Taxation (International and Other Provisions) Act 2010

2010 CHAPTER 8

[F1PART 6A

HYBRID AND OTHER MISMATCHES

[F1CHAPTER 11

IMPORTED MISMATCHES

Textual Amendments

F1 Pt. 6A inserted (with effect in accordance with Sch. 10 paras. 18-21 of the amending Act) by Finance Act 2016 (c. 24), **Sch. 10 para. 1**

Introduction

259K Overview of Chapter

(1) This Chapter contains provision denying deductions in connection with payments or quasi-payments that are made under, or in connection with, imported mismatch arrangements where the payer is within the charge to corporation tax for the payment period.

(2) Section 259KA contains the conditions that must be met for this Chapter to apply and defines "imported mismatch payment" and "imported mismatch arrangement".

(3) Section 259KB defines "dual territory double deduction", "excessive PE deduction" and "PE jurisdiction".

(4) Section 259KC contains provision for denying some or all of a relevant deduction in relation to an imported mismatch payment.

F2 **[** Section 259KD provides for relief where an amount is deducted from dual inclusion (4A) income.**]**

F3 **[** Section 259KE sets a limit on reductions under section 259KC.**]** (4B)

F4 **[** Section 259KF contains provision for cases also falling within Part 4 (transfer (4C) pricing).**]**

(5) See also section 259BB for the meaning of "payment", "quasi-payment", "relevant deduction", "payment period" and "payer".

Textual Amendments

F2 S. 259K(4A) inserted (retrospectively) by Finance Act 2018 (c. 3), **Sch. 7 paras. 15**, 19(4)

F3 S. 259K(4B) inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 20**

F4 S. 259K(4C) inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 32**

Application of Chapter

259KA Circumstances in which the Chapter applies

(1) This Chapter applies if conditions A to G are met.

(2) Condition A is that a payment or quasi-payment ("the imported mismatch payment") is made under, or in connection with, an arrangement ("the imported mismatch arrangement").

(3) Condition B is that, in relation to the imported mismatch payment, the payer ("P") is within the charge to corporation tax for the payment period.

(4) Condition C is that the imported mismatch arrangement is one of a series of arrangements.

(5) A "series of arrangements" means a number of arrangements that are each entered into (whether or not one after the other) in pursuance of, or in relation to, another arrangement ("the over-arching arrangement").

(6) Condition D is that—

(a) under an arrangement in the series other than the imported mismatch arrangement, there is a payment or quasi-payment ("the mismatch payment") in relation to which it is reasonable to suppose that there is or will be—

(i) a hybrid or otherwise impermissible deduction/non-inclusion mismatch (see section 259CB),

(ii) a hybrid transfer deduction/non-inclusion mismatch (see section 259DC),

(iii) a hybrid payer deduction/non-inclusion mismatch (see section 259EB),

(iv) a hybrid payee deduction/non-inclusion mismatch (see section 259GB),

(v) a multinational payee deduction/non-inclusion mismatch (see section 259HB),

(vi) a hybrid entity double deduction amount (see section 259IA(4)), or

(vii) a dual territory double deduction (see section 259KB), or

(b) as a consequence of an arrangement in the series other than the imported mismatch arrangement, there is or will be an excessive PE deduction (see section 259KB),

and in this Chapter "the relevant mismatch" means the mismatch, amount or deduction concerned.

[F5(7) Condition E is that it is reasonable to suppose that the relevant mismatch is not capable of counteraction.

(7A) A relevant mismatch is capable of counteraction to the extent it is capable of being considered, for the purposes of determining the tax treatment of a person, other than P, under the law of a territory that is OECD mismatch compliant.

(7B) If a proportion of the relevant mismatch is not capable of being so considered under the law of any such territory—

(a) Condition E is met in relation to that proportion, and

(b) the remainder of the relevant mismatch is to be ignored for the purposes of this Part.

(7C) A determination about the extent to which a relevant mismatch is capable of being so considered is to be made on a just and reasonable basis.

(7D) A territory is OECD mismatch compliant if under the law of that territory effect is given to the Final Report on Neutralising the Effects of Hybrid Mismatch Arrangements published by the Organisation for Economic Cooperation and Development on 5 October 2015 or any replacement or supplementary publication (within the meaning of section 259BA(3)).**]**

F6(8) . . . . . .

