

*Bill 6: Corporation Tax
Changes in company ownership and recovery of corporation tax
June 2008: CC/SC (08) 22*

Changes in company ownership and recovery of corporation tax

1. The draft clauses rewrite sections 767A to 769 of, and Schedule 28A to, ICTA and Schedule 28 to FA 2000.
2. The draft clauses deal with:
 - Restriction of corporation tax relief following changes in company ownership (see Chapters 2 to 5 of Part 1);
 - Recovery of unpaid corporation tax following changes in company ownership (see Chapter 6 of Part 1); and
 - Recovery of unpaid corporation tax due from non-UK resident companies (see Chapter 1 of Part 2).
3. Although the draft clauses will not sit together in Bill 6, they are being published for consultation together, because the topics they address are linked.
4. In this draft commentary, “draft Bill 5” is the draft of Bill 5 published for consultation in February 2008.
5. Several of the provisions rewritten in these draft clauses of Bill 6 will be consequentially amended by Bill 5, and several of the provisions rewritten in these draft clauses refer to other provisions of Bill 6. The project is keeping the legislative connections between these various provisions under review, and these draft clauses will be amended as necessary. Meanwhile, where the draft clauses have unresolved j-number references to other provisions of Bills 5 and 6, the draft commentary notes the source legislation for those provisions and (where possible) the Tax Law Rewrite publication in which they have appeared.
6. The HMRC Budget 2008 publication *Simplifying anti-avoidance legislation: a progress report on the anti-avoidance simplification review* announced that HMRC would consider the scope for simplifying sections 768 to 769 of ICTA. The project is liaising with colleagues working on the simplification review.

Part 1: Tax avoidance: changes in company ownership

Overview

7. Sections 767A to 769 of, and Schedule 28A to, ICTA have been enacted and amended piecemeal over many years; what is now section 768 of ICTA made its first appearance as section 30(1) to (4) of FA 1969 and paragraphs 8 to 10 of Schedule 15 to that Act. The structure of the legislation is tight and intricate – see, for example, section 768C(5).
8. The opportunity has been taken to restructure the convoluted source legislation and make it easier for users to navigate. In summary, this Part of the Bill has the following structure.

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9. Chapter 1 provides a bird's eye view of the Part.
10. Chapter 2 disallows trading losses in defined situations. It applies both to companies with investment business and to companies without investment business. It is based on sections 768 and 768A of ICTA.
11. Chapters 3 and 4 apply to companies with investment business. They impose restrictions on corporation tax relief. Chapter 3 provides the general rules and. Chapter 4 deals with special circumstances involving the transfer of an asset within a corporate group. Chapter 3 is chiefly based on sections 768B, 768D and 768E of ICTA and paragraphs 1 to 9A of Schedule 28A to that Act. Chapter 4 is based on sections 768C to 768E of ICTA and paragraphs 10, 10A and 13 to 17 of Schedule 28A to that Act.
12. Chapter 5 applies to companies without investment business. It disallows property losses. It is based on section 768D of ICTA.
13. Chapter 6 is concerned with recovery of unpaid corporation tax. It is based on sections 767A to 767B of ICTA.
14. Section 767C of ICTA gives HMRC power to obtain information relevant to sections 767A and 767AA of that Act; the draft clauses in Chapter 6 anticipate the repeal of section 767C by FA 2008. In the event that FA 2008 does not repeal that section, the draft of Bill 6 published for consultation in Spring 2009 will include draft clauses based on it.
15. Chapter 7 defines the key expression “change in the ownership of a company” for the purposes of the Part. It is based on section 769 of ICTA.
16. Chapter 8 is supplementary.

Q1. We welcome comments on the structure of the Part.

Chapter 1: Introduction

Clause 1{j7767Ac}: Overview of Part

17. This clause introduces the Part. It is new.
18. *Subsection (6)* signposts the Chapter on recovery of unpaid corporation tax due from non-UK resident companies. It is similar to Chapter 6 of this Part, but is not located in this Part of the Bill because it applies whether or not there is a change in company ownership. Its location in Bill 6 is under review.
19. *Subsection (7)* signposts three important expressions: “change in the ownership of a company”, “company with investment business” and “linked” person.

Chapter 2: Disallowance of trading losses

Overview

20. Chapter 2 is the first of four Chapters dealing with variations on the theme of “loss buying”.

21. Companies can obtain corporation tax relief for various expenses and losses in different periods from the periods in which the expenses or losses arise. However, they can only turn these reliefs into a reduction in tax liability if they have taxable profits against which the expenses or losses can be set. The shareholders of an unsuccessful company might therefore wish to monetise these tax reliefs by selling the company to people who might be able to make use of them. Sections 768 to 768E of, and Schedule 28A to, ICTA are directed against such “loss buying”.

22. This Part of the Bill does not deal with the buying in of group relief. Section 403A(9) and (10) of ICTA prevent companies claiming group relief in relation to expenses and losses arising before a company joined the group. Section 403A(9) and (10) of ICTA will be rewritten in clause [j4803AArm] of this Bill. See clause 46[j4803AArm] in paper CC/SC (07) 27 (group relief).

23. The loss buying provisions of TCGA are outside the scope of this Bill. See, however, the draft commentary on clause 23[j728A10B] of this Bill.

Clause 2[j7768]: Introduction

24. This clause introduces the Chapter. It is based on sections 768 and 768A of ICTA.

25. *Subsections (1) to (3)* lay down the conditions for the Chapter to apply.

26. Subsection (2) expands the cryptic phrase “within any period of three years” in sections 768(1) and 768A(1) of ICTA. See section 768B(1)(b) of that Act.

27. Subsection (2) omits as otiose the parenthesis “either earlier or later in the period, or at the same time” in sections 768(1) and 768A(1) of ICTA.

28. Section 767A(4)(b) of ICTA refers to a “significant revival” of activities; sections 768(1)(b) and 768B(1)(c) of ICTA refer to a “considerable revival” of a trade or business. Sections 768(1)(b) and 768B(1)(c) contrast “considerable” with “small or negligible”; in section 767A(4)(b), the contrast is not only with “small or negligible” but also with cessation. The rewrite of these provisions eliminates this elegant variation by consistently using “significant” in *subsection (3)* and clauses 6[j7768B](2) and (4), 33[j7768Da](3) and 34[j7768Db](3) of this Bill.

29. *Subsection (4)* defines, non-exhaustively, “major change in the nature or conduct of a trade”. The phrase “major change” has been retained in this definition,

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because there is case law on it: Willis v Peeters Picture Frames Ltd (1982), 56 TC 436 CA(NI)¹ and Purchase v Tesco Stores Ltd (1984), 58 TC 46 HC.² For the same reason, the phrase “major change” has also been retained in the similar definitions in clauses 6{j7768B}(5), 33{j7768Da}(10) and 34{j7768Db}(9) of this Bill.

30. *Subsection (5)* defines “the change in ownership” and “the company” for the purposes of this Chapter.

Clause 3{j7768m}: Disallowance of trading losses

31. This clause restricts relief for trading losses in cases in which this Chapter applies. It is based on sections 768 and 768A of ICTA.

32. *Subsections (1) and (2)* restrict relief under, respectively, clauses [j4505rm] and [j4513rm] of this Bill (relief for trade losses against total profits and carry forward of trade loss against subsequent trade profits). Clauses [j4505rm] and [j4513rm] are based on sections 393A and 393(1) of ICTA respectively. See clauses 3[j4505rm] and 15[j4513rm] in paper CC/SC (07) 38 (loss relief). *Subsections (1) and (2)* are arranged in the order in which clauses [j4505rm] and [j4513rm] will be arranged in the Bill.

33. *Subsection (1)* is aimed at the abuse known as “profits buying” or “loss capacity buying” whereby a trading company with large profits is sold to new owners who feed new activities into the trade which will result in heavy initial losses for which early relief would not otherwise be available. The price paid to the old owners would reflect the tax benefit expected to accrue to the new owners.

34. Section 768(1) of ICTA refers to “relief ... given under section 393 [of that Act] by setting a loss incurred by the company ... against any income or other profits ...” But section 393 of ICTA only gives relief for losses against “trading income” (as defined in section 393(8) of that Act). The reference to “other profits” is considered to be a missed consequential amendment. The words should have been omitted when FA 1991 replaced section 393(2) of ICTA with section 393A of ICTA. *Subsection (2)* of this clause therefore omits the reference to “other profits” as otiose.

35. Section 768(3) of ICTA provides:

“The apportionment under subsection (2) above shall be on a time basis according to the respective lengths of those parts except that if it *appears* that that method would work unreasonably or unjustly such other method shall be used as *appears* just and reasonable.” (emphasis added)

¹ [1983] STC 453.

² [1984] STC 304.

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36. *Subsection (5)* omits the first instance of “appears” in section 768(3) of ICTA for the sake of consistency with clauses 14{j728A6}(3) and 31{j728A6a} of this Bill, which are based on paragraphs 8 and 17 respectively of Schedule 28A to ICTA, and clauses 33{j7768Da}(7) and 34{j7768Db}(7) of this Bill, which are based on section 768D(4) of ICTA. It also omits the second instance of “appears” in section 768(3) of ICTA to sharpen the drafting.

37. *Subsection (6)* defines “profits of a trade”, non-exhaustively, by reference to clause [j4514rm] of this Bill. Clause [j4514rm] is based on section 393(8) of ICTA. See clause 16[j4514rm] in paper CC/SC (07) 38 (loss relief).

Clause 4{j7768za}: Disallowance of trading losses: calculation of balancing charge

38. This clause prevents double taxation in cases in which this Chapter applies. It is based on section 768 of ICTA.

39. If clause 3{j7768m}(2) of this Bill restricts relief for trading losses carried forward under clause [j4513rm] of this Bill, the underlying computations of capital allowances are not affected, because the trade itself does not cease. This means that if, at the time of the change of ownership, a company owns assets on which capital allowances have been given, it can be effectively penalised twice by:

- disallowance of any unused capital allowances included in the losses disallowed; and
- a balancing charge when the assets are disposed of.

40. *Subsections (2) and (3)* solve this problem. If an extinguished loss includes unallowed capital allowances, those capital allowances are treated as not having been given when calculating the balancing charges on an asset owned at the date of the change in ownership and disposed of later.

41. *Subsection (4)* sets an identification rule. If, in any period, both losses and capital allowances were available for setting against profits, capital allowances are treated as set off before other losses.

42. Section 768(6) and (7) of ICTA use the expression “allowance or deduction”. Since “or deduction” adds nothing to “allowance”, subsections (2) to (4) omit “or deduction” as otiose.

43. Section 768(6) and (7) of ICTA use the expression “profits or gains”. This expression appears in numerous places in the Corporation Tax Acts. The project is considering the use of this expression generally in Bill 6, and has not yet decided whether it needs to be retained in the rewritten provisions which are based on section 768(6) and (7).

Clause 5{j7768z}: Disallowance of trading losses where company reconstruction without a change in ownership

44. This clause deals with the interaction between clauses 3{j7768m}(2) and [j4901Arm](3) of this Bill. It is based on section 768 of ICTA.

45. When a trade is transferred from a predecessor company to a successor company, and the relevant conditions are met for a company reconstruction without a change in ownership, clause [j4901Arm](3) of this Bill provides for the successor to be entitled to relief under clause [j4513rm] of this Bill for a trading loss made by the predecessor. Clause 3{j7768m}(2) of this Bill restricts relief under clause [j4513rm] if there is a change in company ownership. If there is both a company reconstruction without a change in ownership (such that clause [j4901Arm](3) applies) and, separately, a change in ownership (such that clause 3{j7768m}(2) applies), then this clause extends clause 3{j7768m}(2) to restrict relief given under clause [j4901Arm](3).

