



# Taxation (International and Other Provisions) Act 2010

## 2010 CHAPTER 8

### PART 4

#### TRANSFER PRICING

### CHAPTER 2

#### KEY INTERPRETATIVE PROVISIONS

##### *Meaning of certain expressions that first appear in section 147*

#### **149 “Actual provision” and “affected persons”**

- (1) In this Part—
  - “the actual provision”, and
  - “the affected persons”,have the meaning given by section 147(1).
- (2) Subsection (1) does not apply if Chapters 1 and 3 to 6 apply in accordance with section 205(2) to (4) (oil-related ring-fence trades) but, in that event, in this Part—
  - “the actual provision” means the provision mentioned in section 205(1)(b),
  - and
  - “the affected persons” means the two persons mentioned in section 205(2).
- (3) Subsections (1) and (2) are subject to subsection (4).
- (4) If the participation condition (see section 148) would not be met but for section 161 or 162 (cases in which actual provision relates, to any extent, to financing arrangements), then in section 147(1)(d), (2)(b), (3), (4)(b) and (5) “the actual provision” is a reference to the actual provision so far as relating to the financing arrangements concerned.

**150 “Transaction” and “series of transactions”**

- (1) In this Part “transaction” includes arrangements, understandings and mutual practices (whether or not they are, or are intended to be, legally enforceable).
- (2) References in this Part to a series of transactions include references to a number of transactions each entered into (whether or not one after the other) in pursuance of, or in relation to, the same arrangement.
- (3) A series of transactions is not prevented by reason only of one or more of the matters mentioned in subsection (4) from being regarded for the purposes of this Part as a series of transactions by means of which provision has been made or imposed as between any two persons.
- (4) Those matters are—
  - (a) that there is no transaction in the series to which both those persons are parties,
  - (b) that the parties to any arrangement in pursuance of which the transactions in the series are entered into do not include one or both of those persons, and
  - (c) that there is one or more transactions in the series to which neither of those persons is a party.
- (5) In this section “arrangement” means any scheme or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable).

**151 “Arm’s length provision”**

- (1) In this Part “the arm’s length provision” has the meaning given by section 147(1).
- (2) For the purposes of this Part, the cases in which provision made or imposed as between any two persons is to be taken to differ from the provision that would have been made as between independent enterprises include the case in which provision is made or imposed as between two persons but no provision would have been made as between independent enterprises; and references in this Part to the arm’s length provision are to be read accordingly.

**152 Arm’s length provision where actual provision relates to securities**

- (1) This section applies where—
  - (a) both of the affected persons are companies, and
  - (b) the actual provision is provision in relation to a security issued by one of those companies (“the issuing company”).
- (2) Section 147(1)(d) is to be read as requiring account to be taken of all factors, including—
  - (a) the question whether the loan would have been made at all in the absence of the special relationship,
  - (b) the amount which the loan would have been in the absence of the special relationship, and
  - (c) the rate of interest and other terms which would have been agreed in the absence of the special relationship.
- (3) Subsection (2) has effect subject to subsections (4) and (5).
- (4) If—

- (a) a company (“L”) makes a loan to another company with which it has a special relationship, and
  - (b) it is not part of L’s business to make loans generally,the fact that it is not part of L’s business to make loans generally is to be disregarded in applying subsection (2).
- (5) Section 147(1)(d) is to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.
- (6) The matters are—
  - (a) the appropriate level or extent of the issuing company’s overall indebtedness,
  - (b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving—
    - (i) the issue of a security by the issuing company, or
    - (ii) the making of a loan, or a loan of a particular amount, to the issuing company, and
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

### **153 Arm’s length provision where security issued and guarantee given**

- (1) This section applies where the actual provision is made or imposed by means of a series of transactions which include—
  - (a) the issuing of a security by a company which is one of the affected persons (“the issuing company”), and
  - (b) the provision of a guarantee by a company which is the other affected person.
- (2) Section 147(1)(d) is to be read as requiring account to be taken of all factors, including—
  - (a) the question whether the guarantee would have been provided at all in the absence of the special relationship,
  - (b) the amount that would have been guaranteed in the absence of the special relationship, and
  - (c) the consideration for the guarantee and other terms which would have been agreed in the absence of the special relationship.
- (3) Subsection (2) has effect subject to subsections (4) and (5).
- (4) If—
  - (a) a company (“G”) provides a guarantee in respect of another company with which it has a special relationship, and
  - (b) it is not part of G’s business to provide guarantees generally,the fact that it is not part of G’s business to provide guarantees generally is to be disregarded in applying subsection (2).
- (5) Section 147(1)(d) is to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.

