Finance Act 2015

2015 CHAPTER 11

PART 3

DIVERTED PROFITS TAX

Calculation of taxable diverted profits: section 86 cases

88 Calculation of taxable diverted profits in section 86 case: introduction

(1) If section 86 applies for an accounting period, section 89, 90 or 91 applies to determine the taxable diverted profits of the foreign company.

(2) But see also section 97 for how a designated HMRC officer estimates those profits when issuing a preliminary notice under section 93 or a charging notice under section 95.

(3) Subsections (4) to (12) define some key expressions used in sections 89 to 91 and this section.

(4) "The foreign company" has the same meaning as in section 86.

[F1(5) "Notional PE profits", in relation to an accounting period, means an amount equal to the sum of—

(a) the amount of profits (if any) which would have been the chargeable profits of the foreign company for that period, attributable (in accordance with sections 20 to 32 of CTA 2009) to the avoided PE, had the avoided PE been a permanent establishment in the United Kingdom through which the foreign company carried on the trade mentioned in section 86(1)(b), and

(b) an amount equal to the total of royalties or other sums which are paid by the foreign company during that period in connection with that trade in circumstances where the payment avoids the application of section 906 of ITA 2007 (duty to deduct tax).

(5A) For the purposes of subsection (5)(b) a payment of a royalty or other sum avoids the application of section 906 of ITA 2007 if—

(a) that section does not apply in relation to the payment, but

(b) that section would have applied in relation to the payment had the avoided PE been a permanent establishment in the United Kingdom through which the foreign company carried on the trade mentioned in section 86(1)(b).**]**

[[F2](5B) In calculating the notional PE profits no account is to be taken of any adjustment within subsection (5C).

(5C) An adjustment is within this subsection if—

(a) it is an adjustment required to be made under Part 4 of TIOPA 2010 to the results of any provision made or imposed between the foreign company and the avoided PE,

(b) it is taken into account in an assessment to corporation tax included in a company tax return of the avoided PE, and

(c) the time when it is first taken into account as mentioned in paragraph (b) is after the end of the review period.**]**

(6) "The material provision" has the same meaning as in section 86.

(7) "The relevant alternative provision" means the alternative provision which it is just and reasonable to assume would have been made or imposed as between the foreign company and one or more companies connected with that company, instead of the material provision, had tax (including any non-UK tax) on income not been a relevant consideration for any person at any time.

(8) For the purposes of subsection (7), making or imposing no provision is to be treated as making or imposing an alternative provision to the material provision.

(9) "The actual provision condition" is met if—

(a) the material provision results in expenses of the foreign company for which [F3]... a deduction for allowable expenses would be allowed in computing what would have been the notional PE profits for the accounting period, and

(b) the relevant alternative provision—

(i) would also have resulted in allowable expenses of the foreign company of the same type and for the same purposes (whether or not payable to the same person) as so much of the expenses mentioned in paragraph (a) as results in the effective tax mismatch outcome mentioned in section 86(2)(c), but

(ii) would not have resulted in relevant taxable income of a connected company for that company's corresponding accounting period.

[[F4](9A) For the purposes of subsection (9)(a) ignore any adjustment that would be required to be made to the results of the material provision under Part 4 of TIOPA 2010 in calculating what would have been the notional PE profits for the accounting period.**]**

(10) "Relevant taxable income" of a company for a period is—

(a) income of the company, for the period, which would have resulted from the relevant alternative provision and in relation to which the company would have been within the charge to corporation tax had that period been an accounting period of the company, less

(b) the total amount of expenses which it is just and reasonable to assume would have been incurred in earning that income and would have been allowable expenses of the company for that period.

(11) "Connected company" means a company which is or, if the relevant alternative provision had been made, would have been connected with the foreign company.

(12) "The mismatch condition" has the same meaning as in section 86.

Textual Amendments

F1 S. 88(5)(5A) substituted for s. 88(5) (with effect in accordance with s. 43(7) of the amending Act) by Finance Act 2016 (c. 24), **s. 43(3)** (with s. 43(8))

F2 S. 88(5B)(5C) inserted (with effect in accordance with Sch. 6 para. 8 of the amending Act) by Finance Act 2019 (c. 1), **Sch. 6 para. 6(2)**

F3 Words in s. 88(9)(a) omitted (with effect in accordance with Sch. 6 para. 8 of the amending Act) by virtue of Finance Act 2019 (c. 1), **Sch. 6 para. 6(3)**

F4 S. 88(9A) inserted (with effect in accordance with Sch. 6 para. 8 of the amending Act) by Finance Act 2019 (c. 1), **Sch. 6 para. 6(4)**

Changes to legislation:
Finance Act 2015, Section 88 is up to date with all changes known to be in force on or before 03 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Sch. 21 para. 2(e) and word inserted by 2021 c. 26 Sch. 27 para. 44(3)(b)
- Sch. 21 para. 5(6) inserted by 2021 c. 26 Sch. 27 para. 44(4)(b)