46. Section 768(5) of ICTA refers to “section 343” of that Act. But section 768(5) only operates on section 768(1) of ICTA, and section 768(1) only restricts relief under section 393 of that Act. The only provision of section 343 of ICTA which gives relief under section 393 of that Act is section 343(3), therefore this clause sharpens the drafting by referring precisely to clause [j4901Arm](3) of this Bill, which is based on section 343(3) of ICTA. See clause 6[j4901Arm] in paper CC/SC (07) 40 (company reconstructions without a change of ownership).

Chapter 3: Company with investment business: restrictions on relief: general provision

Overview

47. Chapter 3 is the second of four Chapters dealing with various kinds of loss buying. It has the following structure.

- Clause 6{j7768B} (introduction) lays down the conditions for the Chapter to apply and defines some key terms.
- If the Chapter applies, clause 7{j728A9B} (notional split of accounting period in which change in ownership occurs) sets the stage. It splits the period in which the change in ownership occurs into two notional accounting periods, and indicates that certain amounts will need to be apportioned between these two periods.
- Clauses 8{j728A9} to 13{j7768De} are a group of six clauses restricting various kinds of corporation tax relief. If, having reviewed them, the reader is satisfied that in the case under review these clauses will make no practical difference, the reader will be able to conclude that there will in practice be no need to make the apportionments required by clause 7{j728A9B}.

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- Clauses 14{j728A6} and 15{j728A7a} are the detailed rules for making apportionments of amounts for the purposes of this Chapter.
- Clause 16{j7768Bf} provides for the adjustment of balancing charges in certain cases in which corporation tax relief is restricted.
- Clauses 17{j728A1} to 20{j728A5} define “significant increase in the amount of a company’s capital”.

Q2. We welcome comments on the structure of Chapter 3.

Clause 6{j7768B}: Introduction

48. This clause introduces the Chapter. It is based on sections 768B, 768D and 768E of ICTA. If, having read this clause, the reader is satisfied that the conditions for this Chapter to apply are not met, the reader need read no further in this Chapter.

49. *Subsections (1) to (4)* lay down the conditions for the Chapter to apply.

50. Subsection (1) is based on, among other things, section 768D(1)(a)(i) of ICTA. Unlike section 768D(1) of ICTA, subsection (1) does not refer to a change in the ownership of a company carrying on a Schedule A business; it refers to a change in the ownership of a company with investment business. The reason is that, if section 768D(1)(a)(i) of ICTA applies, then:

- There is a change in the ownership of a company carrying on a Schedule A business (see the opening words of section 768D(1)); and
- The company whose ownership has changed is a company with investment business (see the opening words of section 768D(1)(a)).

51. Therefore, if section 768D(1)(a)(i) of ICTA applies, there is by implication a change in the ownership of a company with investment business. There is therefore no need for section 768D(1) of ICTA to pick up the opening words of section 768B of that Act.

52. *Subsection (5)* defines, non-exhaustively, “major change in the nature or conduct of a business”.

53. *Subsection (6)* defines “the change in ownership” and “the company” for the purposes of this Chapter.

Clause 7{j728A9B}: Notional split of accounting period in which change in ownership occurs

54. This clause deems the accounting period in which the change in ownership occurs to be split into two notional accounting periods for the purposes of this Chapter. It is based on sections 768B, 768D and 768E of ICTA.

55. *Subsection (3)* requires amounts for the actual accounting period to be apportioned between the two notional accounting periods in accordance with clause 14{j728A6} of this Bill.

56. *Subsection (4)* defines “the actual accounting period” and “notional accounting periods” for the purposes of this Chapter.

Clause 8{j728A9}: Restriction on debits to be brought into account

57. This clause restricts debits on the company’s loan relationships in cases in which this Chapter applies. It is based on section 768B of, and paragraph 9 of Schedule 28A to, ICTA.

58. This clause is the first of a group of six clauses (clauses 8{j728A9} to 13{j7768De}) imposing restrictions on corporation tax relief. The first four of these clauses restrict reliefs given by Bill 5, and are arranged in the order in which those reliefs appear in Bill 5. See the draft Bill. The fifth and sixth of those clauses restrict relief for property losses, and are arranged in the order in which those reliefs appear in Bill 6. See paper CC/SC (07) 38 (loss relief).

59. *Subsection (1)* states the purpose of the clause.

60. Paragraph 14(3) of Schedule 26 to FA 2002 provides that non-trading credits and debits from derivative contracts are to be brought into account as if they were non-trading credits or non-trading debits for the purposes of Chapter 2 of Part 4 of FA 1996 in respect of loan relationships of the company. The reference to that paragraph in section 768B(10) of ICTA is therefore otiose. *Subsection (1)* therefore omits it.

61. *Subsections (2) to (5)* set out the consequences of the apportionment made under clause 7{j728A9B} of this Bill.

62. “Relevant non-trading debits” in subsections (2) and (3) translates “debts falling within paragraph 11 below” in paragraph 9(2) of Schedule 28A to ICTA. *Subsection (6)* tells the reader where this expression is defined.

Clause 9{j728A9A}: Restriction on the carry forward of non-trading deficit from loan relationships

63. This clause restricts relief for the company’s non-trading deficit on its loan relationships in cases in which this Chapter applies. It is based on section 768B of, and paragraph 9A of Schedule 28A to, ICTA.

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64. Debits and deficits have different functions in the loan relationships regime, therefore this Chapter imposes different restrictions on them.

65. Paragraph 14(3) of Schedule 26 to FA 2002 provides that non-trading credits and debits from derivative contracts are to be brought into account as if they were non-trading credits or non-trading debits for the purposes of Chapter 2 of Part 4 of FA 1996 in respect of loan relationships of the company. The reference to that paragraph in section 768B(10) of ICTA is therefore otiose. *Subsection (1)* therefore omits it.

Clause 10{j7768E}: Restriction on relief for non-trading loss on intangible fixed assets

66. This clause restricts relief for the company's non-trading loss on its intangible fixed assets in cases in which this Chapter applies. It is based on section 768E of ICTA.

67. This clause refers to clause 721[j062935] of draft Bill 5, which is based on paragraphs 1(2) and 35 of Schedule 29 to FA 2002.

68. Subsection (3) corrects a drafting error in section 768E(5) of ICTA. This is a minor change in the law. See *Change 655{jc655}* in Annex 1. A similar correction is made in clause 27{j7768Ea}(4) of this Bill.

Q3. We welcome comments on the proposal to clarify in clauses 10{j7768E} and 27{j7768Ea} the restriction imposed by section 768E(5) of ICTA (Change 655{jc655}).

Clause 11{j7768Bd}: Restriction on the deduction of expenses of management

69. This clause restricts relief for the company's expenses of management in cases in which this Chapter applies. It is based on section 768B of ICTA.

70. In rewriting section 768B(6), *subsection (2)* inserts "as" before the second occurrence of "expenses of management", to correct a drafting slip in paragraph 3(3)(b) of Schedule 6 to FA 2004.

71. *Subsections (3) and (4)* refer, respectively, to clauses 1157[j2001] and 1143[j2000] of draft Bill 5, which are based on section 75 of ICTA.

72. Relief for expenses of management is given by way of a deduction from the company's total profits, and so this clause has a somewhat different structure from the others in this group; see in particular *subsection (6)*.

73. Section 768B(7) and (9)(b) of ICTA are not being rewritten. See the draft commentary on Schedule 3 (repeals), under "Section 768B(7) and (9)(b) of ICTA and paragraphs 6(b), 7(1)(aa), 13(1)(c) and 16(1)(aa) of Schedule 28A to that Act".

Clause 12{j7768Dc}: Disallowance of UK property business losses

74. This clause restricts relief for the company's UK property business loss in cases in which this Chapter applies. It is based on section 768D of ICTA.

75. This clause refers to clauses [j4101rm] and [j4101Arm] of this Bill (relief for losses made in UK property business; company with investment business). These clauses are based on section 392A of ICTA. See clauses 25[j4101rm] and 26[j4101Arm] in paper CC/SC (07) 38 (loss relief).

Clause 13{j7768De}: Disallowance of overseas property business losses

76. This clause restricts relief for the company's overseas property business loss in cases in which this Chapter applies. It is based on section 768D of ICTA.

77. Section 768D(9) of ICTA has to be read as implying that, in a case in which section 768D applies in relation to an overseas property business, references to section 392A of ICTA have to be read as references to the corresponding provisions of section 392B of that Act. Otherwise section 768D of that Act will apply in such a case but will not actually do anything. This clause therefore refers to clause [j4102rm] of this Bill, which is based on section 392B of ICTA. See clause 29[j4102rm] in paper CC/SC (07) 38 (loss relief).

78. Section 768D(5) of ICTA can have no application in relation to an overseas property business, and is therefore not rewritten in this clause.

Clause 14{j728A6}: Apportionment of amounts

79. This clause stipulates how various amounts are to be apportioned for the purposes of this Chapter. It is based on paragraphs 6, 7 and 8 of Schedule 28A to ICTA.

80. The source legislation obliges the reader to tally sub-paragraphs of paragraph 6 of Schedule 28A to ICTA with sub-paragraphs of paragraph 7(1) of that Schedule. This is inconvenient, as the sub-paragraphs are not always in one-to-one correspondence and the legislation has been amended several times. Paragraphs 6 and 7(1) of that Schedule have therefore been rewritten in *subsection (2)* as a two-column table.

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81. Detailed comments on the table are given below.

<i>Row</i>	<i>Origin</i>	<i>Comments</i>
1 and 2	Paragraphs 6(da) and 7(1)(c) of Schedule 28A to ICTA.	The opportunity has been taken to deal with profits and deficits separately.
3	Paragraphs 6(db) and 7(1)(d)(i) and (e)(i) of that Schedule.	
4	Paragraphs 6(dc) and 7(1)(b) of that Schedule.	Row 4 refers to clause 444[j069684] of draft Bill 5, which is based on section 83(3A) of, and paragraph 4 of Schedule 8 to, FA 1996.
-	Paragraphs 6(dd) and 7(1)(f) of Schedule 28A to ICTA will not be rewritten, because Bill 5 will repeal them as spent.	
5	Paragraphs 6(de) and 7(1)(g) of Schedule 28A to ICTA.	Row 5 refers to clause 719[j062934] of draft Bill 5, which is mainly based on paragraph 34 of Schedule 29 to FA 2002.
6	Paragraphs 6(df) and 7(1)(h) of Schedule 28A to ICTA.	Row 6 refers to clause 721[j062935] of draft Bill 5, which is mainly based on paragraph 35 of Schedule 29 to FA 2002.
7	Paragraphs 6(a) and 7(1)(a) of Schedule 28A to ICTA.	
-	Paragraphs 6(b) and 7(1)(aa) of that Schedule will be repealed as spent. See the draft commentary on Schedule 3 to this Bill.	

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Row	Origin	Comments
8	Paragraphs 6(c) and 7(1)(b) of Schedule 28A to ICTA.	Row 8 refers to clause 1147[j2002] of draft Bill 5, which is based on section 75(8) and (9) of ICTA.
9	Paragraphs 6(d) and 7(1)(c) of that Schedule.	Row 9 refers to clause 1157[j2001] of Bill 5, which is based on section 75(7) of ICTA.
10	Paragraphs 6(e) and 7(1)(c) of that Schedule.	

