subsection (2)(d) whether P would be taken to have control of another person ("A"), the rights and powers of any person (and not just P) are to be taken to include those that would be attributed to that person by section 159(2) were it being decided under section 159(2) whether that person is indirectly participating in the management, control or capital of A.

(6) In this section "financing arrangements" means arrangements made for providing or guaranteeing, or otherwise in connection with, any debt, capital or other form of finance.

162 Indirect participation: sections 148 and 175: further financing cases

(1) Subsection (2) applies for the purposes of sections 148(2)(b) and (3)(b) and 175(2)(b).

(2) A person ("Q") is indirectly participating in the management, control or capital of each of the affected persons at the time of the making or imposition of the actual provision if—

(a) the actual provision relates, to any extent, to financing arrangements for one of the affected persons ("B"),

(b) B is a body corporate or firm,

(c) Q and other persons acted together in relation to the financing arrangements, and

(d) Q would be taken to have control of both B and the other affected person if, at any relevant time, there were attributed to Q the rights and powers of each of the other persons mentioned in paragraph (c).

(3) It is immaterial for the purposes of subsection (2)(c) whether Q and the other persons acting together in relation to the financing arrangements did so at the time of the making or imposition of the actual provision or at some earlier time.

(4) In subsection (2)(d) "relevant time" means—

(a) a time when Q and the other persons were acting together in relation to the financing arrangements, or

(b) a time in the period of six months beginning with the day on which they ceased so to act.

(5) In determining for the purposes of subsection (2)(d) whether Q would be taken to have control of another person ("A"), the rights and powers of any person (and not

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just Q) are to be taken to include those that would be attributed to that person by section 159(2) were it being decided under section 159(2) whether that person is indirectly participating in the management, control or capital of A.

(6) In this section "financing arrangements" means arrangements made for providing or guaranteeing, or otherwise in connection with, any debt, capital or other form of finance.

163 Meaning of "connected" in section 159

(1) Subsections (2) and (3) apply for the purposes of section 159 and this section.

(2) Two persons are connected with each other if one of them is an individual and the other is—
  (a) the individual's spouse or civil partner,
  (b) a relative of the individual,
  (c) a relative of the individual's spouse or civil partner, or
  (d) the spouse, or civil partner, of a person within paragraph (b) or (c).

(3) Two persons are connected with each other if one of them is a trustee of a settlement and the other is—
  (a) a person who in relation to that settlement is a settlor, or
  (b) a person who is connected with a person within paragraph (a).

(4) In this section—

"relative" means brother, sister, ancestor or lineal descendant, and

"settlement" and "settlor" have the same meaning as in section 620 of ITTOIA 2005.

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