



Taxation (International and Other Provisions) Act 2010

2010 CHAPTER 8

[^{F1}PART 6A

HYBRID AND OTHER MISMATCHES

[^{F1}CHAPTER 4

HYBRID TRANSFER DEDUCTION/NON-INCLUSION 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

259D Overview of Chapter

- (1) This Chapter contains provision that counteracts deduction/non-inclusion mismatches that it is reasonable to suppose would otherwise arise from payments or quasi-payments as a consequence of hybrid transfer arrangements.
- (2) The Chapter counteracts mismatches where the payer or a payee is within the charge to corporation tax and does so by altering the corporation tax treatment of the payer or a payee.
- (3) Section 259DA contains the conditions that must be met for this Chapter to apply.
- (4) Section 259DB defines “hybrid transfer arrangement”.

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- (5) Section 259DC defines “hybrid transfer deduction/non-inclusion mismatch” and provides how the amount of the mismatch is to be calculated.
- (6) Section 259DD contains definitions of certain terms used in section 259DC.
- (7) Section 259DE contains provision in connection with excluding mismatches from counteraction by the Chapter where they arise as a consequence of the tax treatment of a financial trader.
- (8) Section 259DF contains provision that counteracts the mismatch where the payer is within the charge to corporation tax for the payment period.
- (9) Section 259DG contains provision that counteracts the mismatch where a payee is within the charge to corporation tax and neither section 259DF nor any equivalent provision under the law of a territory outside the United Kingdom fully counteracts the mismatch.
- (10) See also section 259BB for the meaning of “payment”, “quasi-payment”, “payment period”, “relevant deduction”, “payer” and “payee”.

Application of Chapter

259DA Circumstances in which the Chapter applies

- (1) This Chapter applies if conditions A to E are met.
- (2) Condition A is that there is a hybrid transfer arrangement in relation to an underlying instrument (see section 259DB).
- (3) Condition B is that a payment or quasi-payment is made under or in connection with—
 - (a) the hybrid transfer arrangement, or
 - (b) the underlying instrument.
- (4) Condition C is that—
 - (a) the payer is within the charge to corporation tax for the payment period, or
 - (b) a payee is within the charge to corporation tax for an accounting period some or all of which falls within the payment period.
- (5) Condition D is that it is reasonable to suppose that, disregarding this Part and any equivalent provision under the law of a territory outside the United Kingdom, there would be a hybrid transfer deduction/non-inclusion mismatch in relation to the payment or quasi-payment (see section 259DC).
- (6) Condition E is that—
 - (a) it is a quasi-payment that is made as mentioned in subsection (3) and the payer is also a payee (see section 259BB(7)),
 - (b) the payer and a payee are related (see section 259NC) at any time in the period—
 - (i) beginning with the day on which the hybrid transfer arrangement is made, and
 - (ii) ending with the last day of the payment period, or
 - (c) the hybrid transfer arrangement is a structured arrangement.

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- (7) The hybrid transfer arrangement is a “structured arrangement” if it is reasonable to suppose that—
- (a) the hybrid transfer arrangement is designed to secure a hybrid transfer deduction/non-inclusion mismatch, or
 - (b) the terms of the hybrid transfer arrangement share the economic benefit of the mismatch between the parties to the arrangement or otherwise reflect the fact that the mismatch is expected to arise.
- (8) The hybrid transfer arrangement may be designed to secure a hybrid transfer deduction/non-inclusion mismatch despite also being designed to secure any commercial or other objective.
- (9) Sections 259DF (cases where the payer is within the charge to corporation tax for the payment period) and 259DG (cases where a payee is within the charge to corporation tax) make provision for the counteraction of the hybrid transfer deduction/non-inclusion mismatch.

259DB Meaning of “hybrid transfer arrangement”, “underlying instrument” etc

- (1) This section has effect for the purposes of this Chapter.
- (2) A “hybrid transfer arrangement” means—
- (a) a repo,
 - (b) a stock lending arrangement, or
 - (c) any other arrangement,
- that is an arrangement within subsection (3).
- (3) An arrangement is within this subsection if it provides for, or relates to, the transfer of a financial instrument (“the underlying instrument”) and—
- (a) the dual treatment condition is met in relation to the arrangement, or
 - (b) a substitute payment could be made under the arrangement.
- (4) The dual treatment condition is met in relation to the arrangement if—
- (a) in relation to a person, for the purposes of a tax—
 - (i) the arrangement is regarded as equivalent, in substance, to a transaction for the lending of money at interest, and
 - (ii) a payment or quasi-payment made under, or in connection with, the arrangement or the underlying instrument could be treated so as to reflect the fact the arrangement is so regarded, and
 - (b) in relation to another person, for the purposes of a tax (whether or not the same one), such a payment or quasi-payment would not be treated so as to reflect the arrangement being regarded as equivalent, in substance, to a transaction for the lending of money at interest.
- (5) A payment or quasi-payment is a “substitute payment” if—
- (a) it consists of or involves—
 - (i) an amount being paid, or
 - (ii) a benefit being given (including the release of the whole or part of any liability to pay an amount),