Q4. We welcome comments on the proposal to rewrite paragraphs 6 and 7(1) of Schedule 28A to ICTA as a two-column table.

82. In rewriting paragraph 8 of Schedule 28A to ICTA, *subsection (3)* omits both instances of “appears”. See the draft commentary on clause 3{j7768m} of this Bill.

Clause 15{j728A7a}: Meaning of certain expressions in section 14{j728A6}

83. This clause supplements clause 14{j728A6} of this Bill. It is based on paragraphs 6, 6A and 7 of Schedule 28A to ICTA. The subsections of this clause are arranged in the order of the rows to which they refer in the table in clause 14{j728A6}(2) of this Bill.

84. *Subsection (2)* refers to clause 308[j061080] of Bill 5, which rewrites the Schedule D Case III charge on non-trading profits arising from loan relationships.

85. *Subsection (4)(b)* refers to clauses 378[j069692], 416[j0696917] and 418[j0696918] of Bill 5, which are based on paragraphs 2, 17 and 18 respectively of Schedule 9 to FA 1996.

86. *Subsection (6)* refers to clause 1143[j2000] of Bill 5, which is based on section 75 of ICTA.

Clause 16{j7768Bf}: Adjustment to balancing charges if relief is restricted

87. This clause prevents double taxation in certain cases within clauses 8{j728A9}, 9{j728A9A} and 11{j7768Bd}. It is based on sections 768 and 768B of ICTA.

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88. This clause has the same function in this Chapter as clause 4{j7768za} has in Chapter 2. See the draft commentary on that clause.

89. Paragraph 14(3) of Schedule 26 to FA 2002 provides that non-trading credits and debits from derivative contracts are to be brought into account as if they were non-trading credits or non-trading debits for the purposes of Chapter 2 of Part 4 of FA 1996 in respect of loan relationships of the company. The reference to that paragraph in section 768B(13) of ICTA is therefore otiose. *Subsection (2)* therefore omits it.

90. Section 768(6) and (7) of ICTA use the expression “allowance or deduction”. Since “or deduction” adds nothing to “allowance”, *subsections (4) to (6)* omit “or deduction” as otiose.

Clause 17{j728A1}: Meaning of “significant increase in the amount of a company’s capital”

91. This clause is the first of a group of four clauses which together define “significant increase in the amount of company’s capital” for the purposes of condition A in clause 6{j7768B}(2) of this Bill. It is based on paragraphs 1 and 2 of Schedule 28A to ICTA.

Clause 18{j728A1a}: Amount A

92. This clause defines “amount A” in clause 17{j728A1} of this Bill. It is based on paragraph 3 of Schedule 28A to ICTA.

Clause 19{j728A1b}: Amount B

93. This clause defines “amount B” in clause 17{j728A1} of this Bill. It is based on paragraph 4 of Schedule 28A to ICTA.

Clause 20{j728A5}: Meaning of “amount of capital”

94. This clause defines “amount of capital” for the purposes of clauses 17{j728A1} to 19{j728A1b} of this Bill. It is based on paragraph 5 of Schedule 28A to ICTA.

95. In paragraph 5(1) of Schedule 28A to ICTA, “The capital of a company” has to be read as “The amount of the capital of a company”. Otherwise, in paragraph 3(1) of that Schedule, “the amount of the company’s capital” will have to be read as “the amount of the aggregate of (a) the amount of ...”. *Subsection (2)* makes this clear; it also expands the reference in paragraph 5(1)(b) of that Schedule to section 417(7) (a) to (c) of ICTA.

96. Paragraph 5(3) of Schedule 28A to ICTA provides for amounts of capital to be rounded up to the nearest pound. *Subsection (4)* omits this requirement because it is thought to have no practical effect.

97. *Subsection (5)* refers prospectively to section 610 of the Companies Act 2006; at the time of writing, that provision is not yet in force.

Chapter 4: Company with investment business: restrictions on relief: asset transferred within group

Overview

98. Chapter 4 is the third of four Chapters dealing with various kinds of loss buying. It rewrites section 768C of ICTA and the corresponding provisions of sections 768D and 768E of ICTA.

99. Section 768C of ICTA was inserted by FA 1995 to block the following scheme. A company is about to realise a chargeable gain on an asset. The company purchases a company with excess management expenses. Relief for these is not restricted by section 768B of ICTA, because the conditions in section 768B(1)(a) to (c) are not met. The asset is transferred to the newly purchased company at no gain/no loss under section 171 of TCGA. When the transferee company disposes of the asset and crystallises the chargeable gain, it can use its pre-acquisition management expenses to shelter the gain.

100. Sections 768D and 768E of ICTA (inserted by FA 1998 and FA 2002 respectively) included provisions corresponding to section 768C to cover pre-acquisition property losses and pre-acquisition non-trading losses on intangible fixed assets: see sections 768D(1)(a)(ii) and 768E(1)(b).

101. Section 768C(13) (inserted by FA 2002) extended section 768C to cover tax-neutral intra-group transfers of intangible fixed assets.

102. Chapter 4 of this Part of the Bill is similar in many respects to Chapter 3 of this Part, but there are important differences of detail because, unlike Chapter 3, Chapter 4 needs to cater for chargeable gains and realisation gains on intangible fixed assets.

103. Chapter 4 has the following structure.

- Clauses 21{j7768C} to 23{j728A10B} lay down the conditions for the Chapter to apply and define some key terms.
- If the Chapter applies, clause 24{j728A10D} (notional split of accounting period in which change in ownership occurs) sets the stage. It splits the period in which the change in ownership occurs into two notional accounting periods, and indicates that certain amounts will need to be apportioned between these two periods.
- Clauses 25{j728A10} to 30{j7768Df} are a group of six clauses restricting various kinds of corporation tax relief. If, having reviewed them, the reader is satisfied that in the case under review these clauses will make no practical

difference, the reader will be able to conclude that there will in practice be no need to make the apportionments required by clause 24{j728A10D}.

- Clauses 31{j728A6a} and 32{j728A7c} contain the detailed rules for making apportionments of amounts for the purposes of this Chapter.

Q5. We welcome comments on the structure of Chapter 4.

Clause 21{j7768C}: Introduction

104. This clause introduces the Chapter. It is based on sections 768C, 768D and 768E of ICTA. If, having read this clause, the reader is satisfied that the conditions for this Chapter to apply are not all met, the reader need read no further in this Chapter.

105. *Subsections (1) to (4)* lay down the conditions for the Chapter to apply.

106. Subsection (1) is based on, among other things, section 768D(1)(a)(ii) of ICTA. Unlike section 768D(1) of ICTA, subsection (1) does not refer to a change in the ownership of a company carrying on a Schedule A business; it refers to a change in the ownership of a company with investment business. The reason is that, if section 768D(1)(a)(ii) of ICTA applies, then:

- There is a change in the ownership of a company carrying on a Schedule A business (see the opening words of section 768D(1)); and
- The company whose ownership has changed is a company with investment business (see the opening words of section 768D(1)(a)).

107. Therefore, if section 768D(1)(a)(ii) of ICTA applies, there is by implication a change in the ownership of a company with investment business. There is therefore no need for section 768D(1) of ICTA to pick up the opening words of section 768B of that Act.

108. Subsection (3)(b) refers to clause 743[j062955] of draft Bill 5, which is based on paragraph 55 of Schedule 29 to FA 2002.

109. *Subsections (5) and (6)* supplement subsection (4).

110. *Subsection (7)* defines “the change in ownership”, “the company” “non-trading chargeable realisation gain” and “the relevant gain” for the purposes of this Chapter.

111. Subsection (7) refers to clause 719[j062934] of draft Bill 5, which is based on paragraph 34 of Schedule 29 to FA 2002.

Clause 22{j728A10C}: Meaning of “amount of profits which represents a relevant gain”

112. This clause defines “amount of profits which represents a relevant gain” for the purposes of this Chapter. It is based on section 768C of ICTA.

113. The numerical example in the draft commentary on clause 27{j7768Ea} of this Bill explains how this concept is used.

Clause 23{j728A10B}: Meaning of “the relevant provisions”

114. This clause defines “the relevant provisions” for the purposes of this Chapter of the Bill. It is based on section 768C of, and paragraph 13 of Schedule 28A to, ICTA.

115. *Paragraph (a)* refers to section 8(1) of TCGA, which provides (in summary) that the chargeable gains included in a company’s total profits are its chargeable gains after deducting allowable losses. Paragraph (a) also refers to Schedule 7A to that Act. That Schedule is directed against another kind of loss buying, namely the purchase of allowable losses for the purposes of corporation tax on chargeable gains. In summary, if that Schedule bites, relief for allowable losses is restricted to the extent that (1) they accrued before the company joined the relevant group and (2) they cannot be deducted from chargeable gains accruing before that date. Defining “the relevant provisions” in this way ensures that Schedule 7A to TCGA is applied before the provisions of this Chapter are applied.

116. The concept of “the relevant provisions” is used, in particular, in row 1 in the table in clause 31{j728A6a}(2) of this Bill. See the illustrative example in the draft commentary on clause 27{j7768Ea} of this Bill.

117. It is considered that, in a case in which section 768C of ICTA applies in relation to an asset to which Schedule 29 to FA 2002 (intangible fixed assets) applies, section 768C(13)(d) of ICTA applies not only to section 768C(12) of that Act but also to paragraph 13(2) of Schedule 28A to that Act.

Clause 24{j728A10D}: Notional split of accounting period in which change in ownership occurs

118. This clause deems the accounting period in which the change in ownership occurs to be split into two notional accounting periods for the purposes of this Chapter. It is based on sections 768C, 768D and 768E of ICTA.

119. *Subsection (3)* requires amounts for the actual accounting period to be apportioned between the two notional accounting periods in accordance with clause 31{j728A6a} of this Bill.

120. *Subsection (4)* defines “the actual accounting period” and “notional accounting periods” for the purposes of this Chapter.

Clause 25{j728A10}: Restriction on debits to be brought into account

121. This clause restricts debits on the company's loan relationships in cases in which this Chapter applies. It is based on section 768C of, and paragraph 10 of Schedule 28A to, ICTA.

122. This clause is the first of a group of six clauses (clauses 25{j728A10} to 30{j7768Df}) imposing restrictions on corporation tax relief. The first four of these clauses restrict reliefs given by Bill 5, and are arranged in the order in which those reliefs appear in Bill 5. See the draft Bill. The fifth and sixth of these clauses restrict relief for property losses, and are arranged in the order in which those reliefs appear in Bill 6. See paper CC/SC (07) 38 (loss relief).

123. *Subsection (1)* states the purpose of the clause.

124. Paragraph 14(3) of Schedule 26 to FA 2002 provides that non-trading credits and debits from derivative contracts are to be brought into account as if they were non-trading credits or non-trading debits for the purposes of Chapter 2 of Part 4 of FA 1996 in respect of loan relationships of the company. The reference to that paragraph in section 768C(9) of ICTA is therefore otiose. *Subsection (1)* therefore omits it.

125. *Subsection (2)* limits the scope of the clause to cases in which gains arise or accrue as discussed in the 'overview' paragraphs of the draft commentary on this Chapter. Its inclusion here emphasises the point that the clause will only make a difference in practice if there are *both* debits to be restricted *and* a gain to be sheltered by those debits.

126. *Subsections (3) to (5)* set out the consequences of the apportionment made in accordance with clause 31{j728A6a} of this Bill.