(9) Condition G is that—

(a) subsection (6)(a) applies and P is in the same control group (see section 259NB) **[**F7as a payee**]**, in relation to the mismatch payment, at any time in the period—

(i) beginning with the day the over-arching arrangement is made, and

(ii) ending with the last day of the payment period in relation to the imported mismatch payment,

(b) subsection (6)(b) applies and P is in the same control group as the company in relation to whom the excessive PE deduction arises at any time in that period, or

(c) the imported mismatch arrangement, or the over-arching arrangement, is a structured arrangement.

(10) The imported mismatch arrangement, or the over-arching arrangement, is a "structured arrangement" if it is reasonable to suppose that—

(a) the arrangement concerned is designed to secure the relevant mismatch, or

(b) the terms of the arrangement concerned share the economic benefit of the relevant mismatch between the parties to that arrangement or otherwise reflect the fact that the relevant mismatch is expected to arise.

(11) An arrangement may be designed to secure the relevant mismatch despite also being designed to secure any commercial or other objective.

(12) Section 259KC contains provision for denying all or part of the relevant deduction in relation to the imported mismatch payment by reference to the relevant mismatch.

Textual Amendments

F5 S. 259KA(7)-(7D) substituted for s. 259KA(7) (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 21(2)**

F6 S. 259KA(8) omitted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by virtue of Finance Act 2021 (c. 26), **Sch. 7 para. 21(3)**

F7 Words in s. 259KA(9)(a) substituted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 21(4)**

259KB Meaning of "dual territory double deduction", "excessive PE deduction" and "PE jurisdiction"

(1) This section has effect for the purposes of this Chapter.

(2) A "dual territory double deduction" means an amount that can be deducted by a company both—

(a) from income for the purposes of a tax charged under the law of one territory, and

(b) from income for the purposes of a tax charged under the law of another territory.

(3) A "PE deduction" is an amount that—

(a) may (in substance) be deducted from a company's income for the purposes of calculating the company's taxable profits, for a taxable period, for the purposes of a tax that is charged on the company, under the law of a territory ("the PE jurisdiction"), by virtue of the company having a permanent establishment in that territory, and

(b) is in respect of a transfer of money or money's worth, from the company in the PE jurisdiction to the company in another territory ("the parent jurisdiction") in which it is resident for the purposes of a tax, that—

(i) is actually made, or

(ii) is (in substance) treated as being made for tax purposes.

[For the purposes of this section a "PE deduction" does not include—

F8(3A) (a) a debit in respect of amortisation that is brought into account under section 729 or 731 of CTA 2009 (writing down the capitalised cost of an intangible fixed asset), or

(b) an amount that is deductible in respect of amortisation under a provision of the law of a territory outside the United Kingdom that is equivalent to either of those sections.**]**

(4) A PE deduction is "excessive" so far as it exceeds the sum of—

(a) any increases, resulting from the circumstances giving rise to the PE deduction, in the taxable profits of the company, for a permitted taxable period, for the purposes of a tax charged under the law of the parent jurisdiction, and

(b) any amounts by which a loss made by the company, for a permitted taxable period, for the purposes of a tax charged under the law of the parent jurisdiction, is reduced as a result of the circumstances giving rise to the PE deduction.

[F9(4A) For the purposes of subsection (4) any increase in taxable profits or reduction of losses is to be ignored in any case where tax is charged at a nil rate under the law of the parent jurisdiction.**]**

(5) A taxable period of the company is "permitted" for the purposes of subsection (4) if—

(a) the period begins before the end of 12 months after the end of the taxable period mentioned in subsection (3)(a), or

(b) where the period begins after that—

(i) a claim has been made for the period to be a permitted period for the purposes of subsection (4), and

(ii) it is just and reasonable for the circumstances giving rise to the PE deduction to affect the profits or loss made for that period rather than an earlier period.

Textual Amendments

F8 S. 259KB(3A) inserted (retrospectively) by Finance (No. 2) Act 2017 (c. 32), **s. 24(9)**(13)

F9 S. 259KB(4A) inserted (with effect in accordance with Sch. 7 para. 19(1) of the amending Act) by Finance Act 2018 (c. 3), **Sch. 7 para. 6**

Counteraction

259KC Denial of the relevant deduction in relation to the imported mismatch payment

(1) If, in addition to the imported mismatch payment, there are, or will be, one or more relevant payments in relation to the relevant mismatch, subsection (3) applies.

