SCHEDULES

SCHEDULE 7

Section 23

HYBRID AND OTHER MISMATCHES

Introductory

1 Part 6A of TIOPA 2010 (hybrid and other mismatches) is amended as follows.

Meaning of "tax" etc and treatment of cases where tax charged at a nil rate

2 In section 259B ("tax" means certain taxes on income and includes foreign tax etc) —

(a) after subsection (3) insert—

"(3A) The payment of any withholding tax in respect of any amount is to be ignored for the purposes of this Part.", and

(b) at the end insert—

"(5) In any case where—

(a) a person is resident in a territory outside the United Kingdom generally for the purposes of the law of the territory or for particular purposes under that law, and

(b) the law of the territory has no provision for a person to be resident for tax purposes under its law,

any reference in Chapter 8 or 11 to a person's residence for tax purposes in the territory is to be read as a reference to the person's residence as mentioned in paragraph (a)."

3 In section 259BC (meaning of "ordinary income"), in subsection (3), for the words from "it is excluded" to the end substitute "—

(a) it is charged to the relevant tax at a nil rate, or

(b) it is excluded, reduced or offset by any exemption, exclusion, relief, or credit—

(i) that applies specifically to all or part of the amount of income (as opposed to ordinary income generally), or

(ii) that arises as a result of, or otherwise in connection with, a payment or quasi-payment that gives rise to the amount of income."

4 In section 259FA (circumstances in which Chapter 6 applies), after subsection (7) insert—

"(7A) For the purposes of subsections (6) and (7) 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 In section 259GB (hybrid payee deduction/non-inclusion mismatches and their extent), in subsection (3)(b)(i), after "charged" insert " at a higher rate than nil ".

6 In section 259KB (meaning of "excessive PE deduction"), after subsection (4) insert —

"(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."

CFCs and foreign CFCs: qualifying CFC amounts

7 (1) Section 259BD (chargeable companies in respect of CFCs and foreign CFCs) is amended as follows.

(2) After subsection (12) insert—

"(12A) For the purposes of subsection (2)—

(a) a qualifying CFC amount arising to C is treated as an amount of relevant income,

(b) a qualifying CFC amount arising to C, for a permitted taxable period, is "under taxed" if the highest rate at which tax is charged on the amount, taking into account on a just and reasonable basis the effect of any credit for underlying tax, is less than C's full marginal rate for that period,

(c) in determining C's "full marginal rate", the reference to the taxable profits mentioned in subsection (9) includes any qualifying CFC amount, and

(d) in determining a "credit for underlying tax", the reference to profits includes any qualifying CFC amount.

(12B) For the purposes of subsection (12A) a "qualifying CFC amount" means an amount arising to C which is brought into account in calculating chargeable profits for the purposes of a foreign CFC charge.

(12C) But an amount is not regarded for this purpose as brought into account so far as—

(a) the amount is excluded, reduced or offset for the purposes of the foreign CFC charge by any exemption, exclusion, relief or credit that—

(i) applies specifically to all or part of the amount (as opposed to amounts brought into account for those purposes 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 sum charged for the purposes of the foreign CFC charge is, or falls to be, refunded (and section 259BC(6) and (7) apply for the purposes of this paragraph with the necessary modifications)."

(3) In subsection (13), in paragraph (b) of the definition of "chargeable profits", after "Part" insert " (including any qualifying CFC amount within the meaning given by subsection (12B)) ".

Hybrid and other mismatches from financial instruments: qualifying capital amounts

8 In section 259CC (interpretation of section 259CB), at the end insert—

"(7) A qualifying capital amount arising to a payee is treated as an amount of ordinary income of a payee and references to tax include any qualifying capital tax.

(8) 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, 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.

(9) 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.

(10) For the purposes of subsections (7) to (9) a "qualifying capital amount" means an amount of a capital nature on which a qualifying capital tax is charged.

(11) 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).

(12) For the purposes of subsections (7) to (11) 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."

Hybrid transfer deduction/non-inclusion mismatches: qualifying capital amounts

9 In section 259DB (meaning of "hybrid transfer arrangement", "underlying instrument" etc), at the end insert—

"(7) For the purposes of subsection (4) references to tax include any qualifying capital tax within the meaning given by section 259DD(11)."

10 In section 259DD (hybrid transfer deduction/non-inclusion mismatches: interpretation of section 259DC), at the end insert—

"(6) A qualifying capital amount arising to a payee is treated as an amount of ordinary 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, 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."

Hybrid payee deduction/non-inclusion mismatches

11 In section 259GB (hybrid payee deduction/non-inclusion mismatches and their extent), after subsection (4) insert—

"(4A) In applying subsection (4)(b) in a case where the payee is a partnership, it is to be assumed that no amount of ordinary income arises to the payee, by reason of the payment or quasi-payment, if—

(a) a partner in the partnership is entitled to the amount, and

(b) having regard only to—

(i) the law of the territory where the partnership is established, and

(ii) the law of the territory where the partner is resident for tax purposes or, if the partner is not resident anywhere for tax purposes, where the partner is established,

the payee would not be regarded as a hybrid entity.

(4B) In subsection (4A) "partnership" has the meaning given by section 259NE(4)."