127. The other five clauses in this group have a similar structure. One of them – clause 27{j7768Ea} – makes two changes in the law, and the draft commentary on that clause includes an illustrative example. That example is also relevant to the other clauses in this group, although they do not work in exactly the same way as clause 27{j7768Ea}.

128. *Subsections (3) and (4)* use, provisionally, the expression "the modified total profits of the accounting period". The drafting of these subsections will be reviewed when work is further advanced on the general provisions of Bill 6 about the calculation of a company's corporation tax liability. Meanwhile, no particular comments are sought on subsections (3) and (4).

129. *Subsection (4)(b)* refers to clause 448[j069681] of draft Bill 5, which is based on paragraph 1 of Schedule 8 to FA 1996.

Clause 26{j728A10A}: Restriction on the carry forward of non-trading deficit from loan relationships

130. This clause restricts relief for the company's non-trading deficit on its loan relationships in cases in which this Chapter applies. It is based on section 768C of, and paragraph 10A of Schedule 28A to, ICTA.

131. Debits and deficits have different functions in the loan relationships regime, therefore this Chapter imposes different restrictions on them.

Clause 27{j7768Ea}: Restriction on relief for non-trading loss on intangible fixed assets

132. This clause restricts relief for the company's non-trading loss on its intangible fixed assets in cases in which this Chapter applies. It is based on section 768E of ICTA.

133. *Subsection (2)* makes it clear that section 768E(5)(b) of ICTA refers to section 768C(6) of that Act by implication. This clarification is a minor change in the law: see *Change 656{jc656}* in Annex 1.

Q6. We welcome comments on the proposal to clarify in clause 27{j7768Ea} the restriction imposed in certain circumstances on relief for non-trading losses on intangible fixed assets (*Change 656{jc656}*).

134. *Subsections (3) and (4)* refer to clause 721[j062935] of Bill 5, which is based on paragraphs 1(2) and 35 of Schedule 29 to FA 2002.

135. *Subsection (4)* includes a minor change in the law. See *Change 655{jc655}* in Annex 1 and the draft commentary on clause 10{j7768E}.

136. Here is an example to illustrate the working of the provisions under review.

137. S Ltd is a company with investment business which prepares accounts for calendar years.

138. H Ltd has an asset which, if disposed of, would crystallise a chargeable gain of £2.0 million.

139. On 30 November 20X1 H Ltd acquires all of the issued share capital of S Ltd.

140. H Ltd transfers its asset to S Ltd in December 20X1. This is a no-gain/no-loss transfer under section 171 of TCGA, because S Ltd is part of H Ltd's capital gains group.

141. Later in December 20X1, S Ltd sells the asset at market value to a third party, crystallising a chargeable gain of £2.0 million.

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142. In the year to 31 December 20X1, S Ltd incurs non-trading debits and credits on intangible fixed assets amounting to £8.4 million and £4.8 million respectively – a non-trading loss on intangible fixed assets (IFA loss) of £3.6 million.

143. There is no increase in S Ltd’s capital at any material time, nor does the company’s investment business change. S Ltd does not fall foul of Chapter 3 of this Part.

144. But for Chapter 4 (and, in particular, this clause) of this Part, S Ltd would be able to use its non-trading IFA loss to shelter the gain.

145. Under clause 24{j728A10D} of this Bill, the period to 31 December 20X1 is divided into two parts – the first from 1 January to 30 November 20X1, the second from 1 to 31 December 20X1 – and these are treated as two separate accounting periods. Clause 24{j728A10D}(3) of this Bill requires amounts to be apportioned under clause 31{j728A6a} of this Bill.

146. Under row 1 in the table in clause 31{j728A6a}(2) of this Bill, S Ltd’s gains are apportioned between the two (notional) accounting periods ended 30 November 20X1 and 31 December 20X1. Because column 1 of row 1 in that table refers to “the relevant provisions” (as defined in clause 23{j728A10B} of this Bill), row 1 produces an amount for chargeable gains for the period from 1 to 31 December 20X1 after deducting allowable losses *but* after also disallowing allowable losses under Schedule 7A to TCGA.

147. If S Ltd had brought forward a non-trading IFA loss from 20X0, this would have come within row 7 of the table in clause 31{j728A6a}(2) of this Bill and would have been apportioned to the notional accounting period ending 30 November 20X1 by column 2 of that row.

148. S Ltd’s non-trading debits and credits on intangible fixed assets for the year ended 31 December 20X1 come within row 6 of that table.

149. S Ltd may, of course, have crystallised chargeable gains on other assets in transactions which do not fall foul of Schedule 7A to TCGA. For example, S Ltd may have crystallised gains on assets which it had held long before H Ltd appeared on the scene. Under column 2 of row 1 of the table, it is necessary to compare the amount in column 1 of that row with the “relevant gain” (as defined in clause 21{j7768C}(7) of this Bill).

150. Assume that in 20X1 S Ltd has the following chargeable gains and allowable losses.

Relevant gain	£2.0 million
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Other chargeable gains crystallised before the change in ownership	£0.6 million
Other chargeable gains crystallised after the change in ownership	£0.2 million
Allowable losses crystallised after the change in ownership and not caught by Schedule 7A to TCGA	-£0.3 million
Allowable losses crystallised before the change in ownership and caught by Schedule 7A to TCGA	-£0.9 million

151. First, it is necessary to consider the Schedule 7A losses. These are set against chargeable gains crystallised before the change in ownership (see section 8(1) of TCGA): £0.9 million (losses) less £0.6 million (pre-acquisition gains) = £0.3 million of pre-acquisition losses caught by Schedule 7A. These cannot be set against gains crystallised after the change in ownership – whether or not the gains are “relevant gains”.

152. The amount in column 1 of row 1 of the table in clause 31{j728A6a}(2) is then:

- The relevant gain of £2.0 million; plus
- Other chargeable gains crystallised after the change in ownership of £0.2 million; minus
- Allowable losses crystallised after the change in ownership and not caught by Schedule 7A to TCGA of £0.3 million –

a net total of £1.9 million. This compares with a relevant gain of £2.0 million.

153. Under column 2 of row 1 of the table in clause 31{j728A6a}(2) of this Bill, if the amount in column 1 of that row does not exceed the relevant gain, the whole of that amount is apportioned to the second notional accounting period being divided – in the present example, the period from 1 December 20X1 to 31 December 20X1. In the present example, the amount in column 1 of that row (£1.9 million) is greater than zero and less than the relevant gain (£2.0 million) because:

- gains other than the relevant gain are fully sheltered by allowable losses; and
- the relevant gain has been *partly* relieved by allowable losses which are *not* disallowed by Schedule 7A to TCGA.

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154. Under column 2 of row 1 of the table in clause 31 {j728A6a}(2) of this Bill, if the amount in column 1 of that row exceeds the relevant gain, the excess is apportioned to the first part of the accounting period being divided and the relevant gain is apportioned to the second part.

155. Next, it is necessary to consider this clause. If the amount apportioned to the second notional accounting period by row 1 of the table in clause 31 {j728A6a}(2) of this Bill was £nil, that would mean that gains for the period being divided would be relieved *in full* by allowable losses. In that case, there would be no need to restrict relief for the non-trading IFA loss and so there would be no need to activate this clause. Hence the hypothetical (“so much of the total profits of the relevant period as represents the relevant gain”) in subsection (4). In the present case, however, the relevant gain is greater than £nil, with the result that “profits of an accounting period ending after the change of ownership” consist, wholly or partly, of the relevant gain and there is something for subsection (4) to do.

156. First, one considers the notional accounting period from 1 January to 30 November 20X1.

157. For 20X1, S Ltd has non-trading debits on intangible fixed assets of £8.4 million and non-trading credits on intangible fixed assets of £4.8 million. Assume that the result of apportioning these debits and credits under row 6 of the table in clause 31 {j728A6a}(2) of this Bill is that S Ltd has non-trading debits of £8.3 million and non-trading credits of £4.4 million for the period from 1 January to 30 November 20X1 and non-trading debits of £0.1 million and non-trading credits of £0.4 million for the period from 1 to 31 December 20X1. This gives the result that debits exceed credits for the former period but credits exceed debits for the latter period. Although these amounts are of course fictitious, such a result could quite easily arise in practice if (a) the non-trading IFA loss was largely due to an impairment charge and (b) the developments giving rise to the impairment occurred during the earlier notional accounting period. Apportionment under row 6 of the table in clause 31 {j728A6a}(2) of this Bill could give such a result.

158. Assume that S Ltd has UK property income of £1.2 million for 20X1. This falls within row 11 of the table in clause 31 {j728A6a}(2) of this Bill. Column 2 of that row apportions £1.1 million to the period from 1 January to 30 November 20X1 and £0.1 million to December 20X1.

159. For the notional accounting period from 1 January to 30 November 20X1, S Ltd therefore has UK property income of £1.1 million and a non-trading IFA loss of £8.3 million – £4.4 million = £3.9 million. The non-trading IFA loss extinguishes the UK property income, and S Ltd has an unrelieved non-trading IFA loss of £2.8 million. This is carried forward to the notional accounting period from 1 to 31 December 20X1 under clause 721{j062935}(3) of draft Bill 5 = paragraph 35(3) of Schedule 29 to FA 2002 and treated as if it were a non-trading debit of that period. Like the source legislation (section 768E(5)(b) of ICTA), clause 27 {j7768Ea}(4) does

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not stop the unrelieved non-trading IFA loss being carried forward. And, to the extent that the relevant gain restriction does not bite, the loss thus carried forward is to be treated as a non-trading debit of the accounting period to which it is carried forward (Change 655{j7768Ea}). But, to the extent that the relevant gain restriction *does* bite, clause 27{j7768Ea}(4) (like the source legislation) stops the non-trading IFA loss being relieved.

160. The legislation needs to say whether the restriction should be:

- The amount of the unrelieved non-trading IFA loss brought forward (in the present example, £2.8 million);
- The amount of the relevant gain (in the present example, £2.0 million); or
- The amount of the relevant gain after giving relief for allowable losses (in the present example, £1.9 million).

161. Change 656{j7768Ea} brings out in subsection (2) the implication that section 768E(5)(b) of ICTA refers to section 768C(6) and (8) of that Act.

162. By implication, section 768C(8) of ICTA quantifies this restriction for the purposes of section 768E of that Act. Change 656{j7768Ea} brings this implication out in subsection (2). There are three key expressions here:

- the “amount of profits which represents the relevant gain”;
- the “amount of the relevant gain”; and
- the “amount which is included in respect of chargeable gains or, as the case may be, non-trading chargeable realisation gains”.

163. The “amount of profits which represents the relevant gain” is found under clause 22{j728A10C} of this Bill by comparing amount Y and amount Z.

164. The “relevant gain” is defined in clause 21{j7768C}(1) of this Bill, and is amount Y in clause 22{j728A10C} of this Bill. It is the gain on the asset transferred in – here, £2.0 million.

165. The “amount which is included in respect of chargeable gains or, as the case may be, non-trading chargeable realisation gains” is amount Z in clause 22{j728A10C} of this Bill. Broadly speaking, it is gains (relevant or otherwise) less allowable losses which are not disallowed by Schedule 7A to TCGA.

166. For the notional accounting period from 1 to 31 December 20X1, S Ltd has:

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- Relevant gain of £2.0 million; plus
- Other chargeable gains crystallised after the change in ownership of £0.2 million; less
- Allowable losses crystallised after the change in ownership and not caught by Schedule 7A to TCGA of £0.3 million –

ie a net amount of £1.9 million.