(2) Otherwise, for corporation tax purposes, in relation to the imported mismatch payment, the relevant deduction that may be deducted from P's income for the payment period is to be reduced by the amount of the relevant mismatch.

[F10(2A) But any reduction under this section has effect subject to section 259KD (deductions from dual inclusion income)**][**F11and section 259KE (limit on reduction under section 259KC)**]**.

(3) For corporation tax purposes, where this subsection applies, in relation to the imported mismatch payment, the relevant deduction that may be deducted from P's income for the payment period is to be reduced by P's share of the relevant mismatch.

(4) P's share of the relevant mismatch is to be determined by apportioning the relevant mismatch between P and every payer in relation to a relevant payment on a just and reasonable basis—

(a) where **[**F12section 259KA(6)(a)**]** applies, having regard (in particular) to the extent to which the imported mismatch payment and each relevant payment funds (directly or indirectly) the mismatch payment, or

(b) where the relevant mismatch is an excessive PE deduction, having regard (in particular) to—

(i) if the transfer of money or money's worth mentioned in section 259KB(3)(b) is actually made, the extent to which the imported mismatch payment and each relevant payment funds (directly or indirectly) the transfer, or

(ii) if the transfer of money or money's worth mentioned in section 259KB(3)(b) is (in substance) treated as being made, the extent to which the imported mismatch payment and each relevant payment would have funded (directly or indirectly) the transfer if it had actually been made.

(5) For the purposes of subsection (4)(a) and (b)(i), the imported mismatch payment is to be taken to fund the mismatch payment or transfer to the extent that the mismatch payment or transfer cannot be shown instead to be funded (directly or indirectly) by one or more relevant payments.

(6) For the purposes of subsection (4)(b)(ii), it is to be assumed that the imported mismatch payment would have funded the transfer if it had actually been made to the extent that it cannot be shown by P that, if it had been made, the transfer would have instead been funded (directly or indirectly) by one or more relevant payments.

(7) For the purposes of this section, a payment or quasi-payment, other than the imported mismatch payment or any mismatch payment, is a "relevant payment" in relation to the relevant mismatch if it is made under an arrangement in the series of arrangements mentioned in section 259KA(4) and—

(a) where **[**F13section 259KA(6)(a)**]** applies, it funds (directly or indirectly) the mismatch payment,

(b) where the relevant mismatch is an excessive PE deduction and the transfer of money or money's worth mentioned in section 259KB(3)(b) is actually made, it funds (directly or indirectly) that transfer, or

(c) where the relevant mismatch is an excessive PE deduction and the transfer of money or money's worth mentioned in section 259KB(3)(b) is (in substance) treated as being made, it would have funded (directly or indirectly) that transfer had that transfer actually been made.

(8) In proceedings before a court or tribunal in connection with this section—

(a) in relation to subsection (1), it is for P to show that, in addition to the imported mismatch payment, there are one or more relevant payments in relation to the relevant mismatch, and

(b) in relation to subsection (5), it is for P to show that the mismatch payment or transfer is funded (directly or indirectly) by one or more relevant payments instead of by the imported mismatch payment.

Textual Amendments

F10 S. 259KC(2A) inserted (retrospectively) by Finance Act 2018 (c. 3), **Sch. 7 paras. 16(2)**, 19(4)

F11 Words in s. 259KC(2A) inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 22**

F12 Words in s. 259KC(4)(a) substituted (retrospectively) by Finance Act 2018 (c. 3), **Sch. 7 paras. 16(3)**, 19(4)

F13 Words in s. 259KC(7)(a) substituted (retrospectively) by Finance Act 2018 (c. 3), **Sch. 7 paras. 16(3)**, 19(4)

[F14 259KD Deductions from dual inclusion income

(1) If—

(a) section 259KA(6)(a) applies as a result of any of sub-paragraphs (iii) to (vii), or

(b) section 259KA(6)(b) applies,

a reduction under section 259KC is not to exceed the relevant net amount.

