



# Taxation (International and Other Provisions) Act 2010

## 2010 CHAPTER 8

### [<sup>F1</sup>PART 6A

#### HYBRID AND OTHER MISMATCHES

### [<sup>F1</sup>CHAPTER 5

#### HYBRID PAYER 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*

#### **259E 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 because the payer is a hybrid entity.
- (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 259EA contains the conditions that must be met for this Chapter to apply.
- (4) Section 259EB defines “hybrid payer deduction/non-inclusion mismatch” and provides how the amount of the mismatch is to be calculated.

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- (5) Section 259EC contains provision that counteracts the mismatch where the payer is within the charge to corporation tax for the payment period.
- (6) Section 259ED contains provision that counteracts the mismatch where a payee is within the charge to corporation tax and the mismatch is not fully counteracted by provision under the law of a territory outside the United Kingdom that is equivalent to section 259EC.
- (7) See also—
  - (a) section 259BB for the meaning of “payment”, “quasi-payment”, “payment period”, “relevant deduction”, “payer” and “payee”, and
  - (b) section 259BE for the meaning of “hybrid entity”, “investor” and “investor jurisdiction”.

### *Application of Chapter*

#### **259EA Circumstances in which the Chapter applies**

- (1) This Chapter applies if conditions A to E are met.
- (2) Condition A is that a payment or quasi-payment is made under, or in connection with, an arrangement.
- (3) Condition B is that the payer is a hybrid entity (“the hybrid payer”).
- (4) Condition C is that—
  - (a) the hybrid 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 the provisions mentioned in subsection (6), there would be a hybrid payer deduction/non-inclusion mismatch in relation to the payment or quasi-payment (see section 259EB).
- (6) The provisions are—
  - (a) this Chapter and Chapters 6 to 10, and
  - (b) any equivalent provision under the law of a territory outside the United Kingdom.
- (7) Condition E is that—
  - (a) it is a quasi-payment that is made as mentioned in subsection (2) and the hybrid payer is also a payee (see section 259BB(7)),
  - (b) the hybrid payer and a payee are in the same control group (see section 259NB) at any time in the period—
    - (i) beginning with the day on which the arrangement mentioned in subsection (2) is made, and
    - (ii) ending with the last day of the payment period, or
  - (c) that arrangement is a structured arrangement.
- (8) The arrangement is “structured” if it is reasonable to suppose that—

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- (a) the arrangement is designed to secure a hybrid payer deduction/non-inclusion mismatch, or
  - (b) the terms of the 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.
- (9) The arrangement may be designed to secure a hybrid payer deduction/non-inclusion mismatch despite also being designed to secure any commercial or other objective.
- (10) Sections 259EC (cases where the hybrid payer is within the charge to corporation tax for the payment period) and 259ED (cases where a payee is within the charge to corporation tax) contain provision for the counteraction of the hybrid payer deduction/non-inclusion mismatch.

### **259EB Hybrid payer deduction/non-inclusion mismatches and their extent**

- (1) There is a “hybrid payer deduction/non-inclusion mismatch”, in relation to a payment or quasi-payment, if—
- (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 by reason of the hybrid payer being a hybrid entity.

[ But there is no hybrid payer deduction/non-inclusion mismatch so far as the relevant<sup>F2</sup>(1A) deduction is—

- (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.]

- (2) The amount of the hybrid payer deduction/non-inclusion mismatch is equal to the excess that arises as mentioned in subsection (1)(b).

- (3) [<sup>F3</sup>Subject to subsections (4A) to (4C)] for the purposes of subsection (1)(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 whether the hybrid payer is a hybrid entity), and
- (b) an excess or part of an excess is to be taken to arise by reason of the hybrid payer being a hybrid entity (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 subsection (4)), it could arise by reason of the hybrid payer being a hybrid entity.

- (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

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the payment or quasi-payment is not made in connection with a business carried on by the payee in that jurisdiction, assume that the payment or quasi-payment is made in connection with such a business.

[ No excess is to be taken to arise by reason of a hybrid payer being a hybrid entity for F4(4A) the purposes of subsection (1)(b) so far as it is attributable to a qualifying institutional investor based in a territory under the law of which—

- (a) the income or profits of the hybrid entity are treated as income and profits of the investor, or
- (b) the hybrid entity is not regarded as a distinct and separate person to the investor.

(4B) Excess is attributable to such a qualifying institutional investor to the extent that ordinary income (arising by reason of the payment or quasi-payment) would fall to be brought into account by the investor if—

- (a) where subsection (4A)(a) applies, under the law of the territory the income or profits of the hybrid entity were not treated as income and profits of the investor, and
- (b) where subsection (4A)(b) applies, under the law of the territory the hybrid entity were regarded as a distinct and separate person to the investor.

(4C) To determine if a “qualifying institutional investor” is “based” in a particular territory for the purposes of subsections (4A) and (4B) see section 259NDA.]

(5) 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
- (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**

- F2** S. 259EB(1A) inserted (retrospectively) by [Finance \(No. 2\) Act 2017 \(c. 32\), s. 24\(5\)\(13\)](#)
- F3** Words in [s. 259EB\(3\)](#) inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by [Finance Act 2021 \(c. 26\), Sch. 7 para. 27\(2\)](#)
- F4** [S. 259EB\(4A\)-\(4C\)](#) inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by [Finance Act 2021 \(c. 26\), Sch. 7 para. 27\(3\)](#)

### *Counteraction*

#### **259EC Counteraction where the hybrid payer is within the charge to corporation tax for the payment period**

- (1) This section applies where the hybrid payer is within the charge to corporation tax for the payment period.
- (2) For corporation tax purposes, the relevant deduction so far as it does not exceed the hybrid payer deduction/non-inclusion mismatch mentioned in section 259EA(5) (“the

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restricted deduction”) may not be deducted from the hybrid payer's income for the payment period unless it is deducted from dual inclusion income for that period.