167. Under clause 22{j728A10C}(2) of this Bill, if “the amount of the relevant gain” does not exceed “the amount which is included in respect of chargeable gains ... for the period concerned”, then “the amount ... which represents the relevant gain” is equal to the amount of the relevant gain. “The amount of the relevant gain” will be less than “the amount which is included ...” if gains other than the relevant gain exceed allowable losses which are not disallowed by Schedule 7A to TCGA.

168. Under clause 22{j728A10C}(3) of this Bill, if “the amount of the relevant gain” is greater than “the amount which is included ...”, then “the amount ... which represents the relevant gain” is equal to “the amount which is included ...”.

169. To continue with the example of S Ltd, in this case “the amount of the relevant gain” (£2.0 million) is greater than “the amount which is included ...” (£1.9 million). Therefore, “the amount ... which represents the relevant gain” is £1.9 million.

170. In the present example, for the period from 1 to 31 December 20X1, S Ltd has:

- Chargeable gains less allowable losses (after restriction under Schedule 7A to TCGA) of £1.9 million;
- UK property income of £0.1 million;
- Non-trading IFA loss brought forward and treated as a non-trading debit of £2.8 million;
- Non-trading debits on intangible fixed assets apportioned to the period amounting to £0.1 million; and
- Non-trading credits on intangible fixed assets apportioned to the period amounting to £0.4 million.

171. Before any adjustment under this Chapter, S Ltd has a non-trading IFA loss for the 12-month period from 1 January to 31 December 20X1 of £3.6 million. Once one applies the provisions of this Chapter, S Ltd has a non-trading IFA loss for the one-month period from 1 to 31 December 20X1, and the loss brought forward as at 1 December 20X1 is taken into account in calculating this loss.

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172. A non-trading credit is not itself a gain, even though a company can have a non-trading gain on intangible fixed assets which is equal in amount to a gain (paragraph 34 of Schedule 29 to FA 2002 = clause 719[j062934] of draft Bill 5). Therefore, a non-trading credit is not itself one of the types of “profits” which can only be sheltered by relief under paragraph 35 of Schedule 29 to FA 2002 = clause 721[j062935] of draft Bill 5 to the extent that this Chapter does not bite. It is a numerical item which is calculated as part of the process of deciding (a) whether the company has a non-trading gain or a non-trading loss and (b) how much that gain or loss is. Therefore, the loss brought forward as at 1 December 20X1 is automatically deducted from the non-trading credits apportioned to the period from 1 to 31 December 20X1.

173. Therefore, in the present example, S Ltd has a non-trading IFA loss under paragraph 34 of Schedule 29 to FA 2002 = clause 719[j062934] of draft Bill 5 of £2.8 million (brought forward) plus £0.1 million (debits apportioned to the period) minus £0.4 million (credits apportioned to the period) = £2.5 million. If S Ltd had a non-trading IFA loss (a) carried forward from 20X0 and (b) not fully utilised in the notional accounting period ending 30 November 20X1, it would be treated in the same way as the unrelieved non-trading IFA loss arising in that period; since that refinement does not raise any new issue of principle, the present example does not cover it.

174. Of S Ltd’s non-trading IFA loss of £2.5 million for December 20X1, £1.9 million cannot be relieved this period, because £1.9 million “represents the relevant gain”. S Ltd has profits of £1.9 million (gains less losses) plus £0.1 million (UK property income) = £2.0 million. Therefore, S Ltd is allowed relief of £0.1 million under paragraph 35(1) of Schedule 29 to FA 2002 = clause 721[j062935](1) of draft Bill 5. The unrelieved non-trading IFA loss (including the loss for which relief has been denied under this Chapter) is carried forward again under paragraph 35(3) of that Schedule = clause 721[j062935](3) of draft Bill 5.

175. Here is the calculation of S Ltd’s profits chargeable to corporation tax for the year ended 31 December 20X1.

*S Ltd
Profits chargeable to corporation tax, 20X1*

	£m	£m	£m
Chargeable gains			
Pre-acquisition chargeable gains		0.8	
Allowable losses (within Schedule 7A to TCGA)	0.9		
Set against pre-acquisition gains	<u>-0.8</u>	<u>-0.8</u>	
			0.0
Allowable losses (within Schedule 7A) unrelieved	<u>0.1</u>		

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Relevant gain		2.0
Other post-acquisition chargeable gains		0.2
Allowable losses (outside Schedule 7A)		<u>-0.3</u>
Net chargeable gains		1.9
UK property income		<u>1.2</u>
Total profits		3.1
less: Non-trading IFA loss	3.6	
Apportioned to Jan-Nov and set against UK property income	-1.1	-1.1
Apportioned to Dec and set against profits	-0.1	-0.1
Set against profits in 20X1	-1.2	-1.2
Carried forward to 20X2 under paragraph 35(3) of Schedule 29 to FA 2002		<u>2.4</u>
Restriction in 20X1 under this Chapter		<u>1.9</u>
Profits chargeable to corporation tax		<u>1.9</u>

Clause 28{j7768Ca}: Restrictions on the deduction of expenses of management

176. This clause restricts relief for the company's expenses of management in cases in which this Chapter applies. It is based on section 768C of ICTA.

177. *Subsections (3) and (5)* refer, respectively, to clauses 1157[j2001] and 1143[j2000] of draft Bill 5, which are based on section 75 of ICTA.

178. *Subsection (4)* only operates on subsection (5). The corresponding provision in the other clauses in this group operates, in each case, on the whole clause.

Clause 29{j7768Dd}: Disallowance of UK property business losses

179. This clause restricts relief for the company's UK property business loss in cases in which this Chapter applies. It is based on section 768D of ICTA.

180. *Subsections (1), (3) and (4)* refer to clause [j4101rm] of this Bill (relief for losses made in UK property business) and subsections (1) and (4) refer to clause [j4101Arm] of this Bill (company with investment business ceasing to carry on UK property business). These clauses are based on section 392A of ICTA. See clauses 25[j4101rm] and 26[j4101Arm] in paper CC/SC (07) 38 (loss relief).

181. *Subsection (2)* makes it clear that section 768D(6)(b) of ICTA refers by implication to section 768C(6) of that Act. This clarification is a minor change in the law: see Change 656{j656} in Annex 1.

Q7. We welcome comments on the proposal to clarify in clauses 29{j7768Dd} and 30{j7768Df} the restriction imposed in certain circumstances on relief for property losses (Change 656{jc656}).

Clause 30{j7768Df}: Disallowance of overseas property business losses

182. This clause restricts relief for the company's overseas property business loss in cases in which this Chapter applies. It is based on section 768D of ICTA.

183. Section 768D(9) of ICTA has to be read as implying that, in a case in which section 768D applies in relation to an overseas property business, references to section 392A of ICTA have to be read as references to the corresponding provisions of section 392B of that Act. Otherwise section 768D of that Act will apply in such a case but will not actually do anything. *Subsections (1) and (3)* therefore refer to clause [j4102rm] of this Bill, which is based on section 392B of ICTA. See clause 29[j4102rm] in paper CC/SC (07) 38 (loss relief).

184. *Subsection (2)* includes a minor change in the law. See Change 656{jc656} and the draft commentary on clause 29{j7768Dd} of this Bill.

Clause 31{j728A6a}: Apportionment of amounts

185. This clause stipulates how various amounts are to be apportioned for the purposes of this Chapter. It is based on section 768C of ICTA and paragraphs 13 to 17 of Schedule 28A to that Act.

186. The source legislation obliges the reader to tally sub-paragraphs of paragraph 13(1) of Schedule 28A to ICTA with sub-paragraphs of paragraphs 15 and 16(1) of that Schedule. This is inconvenient, as the sub-paragraphs are not always in one-to-one correspondence and the legislation has been amended several times. Paragraphs 13(1), 15 and 16(1) of that Schedule have therefore been rewritten in *subsection (2)* as a two-column table.

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187. Detailed comments on the table are given below.

Row	Origin	Comments
1	Paragraphs 13(1)(a) and 15 of Schedule 28A to ICTA	
2 and 3	Paragraphs 13(1)(ea) and 16(1)(c) of that Schedule.	The opportunity has been taken to deal with profits and deficits separately.
4	Paragraphs 13(1)(eb) and 16(1)(d) and (e) of that Schedule.	
5	Paragraphs 13(1)(ec) and 16(1)(b) of that Schedule.	Row 5 refers to clause 444[j069684] of draft Bill 5, which is based on section 83(3A) of, and paragraph 4 of Schedule 8 to, FA 1996.
-	Paragraphs 13(1)(ed) and 16(1)(f) of that Schedule will not be rewritten, because Bill 5 will repeal them as spent.	
6	Paragraphs 13(1)(ee) and 16(1)(g) of that Schedule.	Row 6 refers to clause 719[j062934] of draft Bill 5, which is mainly based on paragraph 34 of Schedule 29 to FA 2002.
7	Paragraphs 13(1)(ef) and 16(1)(h) of that Schedule.	Row 7 refers to clause 721[j062935] of draft Bill 5, which is mainly based on paragraph 35 of Schedule 29 to FA 2002.
8	Paragraphs 13(1)(b) and 16(1)(a) of that Schedule.	
-	Paragraphs 13(1)(c) and 16(1)(aa) of that Schedule will be repealed as spent; see the draft commentary on Schedule 3 of this Bill.	

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Row	Origin	Comments
9	Paragraphs 13(1)(d) and 16(1)(b) of that Schedule.	Row 9 refers to clause 1147[j2002] of draft Bill 5, which is based on section 75(8) and (9) of ICTA.
10	Paragraphs 13(1)(e) and 16(1)(c) of that Schedule	Row 10 refers to clause 1157[j2001] of draft Bill 5, which is based on section 75(7) of ICTA.
11	Paragraphs 13(1)(f) and 16(1)(c) of that Schedule.	

Q8. We welcome comments on the proposal to rewrite paragraphs 13(1), 15 and 16(1) of Schedule 28A to ICTA as a two-column table.

188. The numerical example in the draft commentary on clause 27{j7768Ea} of this Bill illustrates the operation of this clause.

Clause 32{j728A7c}: Meaning of certain expressions in section 31{j728A6a}

189. This clause supplements clause 31{j728A6a} of this Bill. It is based on paragraphs 13, 13A and 16 of ICTA.

190. *Subsection (2)* refers to clause 308[j061080] of draft Bill 5, which rewrites the Schedule D Case III charge on non-trading profits arising from loan relationships.

191. *Subsection (4)* refers to clauses 378[j069692], 416[j0696917] and 418[j0696918] of draft Bill 5, which are based on paragraphs 2, 17 and 18 respectively of Schedule 9 to FA 1996.

192. *Subsection (6)* refers to clause 1143 [j2000] of draft Bill 5, which is based on section 75 of ICTA.

Chapter 5: Company without investment business: disallowance of property losses

Overview

193. Chapter 5 is the fourth of four Chapters dealing with various kinds of loss buying.

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Clause 33{j7768Da}: Company carrying on UK property business

194. This clause restricts relief for UK property losses in cases in which this Chapter applies. It is based on section 768D of ICTA.

195. *Subsections (1) to (3)* lay down the conditions for the clause to apply.

196. *Subsection (4)* states the purpose of the clause. In subsection (4), “the company” has the meaning given by subsection (1).

197. *Subsection (5)* deems the accounting period in which the change of ownership occurs to be two separate accounting periods. The profits or losses of the actual accounting period must then be apportioned to the two notional accounting periods in accordance with *subsections (6) and (7)*.