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- (b) that amount, or the value of that benefit, is representative of a return of any kind (“the underlying return”) that arises on, or in connection with, the underlying instrument, and
 - (c) the amount is paid, or the benefit is given, to someone other than the person to whom the underlying return arises.
- (6) For the purposes of subsection (3) where there is an arrangement, to which a person (“P”) and another person (“Q”) are party, under which—
- (a) a financial instrument (“the first instrument”) ceases to be owned by P (whether or not because it ceases to exist), and
 - (b) Q comes to own a financial instrument (“the second instrument”) under which Q has the same, or substantially the same, rights and liabilities as P had under the first instrument,

the second instrument is to be treated as being transferred from P to Q.

[For the purposes of subsection (4) references to tax include any qualifying capital tax ^{F2}(7) within the meaning given by section 259DD(11).]

Textual Amendments

F2 S. 259DB(7) inserted (retrospectively) by [Finance Act 2018 \(c. 3\)](#), [Sch. 7 paras. 9, 19\(4\)](#)

259DC Hybrid transfer deduction/non-inclusion mismatches and their extent

- (1) There is a “hybrid transfer deduction/non-inclusion mismatch”, in relation to a payment or quasi-payment, if either or both of case 1 or 2 applies.
- (2) Case 1 applies where—
 - (a) the relevant deduction exceeds the sum of the amounts of ordinary income that, by reason of the payment or quasi-payment, arise to each payee for a permitted taxable period, and
 - (b) all or part of that excess arises for a reason mentioned in subsection (8).
- (3) Subject to subsection (9), for the purposes of subsection (2)(b)—
 - (a) it does not matter whether the excess or part arises for another reason as well (even if it would have arisen for that other reason regardless of any reasons mentioned in subsection (8)), and
 - (b) an excess or part of an excess is to be taken to arise for a reason mentioned in subsection (8) (so far as would not otherwise be the case) if, on making such of the relevant assumptions in relation to each payee as apply in relation to that payee (see subsections (4) and (5)), it could arise for a reason mentioned in subsection (8).
- (4) These are the “relevant assumptions”—
 - (a) where a payee is not within the charge to a tax under the law of a payee jurisdiction because the payee benefits from an exclusion, immunity, exemption or relief (however described) under that law, assume that the exclusion, immunity, exemption or relief does not apply;
 - (b) where an amount of income is not included in the ordinary income of a payee for the purposes of a tax charged under the law of a payee jurisdiction because the payment or quasi-payment is not made in connection with a business

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- carried on by the payee in that jurisdiction, assume that the payment or quasi-payment is made in connection with such a business;
- (c) where a payee is not within the charge to a tax under the law of any territory because there is no territory where the payee is—
- (i) resident for the purposes of a tax charged under the law of that territory, or
 - (ii) within the charge to a tax under the law of that territory as a result of having a permanent establishment in that territory,
- assume that the payee is a company that is resident for tax purposes, and carries on a business in connection with which the payment or quasi-payment is made, in the United Kingdom.
- (5) Where the relevant assumption in subsection (4)(c) applies in relation to a payee the following provisions are to be disregarded in relation to that payee for the purposes of subsection (3)(b)—
- (a) section 441 of CTA 2009 (loan relationships for unallowable purposes);
 - (b) Part 4 (transfer pricing);
 - (c) this Part;
 - [^{F3}(d) Part 10 (corporate interest restriction).]
- (6) Case 2 applies where there are one or more amounts of ordinary income (“under-taxed amounts”) that—
- (a) arise, by reason of the payment or quasi-payment, to a payee for a permitted taxable period, and
 - (b) are under taxed for a reason mentioned in subsection (8).
- (7) Subject to subsection (9), for the purposes of subsection (6)(b) it does not matter whether an amount of ordinary income is under taxed for another reason as well (even if it would have been under taxed for that other reason regardless of any reason mentioned in subsection (8)).
- (8) The reasons are—
- (a) the dual treatment condition being met in relation to a hybrid transfer arrangement under, or in connection with, which the payment or quasi-payment is made (see section 259DB(4));
 - (b) the payment or quasi-payment being a substitute payment.
- (9) For the purposes of this section, disregard—
- (a) any excess or part of an excess mentioned in subsection (2), and
 - (b) any under-taxed amount,
- in relation to which the financial trader exclusion applies (see section 259DE) or that arises as a result of a payee being a relevant investment fund (see section 259NA).
- (10) Where case 1 applies, the amount of the hybrid transfer deduction/non-inclusion mismatch is equal to the excess that arises as mentioned in subsection (2)(b).
- (11) Where case 2 applies, the amount of the hybrid transfer deduction/non-inclusion mismatch is equal to the sum of the amounts given in respect of each under-taxed amount by—

$$\frac{(UTA \times (FMR - R))}{FMR}$$

FMR

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where—

“UTA” is the under-taxed amount;