Multinational payee deduction/non-inclusion mismatches

12 In section 259HB (multinational payee deduction/non-inclusion mismatches and their extent), after subsection (2) insert—

"(2A) The excess is to be taken (so far as would not otherwise be the case) to arise for the purposes of subsection (1)(b) by reason of a payee being a multinational company so far as it would not arise if it is assumed—

(a) that the company is not regarded, under the law of the parent jurisdiction, the PE jurisdiction or any other territory, as carrying on a business in the PE jurisdiction through a permanent establishment in that jurisdiction, and

(b) that, for tax purposes under the law of the parent jurisdiction, all amounts of ordinary income arising, by reason of the payment or quasi-payment, to the company are regarded as arising to it in that jurisdiction and nowhere else."

Hybrid entity double deduction mismatches: use of restricted deduction

13 In section 259IC(4) (counteraction where the hybrid entity is within the charge to corporation tax), for the words from "unless" to the end substitute "unless it is deducted from—

(c) dual inclusion income for that period, or

(d) section 259ID income for that period."

14 After section 259IC insert—

"**259ID Section 259ID income for the purposes of section 259IC**

(1) This section applies where—

(a) section 259IC applies,

(b) the restricted deduction exceeds the dual inclusion income of the hybrid entity (if any) for the hybrid entity deduction period, and

(c) conditions A to D are met.

(2) Condition A is that—

(a) the investor in the hybrid entity makes a payment to the hybrid entity, and

(b) no amount is deductible, under the law of the investor jurisdiction, from the income of the investor in respect of the payment.

(3) Condition B is that, as a result of the payment, an amount of ordinary income arises to the hybrid entity for the hybrid entity deduction period.

(4) Condition C is that the payment is made in direct consequence of a payment made to the investor by a person ("the unrelated party") who is not related (see section 259NC) to the investor or the hybrid entity.

(5) Condition D is that, as a result of the payment made by the unrelated party, an amount of ordinary income arises to the investor.

(6) For the purposes of section 259IC "section 259ID income" is an amount of income of the hybrid entity equal to the lesser of—

(a) the amount of the payment made by the investor to the hybrid entity, and

(b) the amount of the payment made by the unrelated party to the investor."

Imported mismatches: dual inclusion income

15 In section 259K (overview of Chapter 11), after subsection (4) insert—

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

16 (1) Section 259KC (denial of the relevant deduction in relation to imported mismatch payments) is amended as follows.

(2) After subsection (2) insert—

"(2A) But any reduction under this section has effect subject to section 259KD (deductions from dual inclusion income)."

(3) In subsections (4)(a) and (7)(a), for "subsection (6)(a)" substitute " section 259KA(6)(a) ".

17 After section 259KC insert—

"**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."

Adjustments in light of subsequent events: accounting treatment

18 After section 259LA insert—

"**259LB Adjustments in light of later treatment for accounting purposes**

(1) This section applies where—

(a) a payment or quasi-payment gives rise to a debit of a company that is recognised for accounting purposes,

(b) a relevant deduction of the company in respect of some or all of the debit is reduced by any provision of this Part,

(c) there is a reversal of some or all of the debit by a credit of the company that is recognised for accounting purposes after the end of the payment period, and

(d) the credit is brought into account for corporation tax purposes.

(2) Such consequential adjustments as are just and reasonable may be made in respect of so much of the debit as gives rises to the relevant deduction and as is reversed by the credit.

(3) The adjustments may be made (whether or not by an officer of Revenue and Customs) by way of an assessment, the modification of an assessment, amendment or disallowance of a claim, or otherwise.

(4) The power to make adjustments by virtue of this section may be exercised despite any time limit imposed by or under any enactment."

Commencement

19 (1) The amendments made by paragraphs 2(b), 3 to 6 and 12—

(a) have effect, in the case of their application to Chapter 6 of Part 6A of TIOPA 2010, in relation to excessive PE deductions in relation to which the relevant PE period begins on or after 1 January 2018,

(b) have effect, in the case of their application to Chapter 9 or 10 of that Part, in relation to accounting periods beginning on or after that date, and

(c) have effect, in the case of their application to any other Chapter of that Part, in relation to—

(i) payments made on or after date, or

(ii) quasi-payments in relation to which the payment period begins on or after that date.

(2) For the purposes of sub-paragraph (1)(a), (b) and (c)(ii), where there is a straddling period—

(a) so much of the straddling period as falls before 1 January 2018, and so much of it as falls on or after that date, are to be treated as separate accounting periods or separate taxable periods (as the case may be), and

(b) if it is necessary to apportion an amount for the straddling period to the two separate periods, it is to be apportioned—

(i) on a time basis according to the respective length of the separate periods, or

(ii) if that would produce a result that is unjust or unreasonable, on a just and reasonable basis.

(3) A "straddling period" means an accounting period or payment period (as the case may be) beginning before 1 January 2018 and ending on or after that date.

(4) Part 6A of TIOPA 2010 has effect, and is to be deemed always to have had effect, with the amendments set out in paragraphs 2(a), 7 to 11 and 13 to 18.

Changes to legislation:
There are currently no known outstanding effects for the Finance Act 2018, SCHEDULE 7.