198. *Subsections (8) and (9)* set out the consequences of this apportionment.

199. *Subsection (10)* defines “major change in the nature or conduct of a trade or UK property business”.

200. Subsections (4), (8) and (9) refer to clause [j4101rm] of this Bill (relief for losses made in UK property business). This clause is based on section 392A of ICTA. See clause 25[j4101rm] in paper CC/SC (07) 38 (loss relief).

Clause 34{j7768Db}: Company carrying on overseas property business

201. This clause restricts relief for the company’s overseas property business loss in cases in which this Chapter applies. It is based on section 768D of ICTA, and has a similar structure to clause 33{j7768Da} of this Bill.

202. Section 768D(9) of ICTA has to be read as implying that, in a case in which section 768D applies in relation to an overseas property business, references to section 392A of ICTA have to be read as references to the corresponding provisions of section 392B of that Act. Otherwise section 768D of that Act will apply in such a case but will not actually do anything. *Subsections (4) and (8)* therefore refer to clause [j4102rm] of this Bill, which is based on section 392B of ICTA. See clause 29[j4102rm] in paper CC/SC (07) 38 (loss relief).

203. Section 768D(5) of ICTA can have no application in relation to an overseas property business, and is therefore not rewritten in this clause.

Chapter 6: Recovery of unpaid corporation tax

Overview

204. This Chapter is based on sections 767A to 767B of ICTA.

205. Sections 767A and 767B of ICTA were introduced by FA 1994 to counter the use of company purchase schemes to avoid the payment of corporation tax. In a typical case a profitable company is stripped of its trade or business, usually by way

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of transfer to another member of its group, leaving it only with sufficient cash to settle its outstanding corporation tax. The company is then sold – for a sum equivalent to a proportion of the tax outstanding – to a third party (often non-resident) who arranges for the company to participate in arrangements intended to eliminate the tax liability. On the assumption that the arrangements will be successful, the new owner then arranges for the cash to be withdrawn.

206. If the avoidance arrangements are effective, the company has no corporation tax to pay. But if they are found to be ineffective, HMRC will have little or no prospect of collecting the unpaid tax from the company, because the company will have been left with no funds. Sections 767A and 767B of ICTA enable HMRC to collect the unpaid corporation tax from a person linked with the company as mentioned in section 767A(2).

207. Subsequently alternative schemes were developed that attempted to find ways around sections 767A and 767B of ICTA. For example, as sections 767A and 767B of ICTA only applied to tax liabilities for accounting periods beginning before the change in ownership, the new schemes ensured that the tax liability crystallised in an accounting period beginning after that date. They did this by using provisions such as rollover relief that postponed the tax charge or other provisions that involved income or gains being taxed in periods other than that in which they accrued. Section 767AA of ICTA was introduced by FA 1998 to block such schemes. If it bites, HMRC is able to collect the unpaid corporation tax from a person linked with the company as mentioned in section 767AA(4).

208. This Chapter has the following structure.

- Clauses 35{j7767Ad} to 38{j7767Aj} define some key expressions for the purposes of the Chapter.
- Clauses 39{j7767Aa} to 41{j7767Bc} enable HMRC to recover unpaid corporation tax for an accounting period beginning before the change in ownership. They are based on sections 767A and 767B of ICTA.
- Clauses 42{j7767AAa} to 44{j7767AAd} enable HMRC to recover unpaid corporation tax for an accounting period ending on or after the change in ownership. They are based on section 767AA of ICTA.
- Clauses 45{j7767Ba} to 47{j7767Cd} are miscellaneous provisions.

Clause 35{j7767Ad}: Meaning of “linked” person

209. This clause explains when a person is “linked” to a company for the purposes of this Chapter of the Bill. It is based on sections 767A and 767AA of ICTA.

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210. If the statutory conditions are met, such a person may be assessed and charged to an amount of unpaid corporation tax under clause 39{j7767Aa}(2) or, as the case may be, clause 42{j7767AAa}(2) of this Bill.

Clause 36{j7767Bb}: Meaning of “control”

211. This clause defines “control” for the purposes of this Chapter of the Bill. It is based on section 767B of ICTA.

212. Section 767B(4) and (5) of ICTA adopt, with modifications, the definition of “control” in section 416 of that Act. Section 416 of ICTA is also being rewritten in this Bill. Care is being taken to ensure that sections 416 and 767B(4) and (5) are rewritten consistently. Draft clauses rewriting section 416 will be published for consultation in due course. Meanwhile, detailed comments are not sought on this clause or the next, which rewrite sections 767B(4) and (5).

213. *Subsection (6)* refers to clauses [j7417c] and [j7417] of this Bill. These clauses have not yet been published. Clause [j7417c] is based on section 417(7) to (9) of ICTA and clause [j7417] is based on section 417(1) and (2) of that Act.

Clause 37{j7767Bb1}: Rights to be attributed for the purposes of section 36{j7767Bb1}

214. This clause supplements clause 36{j7767Bb}. It is based on section 767B of ICTA.

215. *Subsection (7)* refers to clauses [j7417a] and [j7417] of this Bill. These clauses have not yet been published. Clause [j7417a] is based on section 417(3) and (4) of ICTA and clause [j7417] is based on section 417(1) and (2) of that Act.

Clause 38{j7767Aj}: Meaning of “the relevant period”

216. This clause defines “the relevant period” for the purposes of this Chapter of the Bill. It is based on sections 767A and 767AA of ICTA.

217. *Subsection (3)* sets an exception to the general rule laid down by *subsection (2)*. Suppose A sells a company to B without intending to avoid tax and B enters into a company purchase scheme with C: B may be liable under this Chapter but A may not. The rationale is that A can be expected to ensure, when selling the company to B, that B does not behave in a way which would trigger this Chapter, but A cannot be expected to ensure that B does not enter into arrangements with C whereby C triggers this Chapter. *Subsection (3)* begins “But if ...” to make it clear that *subsection (2)* is subject to *subsection (3)*.

Clause 39{j7767Aa}: Recovery of unpaid corporation tax for accounting period beginning before change

218. This clause enables an officer of Revenue and Customs to assess and charge a linked person to an amount of unpaid corporation tax for an accounting period

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beginning before the change in the ownership of a company. It is based on section 767A of ICTA.

219. Section 767A(1) of ICTA gives this assessment function to “the Board”, ie to the Commissioners for Her Majesty’s Revenue and Customs. In practice, the Commissioners delegate this function to officers of Revenue and Customs, and *subsections (1) and (2)* reflect this. This is a minor change in the law. See *Change 601{j77601}* in Annex 1. In practice, the administration of sections 767A to 767C of ICTA is restricted to a specialist group of officers. Change 601{j77601} will have no effect on this practice.

220. Like the source legislation, subsection (2) provides that “[a person]... *may* be assessed ...”. This gives officers the power, but not the obligation, to assess linked persons, and therefore allows HMRC to exercise managerial discretion.

Q9. We welcome comments on the proposal to give officers of Revenue and Customs the function of making assessments under clause 39{j7767Aa} (Change 601{j77601}).

Clause 40{j7767Ab}: Conditions relating to company’s trade or business

221. This clause lists three conditions which relate to the company’s trade or business; if none of these conditions is met, clause 39{j7767Aa} does not apply. This clause is based on sections 767A and 767B of ICTA.

222. This Bill will rewrite section 839 of ICTA (connected persons), and will include a provision applying the rewritten section 839 throughout the Bill unless otherwise indicated. See section 1021(1) of ITA. Unlike section 767B(9) of ICTA, therefore, *subsection (5)* does not specifically apply the definition of “connected persons” in section 839 of that Act.

Clause 41{j7767Bc}: Meaning of “a major change in the nature or conduct of a trade or business”

223. This clause defines “a major change in the nature or conduct of a trade or business” for the purposes of clause 40{j7767Ab} of this Bill. It is based on section 767B of ICTA.

224. Section 767B(7) of ICTA refers to section 245 of that Act. In repealing section 245 of ICTA, FA 1998 inadvertently omitted to make the necessary consequential amendment to section 767B(7) of that Act.

225. As it stood before its repeal, section 245(4)(a) of ICTA read:

“In subsection (1) above “a major change in the nature or conduct of a trade or business” includes –

- (a) a major change in the type of property dealt in, or services or facilities provided, in the trade or business; or

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- (b) a major change in customers, outlets or markets of the trade or business; or
- (c) a change whereby the company ceases to be a trading company and becomes an investment company or vice versa; or
- (d) where the company is an investment company, a major change in the nature of the investments held by the company.”

226. Before its repeal, section 245(5) of ICTA defined “trading company” and “investment company” for the purposes of that section:

“ “trading company” means a company whose business consists wholly or mainly of the carrying on of a trade or trades and

“investment company” means a company (other than a holding company) whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom;

“holding company” means a company whose business consists wholly or mainly in the holding of shares or securities of companies which are its 90 per cent subsidiaries and which are trading companies.”

227. Departmental practice in applying section 767B(7) of ICTA has not changed since 1998.

228. If the repeal of section 245(4) of ICTA repealed section 767B(7) of that Act by implication, then it enabled the taxpayer to argue that a change which used to be mentioned in section 245(4) was not necessarily a major change in the nature or conduct of a trade or business.

229. Section 245 of ICTA was one of a number of provisions repealed by Schedule 3 to FA 1998 as part of the abolition of advance corporation tax (ACT). It would be anomalous if, as part of the abolition of ACT, Parliament implicitly repealed section 767B(7) of ICTA and thereby weakened section 767A of that Act. It would be particularly anomalous if Parliament did this in FA 1998, since FA 1998 inserted section 767AA of ICTA to catch schemes which section 767A of that Act did not. In statutory interpretation, there is a presumption that Parliament wishes to avoid an anomalous result. It is therefore considered that the repeal of section 245 of ICTA did not by implication repeal section 767B(7) of that Act.

230. Accordingly, this clause draws on section 245 of ICTA (repealed) to rewrite section 767B(7) of ICTA.

Clause 42{j7767AAa}: Recovery of unpaid corporation tax for accounting period ending on or after change

231. This clause enables an officer of Revenue and Customs to assess and charge a linked person to an amount of unpaid corporation tax for an accounting period ending

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on or after the change in the ownership of a company. It is based on section 767AA of ICTA.

232. Section 767AA(1) of ICTA gives this assessment function to “the Board”, ie to the Commissioners for Her Majesty’s Revenue and Customs. In practice, the Commissioners delegate this function to officers of Revenue and Customs, and *subsections (1) and (2)* reflect this. This is a minor change in the law. See *Change 601{j77601}* in Annex 1. In practice, the administration of sections 767A to 767C of ICTA is restricted to a specialist group of officers; *Change 601{j77601}* will have no effect on this practice.

233. Like the source legislation, subsection (2) provides that “[a person]... *may* be assessed ...”. This gives officers the power, but not the obligation, to assess linked persons, and therefore allows HMRC to exercise managerial discretion.

Q10. We welcome comments on the proposal to give officers of Revenue and Customs the function of making assessments under clause 42{j7767AAa} (Change 601{j77601}).

234. For the sake of consistency, subsection (1)(b) has been brought into line with clause 39{j7767AAa}(1)(b) of this Bill.

Clause 43{j7767AAb}: The expectation condition

235. This clause spells out the expectation condition mentioned in clause 42{j7767AAa}(1)(d). It is based on section 767AA of ICTA.