“FMR” is the payee's full marginal rate (expressed as a percentage) for the permitted taxable period for which the under-taxed amount arises;

“R” is the highest rate (expressed as a percentage) at which tax is charged on the taxable profits in which the under-taxed amount is included, taking into account on a just and reasonable basis the effect of any credit for underlying tax.

- (12) Where cases 1 and 2 both apply, the amount of the hybrid transfer deduction/non-inclusion mismatch is the sum of the amounts given by subsections (10) and (11).
- (13) See section 259DD for the meaning of “permitted taxable period” and “under taxed”.

Textual Amendments

- F3** S. 259DC(5)(d) substituted (with effect in accordance with Sch. 5 para. 25(1)(2) of the amending Act) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), [Sch. 5 para. 19](#)

259DD Interpretation of section 259DC

- (1) This section has effect for the purposes of section 259DC.
- (2) A taxable period of a payee is “permitted” in relation to an amount of ordinary income that arises as a result of the payment or quasi-payment if—
- (a) the period begins before the end of 12 months after the end of the payment period, or
 - [^{F4}(b) the period begins at a later time and it is just and reasonable for the amount of ordinary income to arise for the period (rather than an earlier one).]
- (3) An amount of ordinary income of a payee, for a permitted taxable period, is “under taxed” if the highest rate at which tax is charged on the taxable profits of the payee in which the amount is included, taking into account on a just and reasonable basis the effect of any credit for underlying tax, is less than the payee's full marginal rate for that period.
- (4) The payee's “full marginal rate” means the highest rate at which the tax that is chargeable on the taxable profits mentioned in subsection (3) could be charged on taxable profits, of the payee for the permitted taxable period, which include ordinary income that arises from, or in connection with, a financial instrument.
- (5) A “credit for underlying tax” means a credit or relief given to reflect tax charged on profits that are wholly or partly used to fund (directly or indirectly) the payment or quasi-payment.
- [A qualifying capital amount arising to a payee is treated as an amount of ordinary
- ^{F5}(6) income of a payee and references to tax include any qualifying capital tax.
- (7) For the purposes of case 2—
- (a) a qualifying capital amount arising to a payee, for a permitted taxable period, is “under taxed” if the highest rate at which tax is charged on the amount,

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- taking into account on a just and reasonable basis the effect of any credit for underlying tax, is less than the payee’s full marginal rate for that period,
- (b) in determining the payee’s “full marginal rate”, the reference to the taxable profits mentioned in subsection (4) includes any qualifying capital amount, and
 - (c) in determining a “credit for underlying tax”, the reference to profits includes any qualifying capital amount.
- (8) If the rate at which a qualifying capital tax is charged on a qualifying capital amount of a payee exceeds the rate at which tax would be charged on an amount of income of the payee, the excess is to be ignored.
- (9) For the purposes of subsections (6) to (8) a “qualifying capital amount” means an amount of a capital nature on which a qualifying capital tax is charged.
- (10) A qualifying capital tax is not regarded for this purpose as charged on an amount so far as—
- (a) the amount is excluded, reduced or offset for the purposes of the tax by any exemption, exclusion, relief or credit that—
 - (i) applies specifically to all or part of the amount (as opposed to amounts of a capital nature generally), or
 - (ii) arises as a result of, or otherwise in connection with, a payment or quasi-payment that gives rise to the amount, or
 - (b) the tax is, or falls to be, refunded (and section 259BC(6) and (7) apply for the purposes of this paragraph with the necessary modifications).
- (11) For the purposes of subsections (6) to (10) a “qualifying capital tax” means—
- (a) capital gains tax or the charge to corporation tax in respect of chargeable gains, or
 - (b) any tax chargeable under the law of a territory outside the United Kingdom that corresponds to a United Kingdom tax mentioned in paragraph (a), but does not include any tax chargeable at a nil rate.]