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*Status: This is the original version (as it was originally enacted).*

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- (6) The matters are—
- (a) the appropriate level or extent of the issuing company’s overall indebtedness,
  - (b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving—
    - (i) the issue of a security by the issuing company, or
    - (ii) the making of a loan, or a loan of a particular amount, to the issuing company, and
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

#### **154 Interpretation of sections 152 and 153**

- (1) Subsections (3) to (7) apply for the purposes of sections 152 and 153.
- (2) Subsection (6) applies also for the purposes of subsection (7)(a).
- (3) “Special relationship” means any relationship by virtue of which the participation condition is met (see section 148) in the case of the affected persons concerned.
- (4) Any reference to a guarantee includes—
  - (a) a reference to a surety, and
  - (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.
- (5) One company (“A”) has a “participatory relationship” with another (“B”) if—
  - (a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or
  - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.
- (6) “Security” includes securities not creating or evidencing a charge on assets.
- (7) Any—
  - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced, is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

#### **155 “Potential advantage” in relation to United Kingdom taxation**

- (1) Subsection (2) applies for the purposes of this Part.
- (2) The actual provision confers a potential advantage on a person in relation to United Kingdom taxation wherever, disregarding this Part, the effect of making or imposing the actual provision, instead of the arm’s length provision, would be one or both of Effects A and B.

- (3) Effect A is that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of the person's profits for any chargeable period.
- (4) Effect B is that a larger amount (or, if there would not otherwise have been losses, any amount of more than nil) would be taken for tax purposes to be the amount for any chargeable period of any losses of the person.
- (5) In determining for the purposes of subsection (3) or (4) the amount that would be taken for tax purposes to be the amount of the profits or losses for a year of assessment in the case of a non-UK resident, there is to be left out of account any income of that person which is—
  - (a) disregarded income within the meaning given by section 813 of ITA 2007 (limits on liability to income tax of non-UK residents), or
  - (b) disregarded company income within the meaning given by section 816 of that Act.
- (6) For the purposes of subsections (2) to (4)—
  - (a) Part 7 (tax treatment of financing costs and income), and
  - (b) paragraph E of the list in section 1000(1) of CTA 2010 (excessive interest etc treated as a distribution),
 are to be disregarded.

## 156 “Losses” and “profits”

- (1) In this Part “losses” includes amounts which are not losses but in respect of which relief may be given in accordance with—
  - (a) section 57 of ITTOIA 2005 (pre-trading expenses),
  - (b) section 88 of ITA 2007 (carry forward of certain interest),
  - (c) section 61 of CTA 2009 (pre-trading expenses),
  - (d) sections 387 to 391 of CTA 2009 (insurance companies: non-trading deficits on loan relationships),
  - (e) Chapter 16 of Part 5 of CTA 2009 (non-trading deficits on loan relationships),
  - (f) section 1223 of CTA 2009 (excess of management expenses), or
  - (g) Part 5 of CTA 2010 (group relief).
- (2) In this Part “profits” includes income.

*“Direct participation” in management, control or capital of a person*

## 157 Direct participation

- (1) Subsection (2) applies for the purposes of—
  - (a) this Part,
  - (b) in Part 2, section 132(7), and
  - (c) in Part 5, section 219(2).
- (2) A person is directly participating in the management, control or capital of another person at a particular time if (and only if) that other person is at that time—
  - (a) a body corporate or a firm, and
  - (b) controlled by the first person.

*“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.

**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,
- 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,
  - (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 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.

*Application of OECD principles***164 Part to be interpreted in accordance with OECD principles**

- (1) This Part is to be read in such manner as best secures consistency between—
  - (a) the effect given to sections 147(1)(a), (b) and (d) and (2) to (6), 148 and 151(2), and
  - (b) the effect which, in accordance with the transfer pricing guidelines, is to be given, in cases where double taxation arrangements incorporate the whole or any part of the OECD model, to so much of the arrangements as does so.
- (2) Subsection (1) has effect subject to—
  - section 147(1)(c) and (7) (oil-related provision to which Part does not apply),
  - sections 205 and 206 (rules for oil-related ring-fence trades),
  - section 217(3) to (7) (provision for sales of oil),
  - section 447(5) and (6) of CTA 2009 (this Part generally does not affect how exchange gains or losses from loan relationships are accounted for), and
  - section 694(8) and (9) of CTA 2009 (this Part generally does not affect how exchange gains or losses from derivative contracts are accounted for).
- (3) In this section “the OECD model” means—
  - (a) the rules which, at the passing of ICTA (which occurred on 9 February 1988), were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the Organisation for Economic Co-operation and Development, or
  - (b) any rules in the same or equivalent terms.
- (4) In this section “the transfer pricing guidelines” means—
  - (a) all the documents published by the Organisation for Economic Co-operation and Development, at any time before 1 May 1998, as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, and
  - (b) such documents published by that Organisation on or after that date as may for the purposes of this Part be designated, by an order made by the Treasury, as comprised in the transfer pricing guidelines.
- (5) In this section “double taxation arrangements” means arrangements that have effect under section 2(1) (double taxation relief by agreement with territories outside the United Kingdom).