236. *Subsection (2)* omits as otiose “either or both of” in section 767AA(2) of ICTA.

237. In *subsection (4)(a)*, the parenthesis warns the reader that “an associated company” is not necessarily the associated company mentioned in clause 42{j7767AAa}(1)(b) of this Bill. Which company in a group has a corporation tax liability may depend on (for example) how the group allocates its group relief.

Clause 44{j7767AAc}: Meaning of “transaction entered into in connection with change in ownership”

238. This clause defines “transaction entered into in connection with change in ownership” for the purposes of clause 43{j7767AAb} of this Bill. It is based on section 767AA of ICTA.

Clause 45{j7767BA}: Interest on overdue tax

239. This clause imposes interest on tax which has been assessed under clause 39{j7767AAa} or clause 42{j7767AAa} of this Bill and is overdue. It is based on section 767B of ICTA.

Clause 46{j7767Bd}: Effects of payment in pursuance of assessment under section 39{j7767Aa} or 42{j7767AAa}

240. This clause is about the effects of payment in pursuance of an assessment under clause 39{j7767Aa} or 42{j7767AAa} of this Bill. It is based on section 767B of ICTA.

241. *Subsection (1)* disallows such a payment. *Subsection (2)* gives the maker of such a payment a right of recovery.

Clause 47{j7767Cd}: Meaning of “associated company”

242. This clause defines “associated company” for the purposes of clauses 42{j7767AAa} and 43{j7767AAb} of this Bill. It is based on section 767AA of ICTA.

Chapter 7: Meaning of “change in the ownership of a company”

Overview

243. This Chapter defines “change in the ownership of a company” for the purposes of this Part of the Bill. It applies both for the purposes of Chapters 2 to 5 (restriction of corporation tax reliefs) and for the purpose of Chapter 6 (recovery of unpaid corporation tax).

244. This Chapter is based on section 769 of ICTA. Section 769 of ICTA does not expressly mention section 768E of that Act, but it is considered that the references in section 769 of ICTA to sections 768B and 768C of that Act include by implication references to section 768E of that Act.

Clause 48{j7769}: Meaning of “change in the ownership of a company”

245. This clause gives the basic definition of “change in the ownership of a company” for the purposes of this Part of the Bill. It is based on section 769 of ICTA.

246. Section 769(1)(a) of ICTA is satisfied “if a single person acquires more than half the ordinary share capital of the company”. This raises the question: is this a reference to acquiring:

- An additional holding (A);
- The existing holding (X);
- The total holding after the acquisition ($T = A + X$); or
- T, but only if $X < 50\%$?

247. Section 769(1)(a) of ICTA cannot be read as referring to the acquisition of X. Otherwise, a person who held more than 50% of the ordinary share capital and did not acquire any more shares would “acquire more than half the ordinary share capital”. As a matter of normal English usage, “acquires” cannot imply that.

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248. Section 769(1)(a) of ICTA cannot be read as referring to the acquisition of T, whether or not X<50%. According to Bramwell et al.:³

“If one person owns 50 per cent. of a company’s shares and then buys 1 per cent. more, he does not thereby “acquire more than half” of the shares – he acquires 1 per cent. [Section 769(1)(b) and (c) of ICTA] refers to any number of persons acquiring holdings of shares that together amount to more than half of the ordinary shares in a company, but [section 769 (1)(c)] makes it clear that acquired holdings must be distinguished from existing holdings.”

249. It is considered that Bramwell et al. are correct on this point, because:

- There is no indication that “acquire” has to have a different scope in section 769(1)(a) and (c) of ICTA;
- Since Parliament has not said “acquires *a total of* more than half the ordinary share capital” it is not legitimate for any such words to be read in; and
- Section 769(2)(b) of ICTA says “... may be regarded as having acquired a percentage holding *equal to the increase*” (emphasis added).

250. The acquisition of “more than half the ordinary share capital” in section 769(1)(a) of ICTA is therefore a reference to the acquisition of the additional holding, A. Accordingly, to sharpen the drafting, *subsection (2)* expressly refers to the acquisition of “a holding of more than half the ordinary share capital”.

251. Section 769(1)(c) of ICTA says “less than 5 per cent”. *Subsection (5)* corrects this typo.

252. “Ordinary share capital” in section 769(1) of ICTA has the meaning given by section 832(1) of that Act. This Bill will rewrite that definition.

**Clause 49{j7769e}: Meaning of “change in the ownership of a company”:
supplementary**

253. This clause supplements clause 51{j7769} of this Bill. It is based on section 769 of ICTA.

254. This Bill will rewrite section 839 of ICTA (connected persons), and will include a provision applying the rewritten section 839 throughout the Bill unless otherwise indicated. Cf. section 1021(1) of ITA. Unlike section 769(2)(c) of ICTA, therefore, *subsection (4)* does not specifically apply the definition of “connected persons” in section 839 of that Act.

³ Bramwell et al. *Taxation of Companies and Company Reconstructions* (Thomson, Sweet & Maxwell, November 2002) paragraph A 9.2.7 footnote 3.

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255. Section 769(2)(d) of ICTA has the expression “under the will or on the intestacy of a deceased person”.. The words “of a deceased person” add nothing and so *subsection (5)* compresses that expression to “under a will or on intestacy”.

Clause 50{j7769k}: Cases where things other than ordinary share capital may be taken into account for the purposes of Chapters 2 to 5

256. This clause allows other interests in a company, such as voting power attaching to shares, to be taken into account in determining whether there has been a change in ownership. It applies in cases when applying the “ordinary share capital” test in clause 51{j7769} of this Bill would give anomalous results. It is based on section 769 of ICTA.

257. Section 769(3) of ICTA has the long-winded expression “under the articles of association or under any other document regulating the company”. *Subsection (2)* compresses this to “under any document regulating the company”. It cannot be credibly maintained that the articles of association of a company are not a document regulating it.

258. Section 769(3) of ICTA uses the old-fashioned term “enure”. In response to representations, the term “enure” was retained in section 723(1) of ITA (transfer of assets abroad: charge where power to enure income: enjoyment conditions). It has therefore also been retained in *subsection (3)*.

259. Section 769(3) of ICTA uses the long-winded expression “all kinds of share capital, including preference shares,”. *Subsection (4)(a)* compresses this to “all kinds of share capital”. It cannot be credibly maintained that preference shares are not share capital. Indeed, preference shares are the obvious example of shares which might not be “ordinary share capital”.

Clause 51{j7769f}: Cases in which things other than ordinary share capital may be taken into account for the purposes of Chapter 6

260. In cases when applying the “ordinary share capital” test in clause 51{j7769} of this Bill would give anomalous results, this clause allows other interests in a company, such as voting power attaching to shares, to be taken into account in determining whether there has been a change in ownership. It is based on section 769 of ICTA.

261. This clause has the same function as clause 50{j7769k} of this Bill, and so their drafting is, as far as possible, identical. But the clauses have not been merged, because *subsection (3)* and clause 50{j7769k}(3) set different conditions for the clauses to apply.

Clause 52{j7769h}: Changes in indirect ownership

262. This clause extends the basic rule about changes in company ownership in clause 48{j7769} of this Bill. It is based on section 769 of ICTA.

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263. The basic rule in clause 48{j7769} of this Bill only relates to the direct ownership of a company. It does not capture a change in the ultimate ownership of a company, so this clause contains additional rules for groups of companies.

Clause 53{j7769g}: Disregard of change in company ownership

264. This clause excludes certain changes in company ownership from the scope of Chapters 2 to 6 of this Part of the Bill. It is based on section 769 of ICTA.

Clause 54{j7769i}: Provision applying for the purposes of Chapters 2 to 5

265. This supplementary clause is based on section 769 of ICTA.

266. *Subsection (2)* is a “tie-breaker” provision, to deal with shareholdings being acquired piecemeal.

267. *Subsections (3) to (6)* explain how the three-year maximum in clause 49{j7769e}(2) of this Bill is to be applied in cases involving (for example) options or contracts for future delivery.

Clause 55{j7769j}: Interpretation

268. This interpretative clause is based on section 769 of ICTA.

Chapter 8: Supplementary provision

Clause 56{j7768v}: Extended time limit for assessment

269. This clause extends the time limit for assessments giving effect to the provisions of Chapters 2 to 6 of this Part of the Bill. It is based on sections 768 to 768E of ICTA.

Clause 57{j7768u}: Provision of information about ownership of shares etc

270. This clause enables officers of Revenue and Customs to obtain information about the ownership of shares, stock and securities for the purposes of this Part of the Bill. It is based on sections 767B and 768 to 768E of ICTA.

Clause 58{j7768t}: Meaning of “company with investment business”

271. This clause defines “company with investment business” for the purposes of this Part of the Bill. It is based on sections 768B to 768E of ICTA.

272. This clause refers to clause 1142[j2000A](1) of draft Bill 5, which is based on section 130 of ICTA.

Clause 59{j728A11}: Meaning of “relevant non-trading debit”

273. This clause defines “relevant non-trading debit” for the purposes of clauses 8{j728A9} and 25{j728A10} of this Bill. It is based on paragraphs 11 and 12 of Schedule 28A to ICTA.

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274. *Subsections (3)(b) and (4)(c)* refer to clauses 416[j0696917] and 418[j0696918] of draft Bill 5, which are based on paragraphs 17 and 18 respectively of Schedule 9 to FA 1996.

275. *Subsections (3)(c) and (4)(b)* refer to clause 378[j069692] of draft Bill 5, which is based on paragraph 2 of Schedule 9 to FA 1996.

276. Bill 5 will repeal paragraph 11(2) of Schedule 28A to ICTA as spent. It is therefore not rewritten in this clause.

Part 2: Corporation tax liability: miscellaneous rules

Chapter 1: Recovery of unpaid corporation tax due from non-UK resident company

Overview

277. This Chapter enables unpaid corporation tax due from a non-UK resident company to be recovered from a related company.

Clause 60{j7281}: Overview of Chapter

278. This clause introduces the Chapter and defines “company” for the purposes of clauses 63{j7281}(1) and (4) and 64{j7281a} to 70{j7286} of this Bill. It is based on paragraph 6 of Schedule 28 to FA 2000.

Clause 61{j7281a}: Case in which this Chapter applies

279. This clause states when this Chapter of the Bill applies. It is based on paragraph 1 of Schedule 28 to FA 2000.

280. *Subsection (2)* defines “the taxpayer company” for the purposes of this Chapter.

Clause 62{j7282a}: Meaning of “the relevant period”

281. This clause defines “the relevant period” for the purposes of this Chapter. It is based on paragraph 2 of Schedule 28 to FA 2000.

Clause 63{j7282}: Meaning of “related company”

282. This clause defines “related company” for the purposes of this Chapter. It is based on paragraph 2 of Schedule 28 to FA 2000.

Clause 64{j7283}: Notice requiring payment of unpaid tax

283. This clause enables an officer of Revenue and Customs to serve notice on a related company requiring it to pay unpaid corporation tax due from the taxpayer company. It is based on paragraph 3 of Schedule 28 to FA 2000.

284. Paragraph 3(1) of Schedule 28 to FA 2000 gives “the Board”, ie the Commissioners for Her Majesty’s Revenue and Customs the power to serve notice to pay unpaid corporation tax due from the taxpayer company. In practice, the Commissioners delegate this function to officers of Revenue and Customs, and

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subsection (1) reflects this. This is a minor change in the law without any practical implications; see *Change 601{j7283}* in Annex 1.