Textual Amendments

- F4** S. 259DD(2)(b) substituted (retrospectively) by [Finance \(No. 2\) Act 2017 \(c. 32\), s. 24\(4\)\(13\)](#)
F5 S. 259DD(6)-(11) inserted (retrospectively) by [Finance Act 2018 \(c. 3\), Sch. 7 paras. 10, 19\(4\)](#)

259DE The financial trader exclusion

- (1) This section has effect for the purposes of section 259DC(9).
- (2) The financial trader exclusion applies, in relation to an excess or part of an excess mentioned in section 259DC(2) or an under-taxed amount, where conditions A to C are met.
- (3) Condition A is that the excess or part arises, or the under-taxed amount is under taxed, because the payment or quasi-payment—
 - (a) is a substitute payment,
 - (b) is treated, for the purposes of tax charged on a person, so as to reflect the fact that it is representative of the underlying return, and

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- (c) is brought into account by another person (“the financial trader”) in calculating the profits of a trade under—
 - (i) Part 3 of CTA 2009 (trading income), or
 - (ii) an equivalent provision of the law of a territory outside the United Kingdom.
- (4) Condition B is that the financial trader also brings any associated payments into account as mentioned in subsection (3)(c).
- (5) In subsection (4) “associated payment” means a payment or quasi-payment—
 - (a) in relation to which the financial trader is the payer or a payee, and
 - (b) that is made under, or in connection with, the underlying instrument or an arrangement that relates to the underlying instrument.
- (6) Condition C is that—
 - (a) if the underlying return were to arise, and be paid directly, to the payee or payees in relation to the substitute payment, neither Chapter 3 (hybrid and other mismatches from financial instruments) nor any equivalent provision under the law of a territory outside the United Kingdom would apply, and
 - (b) the hybrid transfer arrangement under, or in connection with, which the substitute payment is made is not a structured arrangement (within the meaning given by section 259DA(7) and (8)).

Counteraction

259DF Counteraction where the payer is within the charge to corporation tax for the payment period

- (1) This section applies where the payer is within the charge to corporation tax for the payment period.
- (2) For corporation tax purposes, the relevant deduction that may be deducted from the payer's income for the payment period is reduced by an amount equal to the hybrid transfer deduction/non-inclusion mismatch mentioned in section 259DA(5).

259DG Counteraction where a payee is within the charge to corporation tax

- (1) This section applies in relation to a payee where—
 - (a) the payee is within the charge to corporation tax for an accounting period some or all of which falls within the payment period, and
 - (b) it is reasonable to suppose that—
 - (i) neither section 259DF nor any equivalent provision under the law of a territory outside the United Kingdom applies, or
 - (ii) a provision of the law of a territory outside the United Kingdom that is equivalent to section 259DF applies, but does not fully counteract the hybrid transfer deduction/non-inclusion mismatch mentioned in section 259DA(5).
- (2) A provision of the law of a territory outside the United Kingdom that is equivalent to section 259DF does not fully counteract that mismatch if (and only if)—
 - (a) it does not reduce the relevant deduction by the full amount of the mismatch, and

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- (b) the payer is still able to deduct some of the relevant deduction from income in calculating taxable profits.
- (3) In this section “the relevant amount” is—
- (a) in a case where subsection (1)(b)(i) applies, an amount equal to the hybrid transfer deduction/non-inclusion mismatch mentioned in section 259DA(5), or
 - (b) in a case where subsection (1)(b)(ii) applies, the lesser of—
 - (i) the amount by which that mismatch exceeds the amount by which it is reasonable to suppose the relevant deduction is reduced by a provision under the law of a territory outside the United Kingdom that is equivalent to section 259DF, and
 - (ii) the amount of the relevant deduction that may still be deducted as mentioned in subsection (2)(b).
- (4) If the payee is the only payee, the relevant amount is to be treated as income arising to the payee for the counteraction period.
- (5) If there is more than one payee, an amount equal to the payee's share of the relevant amount is to be treated as income arising to the payee for the counteraction period.
- (6) The payee's share of the relevant amount is to be determined by apportioning that amount between all the payees on a just and reasonable basis, having regard (in particular)—
- (a) to any arrangements as to profit sharing that may exist between some or all of the payees,
 - (b) to whom any under-taxed amounts (within the meaning given by section 259DC(6)) arise, and
 - (c) to whom any amounts of ordinary income that it would be reasonable to expect to arise as a result of the payment or quasi-payment, but that do not arise, would have arisen.
- (7) An amount of income that is treated as arising under subsection (4) or (5) is chargeable under Chapter 8 of Part 10 of CTA 2009 (income not otherwise charged) (despite section 979(2) of that Act).
- (8) The “counteraction period” means—
- (a) if an accounting period of the payee coincides with the payment period, that accounting period, or
 - (b) otherwise, the first accounting period of the payee that is wholly or partly within the payment period.]

Changes to legislation:

There are currently no known outstanding effects for the Taxation (International and Other Provisions) Act 2010, CHAPTER 4.