- (3) So much of the restricted deduction (if any) as, by virtue of subsection (2), cannot be deducted from the payer's income for the payment period—
- (a) is carried forward to subsequent accounting periods of the payer, and
  - (b) for corporation tax purposes, may be deducted from dual inclusion income for any such period (and not from any other income), so far as it cannot be deducted under this paragraph for an earlier period.
- (4) In this section “dual inclusion income” of the payer for an accounting period means an amount that <sup>F5</sup>... is both—
- (a) ordinary income of the payer for that period for corporation tax purposes, and
  - (b) ordinary income of an investor in the payer for a permitted taxable period for the purposes of any tax charged under the law of an investor jurisdiction.
- (5) A taxable period of an investor is “permitted” for the purposes of paragraph (b) of subsection (4) if—
- (a) the period begins before the end of 12 months after the end of the accounting 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.
- [ For the purposes of subsection (4)(b) the reference to ordinary income of an investor
- <sup>F6</sup>(6) in the payer for a permitted taxable period for the purposes of any tax charged under the law of an investor jurisdiction is taken to include a reference to an amount that meets the following requirements.
- (7) The requirements are that—
- (a) the amount may not be deducted under the law of any territory from the income of any person for the purposes of calculating taxable profits for a relevant taxable period;
  - (b) in the case of a person resident for tax purposes in a zero-tax territory, the amount could not be deducted from the income of the person for the purposes of calculating taxable profits for a relevant taxable period if the person were resident in the United Kingdom for tax purposes; and
  - (c) under the law of the investor jurisdiction, the amount could be deducted from the income of the investor in the hybrid payer for the purposes of calculating the investor's taxable profits for a relevant taxable period if the following assumptions were made.
- (8) The assumptions are that, for the purposes of identifying the recipient of the amount for tax purposes in the investor jurisdiction—
- (a) condition B in section 259BE(3) was not met by the hybrid payer as respects the investor jurisdiction, and
  - (b) as a result of that, the hybrid payer was not a hybrid entity as respects the investor jurisdiction.
- (9) In subsection (7), “zero-tax territory”, in relation to a person, means a territory in which the person—

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- (a) is not within the charge to tax, or
  - (b) is within the charge to tax at a nil rate.
- (10) Section 259B(5) (determination of residence where no concept of residence for tax purposes exists) applies to the reference in subsection (7)(b) to a person's residence for tax purposes in a zero-tax territory as it applies to references to a person's residence for tax purposes in Chapter 8 or 11.
- (11) A taxable period of an investor or another person is “relevant” for the purposes of subsection (7) if—
- (a) the period begins before the end of 12 months after the end of the accounting period mentioned in subsection (4)(a), or
  - (b) where the period begins after that, it is just and reasonable for the question of whether the amount concerned may or could be deducted in calculating taxable profits to be determined by reference to that taxable period rather than an earlier period.]

#### **Textual Amendments**

- F5** Words in *s. 259EC(4)* 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. 10(2)**
- F6** *S. 259EC(6)-(11)* inserted (with effect in accordance with Sch. 7 paras. 37-39 of the amending Act) by *Finance Act 2021 (c. 26)*, **Sch. 7 para. 10(3)**

#### **259ED 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) no provision under the law of a territory outside the United Kingdom that is equivalent to section 259EC applies, or
    - (ii) such a provision does apply, but does not fully counteract the hybrid payer deduction/non-inclusion mismatch mentioned in section 259EA(5).
- (2) A provision of the law of a territory outside the United Kingdom that is equivalent to section 259EC does not fully counteract that mismatch if (and only if)—
- (a) the amount of the relevant deduction that the provision prevents from being deducted from income of the hybrid payer, for the payment period, other than dual inclusion income, is less than the amount of the mismatch, and
  - (b) the hybrid payer is still able to deduct some of the relevant deduction from income, for the payment period, that is not dual inclusion income.
- (3) In this section “the relevant amount” is—
- (a) in a case where subsection (1)(b)(i) applies, an amount equal to the hybrid payer deduction/non-inclusion mismatch mentioned in section 259EA(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 of the relevant deduction that it is reasonable to suppose is prevented, by a provision of the law of a territory outside the United Kingdom that

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- is equivalent to section 259EC, from being deducted from income of the hybrid payer, for the payment period, other than dual inclusion income, 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, an amount equal to—
- (a) the relevant amount, less
  - (b) any dual inclusion income,
- 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—
- (a) the payee's share of the relevant amount, less
  - (b) the relevant proportion of any dual inclusion income,
- 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, and
  - (b) 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) The “relevant” proportion of any dual inclusion income for the payment period is the same as the proportion of the relevant amount apportioned to the payee in accordance with subsection (6).
- (8) 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).
- (9) In this section—
- “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;
  - “dual inclusion income” means an amount that <sup>F7</sup>... is both—
    - (a) ordinary income of the payer for the payment period, and
    - (b) ordinary income of an investor in the payer for a permitted taxable period for the purposes of a tax charged under the law of an investor jurisdiction.
- (10) A taxable period of an investor is “permitted” for the purposes of subsection (9) if—
- (a) the period begins before the end of 12 months after the end of the payment period, 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

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(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**

**F7** Words in s. 259ED(9) 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. 10(4)



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