(2) For the purposes of this section "the relevant net amount" means—

(a) if section 259KA(6)(a)(iii), (iv), (v) or (vi) applies, the amount which, if Chapter 5, 7, 8 or 9 applied to the tax treatment of any person in respect of the mismatch payment, could not be deducted from that person's income under that Chapter (ignoring the effect of any of the carry-forward provisions),

(b) if section 259KA(6)(a)(vii) applies, the amount by which the dual territory double deduction of the company mentioned in section 259KB(2) for a deduction period exceeds its dual inclusion income for that period, or

(c) if section 259KA(6)(b) applies, the amount by which the excessive PE deduction of the company mentioned in section 259KB(4) for the permitted taxable period mentioned there exceeds its dual inclusion income for that period.

(3) In subsection (2)(a) "the carry-forward provisions" means—

(a) section 259EC(3) (hybrid payer deduction/non-inclusion mismatches),

(b) section 259IB(3) to (5) (hybrid entity double deduction mismatches: investor within charge to corporation tax), and

(c) section 259IC(5) to (7) (hybrid entity double deduction mismatches: hybrid entity within charge to corporation tax).

(4) In subsection (2)(b) "dual inclusion income" of a company for a deduction period (that is to say, a period for which the dual territory double deduction is deducted as mentioned in section 259KB(2)(a)) means an amount that is both—

(a) ordinary income of the company for that period for the purposes of a tax charged as mentioned in section 259KB(2)(a), and

(b) ordinary income of the company for a permitted taxable period for the purposes of a tax charged as mentioned in section 259KB(2)(b).

(5) A taxable period of the company is "permitted" for the purposes of subsection (4)(b) if—

(a) the period begins before the end of 12 months after the end of the deduction period, or

(b) where that period begins after that—

(i) a claim has been made for the period to be a permitted period in relation to the amount of ordinary income, and

(ii) it is just and reasonable for the amount of ordinary income to arise for that taxable period rather than an earlier period.

(6) In subsection (2)(c) "dual inclusion income" of a company for a period means an amount that is both—

(a) ordinary income of the company for that period for the purposes of a tax charged under the law of the PE jurisdiction, and

(b) ordinary income of the company for a permitted taxable period for the purposes of a tax charged under the law of the parent jurisdiction.

(7) A taxable period of the company is "permitted" for the purposes of paragraph (b) of subsection (6) if—

(a) the period begins before the end of 12 months after the end of the period mentioned in paragraph (a) of that subsection, or

(b) where the period begins after that—

(i) a claim has been made for the period to be a permitted period in relation to the amount of ordinary income, and

(ii) it is just and reasonable for the amount of ordinary income to arise for that taxable period rather than an earlier period.**]**

Textual Amendments

F14 S. 259KD inserted (retrospectively) by Finance Act 2018 (c. 3), **Sch. 7 paras. 17**, 19(4)

[

F15 259KE Limit on reduction under section 259KC

(1) This section applies where, in relation to the imported mismatch payment, the relevant deduction that may be deducted from P's income for a payment period is to be reduced under section 259KC.

(2) The reduction is not to exceed the amount that the relevant mismatch would have been if the amount of the mismatch payment had been equal to the amount of the imported mismatch payment.**]**

Textual Amendments

F15 S. 259KE inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 23**

[

F16 259KF Provision for cases within Part 4

(1) This section applies where, in calculating the profits and losses of P for tax purposes, the amount to be deducted in respect of the imported mismatch payment is required to be reduced (whether or not to nil) under section 147(3) or (5) (tax calculations to be based on arm's length, not actual, provision).

(2) For the purposes of section 259KC(2), the amount of the relevant mismatch is to be determined as if the mismatch payment was reduced by the same proportion as the reduction mentioned in subsection (1).

(3) For the purposes of section 259KC(3)—

(a) the amount of the relevant mismatch is taken to be the amount it would have been had the arm's length provision been made or imposed instead of the

actual provision in relation to the imported mismatch payment (making such assumptions as to the amount of the mismatch payment as are reasonable in the circumstances), and

(b) P's share of the relevant mismatch is to be determined accordingly.

(4) In subsection (3) "the arm's length provision" and "the actual provision" are to be construed in accordance with section 147(1).**]]**

Textual Amendments

F16 S. 259KF inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by Finance Act 2021 (c. 26), **Sch. 7 para. 33**

Changes to legislation:
There are currently no known outstanding effects for the Taxation (International and Other Provisions) Act 2010, CHAPTER 11.