285. Like the source legislation, *subsection (1)* provides that an officer "... *may* serve a notice ...". This gives officers the power, but not the obligation, to serve notice on related companies, and therefore allows HMRC to exercise managerial discretion.

Q11. We welcome comments on the proposal to give officers of Revenue and Customs the power to serve notices under clause 67{j7283} (Change 601{j7283}).

Clause 65{j7284}: Time limit for giving notice

286. This clause sets the time limit for giving notice under clause 67{j7283} of this Bill. It is based on paragraph 4 of Schedule 28 to FA 2000.

287. Paragraph 4(3)(d) of Schedule 28 to FA 2000 says: "if ... the Inland Revenue amend the return ...". In this context, "the Inland Revenue" is not expressly defined; however, the reference is to amendment under paragraph 34(2) of Schedule 18 to FA 1998. As originally enacted, paragraph 34(2) of that Schedule referred to amendments being made by "the Inland Revenue", which was defined in paragraph 95(1) of that Schedule to mean any officer of the Board; by implication, therefore, "the Inland Revenue" in paragraph 4(3)(d) of Schedule 28 to FA 2000 had the same meaning. Paragraph 68(a) and (b) of Schedule 4 to CRCA (a) substituted "an officer of Revenue and Customs" for "the Inland Revenue" in paragraph 34(2) of Schedule 18 to FA 1998 and (b) consequentially repealed paragraph 95 of that Schedule. Also section 50(2) of CRCA provided that any reference in an enactment (however expressed) to an officer of the Board was to be taken as a reference to an officer of Revenue and Customs. By implication, therefore, CRCA substituted "an officer of Revenue and Customs" for "the Inland Revenue" in paragraph 4(3)(d) of Schedule 28 to FA 2000. Therefore, in rewriting paragraph 4(3)(d) of that Schedule, *subsection (3)(d)* explicitly refers to "an officer of Revenue and Customs".

Clause 66{j7285}: Amount payable in consortium case

288. This clause determines for the purposes of clause 67{j7283}(1)(b) of this Bill the amount payable in a consortium case. It is based on paragraph 5 of Schedule 28 to FA 2000.

289. In paragraph 5(1) of Schedule 28 to FA 2000, the words "limited to" merely repeat the point that the amount to be charged in a consortium case is "the appropriate proportion" in paragraph 3(1)(b) of that Schedule. *Subsection (1)* therefore omits them as otiose.

290. *Subsection (5)* refers to the Chapter of this Bill on equity holders and profits and assets available for distribution which is based on Schedule 18 to ICTA, and to clauses [j4807rm] and [j4807AArm] of this Bill, which are based on section 403C of

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that Act. See Chapter 6 and clauses 47[j4807rm] and 48[j4807AArm] of the draft clauses in paper CC/SC (07) 27 (group relief).

Clause 67{j7286}: Supplementary provision

291. This supplementary clause is based on paragraph 6 of Schedule 28 to FA 2000.

292. For the sake of consistency with clause 46{j7767Bd}(1) of this Bill, *subsection (2)* refers not only to income and profits but also to losses. This verbal change will have no substantive effect.

Schedule 3: Repeals

293. Repeals arising from the rewrite of the provisions about changes in company ownership and recovery of unpaid corporation tax will be published as part of the draft Bill. Meanwhile, the opportunity has been taken to note that the following provisions will be repealed without replacement.

Section 767B(1) and (3) of ICTA

294. Section 767B(1) and (3) of ICTA refer to section 86 of TMA (interest on overdue tax) in so far as it has effect in relation to accounting periods ending on or before 30 September 1993. These references are spent.

Section 768A(3) of ICTA

295. Section 768A(3) of ICTA is the commencement provision for that section. It is spent.

Section 768B(7) and (9)(b) of ICTA and paragraphs 6(b), 7(1)(aa), 13(1)(c) and 16(1)(aa) of Schedule 28A to that Act

296. Under paragraph 6(b) of Schedule 28A to ICTA, the amounts to be apportioned between notional accounting periods in section 768B(4)(c) of ICTA include excess business charges.

297. Paragraph 7(1)(aa) of Schedule 28A to ICTA states how the apportionment of excess business charges is to be made.

298. Section 768B(7) and (9)(b) of ICTA states how the apportioned charges are to be treated for the purposes of sections 75 and 338 of that Act.

299. Paragraphs 13(1)(c) and 16(1)(aa) of Schedule 28A to ICTA are the provisions corresponding to paragraphs 6(b) and 7(1)(aa) of that Schedule which apply in a case which comes within section 768C, rather than section 768B, of that Act.

300. The “charges” in section 768B(7) and (9)(b) of ICTA and paragraphs 6(b), 7(1)(aa), 13(1)(c) and 16(1)(aa) of Schedule 28A to that Act are charges on income. The scope of corporation tax relief for “charges on income” has

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been progressively cut down, and nowadays only charitable donations can rank as charges: see section 338A of ICTA.

301. To come within paragraph 6(b) or paragraph 13(1)(c) of Schedule 28A to ICTA, a payment must meet three conditions.

- It must be a charitable donation within section 338A(2)(a) or (b) of that Act.
- It must be wholly and exclusively for the purposes of the company's business.
- It must not be deductible in computing profits or any description of profits for the purposes of corporation tax (for example, as an expense of management within section 75 of that Act). See section 338A(3) of that Act.

302. It is not considered possible for a payment to meet all three of those conditions. Section 768B(7) and (9)(b) of ICTA and paragraphs 6(b), 7(1)(aa), 13(1)(c) and 16(1)(aa) of Schedule 28A to that Act are therefore obsolete.

Paragraph 11(4) of Schedule 28A to ICTA

303. Paragraph 11(4) of Schedule 28A to ICTA defines "post-change accounting period" for the purposes of that paragraph. This expression no longer appears in that paragraph, therefore paragraph 11(4) of that Schedule is now otiose.

Annex 1

Change 601{j7767Aa}: References to "officer of Revenue and Customs": clauses 39{j7767Aa}, 42{j7767Aa} and 64{j7283}

This change replaces references to the "Board of Inland Revenue" in the source legislation with references to "an officer of Revenue and Customs".

[The paragraph of the change note about the income and corporation tax codes is not reproduced here.]

References in the source legislation to the "Board of Inland Revenue" are treated by section 50(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) as references to "the Commissioners for Her Majesty's Revenue and Customs". The rest of this note accordingly refers to the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") rather than to the Board of Inland Revenue.

The provisions affected by this change will in future authorise or require things to be done by or in relation to an officer of Revenue and Customs rather than by or in relation to the Commissioners. This reflects the way in which Her Majesty's Revenue and Customs is organised and operates in practice. Section 13 of CRCA allows nearly all functions conferred on the Commissioners to be exercised by any officer. All of the functions affected by this change, which are in the main concerned with

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administrative processes, are in fact exercised by officers of the Commissioners, and the Commissioners themselves are not personally involved in their exercise.

[The paragraph of the change note about claims and elections is not reproduced here.]

Each provision affected by the conversion of references to the Commissioners will be identified in the Table of Origins by a cross-reference to this change.

This change has no implications for the amount of tax due, who pays it or when. It affects (in principle and in practice) only administrative matters.

Change 655{j655}: Changes in company ownership: company with investment business: restriction on relief for non-trading loss on intangible fixed assets: clauses 10{j7768E} and 27{j7768Ea}

This change clarifies the restriction imposed by section 768E of ICTA, when there is a change in the ownership of a company with investment business, on relief for a non-trading loss on intangible fixed assets.

If there is a change in the ownership of a company with investment business, and the relevant conditions are met, section 768E of ICTA has effect to prevent relief being given for a non-trading loss on intangible fixed assets incurred before the change of ownership against profits arising after that change.

In particular, section 768E(5) of ICTA provides that a loss made in any accounting period beginning before the change of ownership may not be set off against profits under paragraph 35(3) of Schedule 29 to FA 2002. Paragraph 35(3) of Schedule 29 to FA 2002 is being rewritten in clause [721][j062935](3) of [draft Bill 5] and [Bill 5] will consequentially amend section 768E(5) of ICTA.

However, an unrelieved non-trading loss on intangible fixed assets is not, as such, set against profits. Paragraph 35(3) of Schedule 29 to FA 2002, so far as relevant, says:

“To the extent that the loss is not set off ... it is carried forward to the next accounting period of the company and treated as if it were a non-trading debit of that period.”

Section 768E(5) of ICTA blurs the distinction between:

- calculating the company’s aggregate non-trading gain or loss under paragraph 34 of Schedule 29 to FA 2002; and
- setting a non-trading loss against profits under paragraph 35(1) of that Schedule.

Section 768E(5) uses wording derived from paragraph 35(1) of Schedule 29 to FA 2002; it does not reflect paragraph 35(3).

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The purpose of section 768E of ICTA is set out in section 768E(1) of that Act. It is therefore considered that the courts would adopt a rectifying construction of section 768E(5) of that Act in order to restrict relief which would otherwise be given under paragraph 35(3) of Schedule 29 to FA 2002.

Accordingly, clauses 10{j7768E}(3) and 27{j7768Ea}(4) of this Bill (which are based on section 768E(5)(a) and (b) respectively of ICTA) reflect the wording of paragraph 35(3) of Schedule 29 to FA 2002 and clause [721][j062935](3) of [draft Bill 5]. This has different effects in the context of clauses 10{j7768E}(3) and 27{j7768Ea}(4) of this Bill. In a case within clause 10{j7768E}(3), profits arising after the change in ownership cannot be sheltered at all. In a case within clause 27{j7768Ea}(4) of this Bill, the extent to which profits arising after the change in ownership can be sheltered is restricted. This reflects the differing wording of section 768E(5)(a) and (b) of ICTA: “profits” and “so much of those profits”.

This is a change in the law, in that it will prevent taxpayers arguing for an alternative interpretation.

This change is adverse to taxpayers in principle. But it is expected to have no practical effect as it is in line with generally accepted practice.

Change 656{j7768Ea}: Changes in company ownership: company with investment business: asset transferred within group: restriction on reliefs for non-trading loss on intangible fixed assets and property losses: clauses 27{j7768Ea}, 29{j7768Dd} and 30{j7768Df}

This change clarifies the restrictions imposed by sections 768D and 768E of ICTA on relief for, respectively, property losses and non-trading losses on intangible fixed assets when there is a change in the ownership of a company with investment business and an asset is transferred within the corporate group of which that company is a member.

If there is a change in the ownership of a company with investment business, and section 768C of ICTA (deductions: asset transferred within group) applies, sections 768D and 768E of ICTA have effect to prevent relief being given for, respectively, property losses and non-trading losses on intangible fixed assets incurred before the change of ownership against profits arising after that change.

Sections 768D(6)(b) and 768E(5)(b) of ICTA quantify this restriction by reference to the amount of profits which “represents the relevant gain within the meaning of [section 768C of that Act]”, but they do not expressly define this technical expression.

However, sections 768D(6)(b) and 768E(5)(b) of ICTA only apply in cases in which section 768C of that Act applies, and it would be anomalous if the words under review had a different meaning in sections 768D(6)(b) and 768E(5)(b) of ICTA from the meaning which they have in section 768C(8) of that Act. It is therefore considered that sections 768D(6)(b) and 768E(5)(b) of ICTA refer to section 768C(8) of that Act

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by implication. Since section 768C(8) of ICTA only applies if section 768C(6) of that Act applies, it is considered that sections 768D(6)(b) and 768E(5)(b) of that Act also refer to section 768C(6) of that Act by implication and so are similarly restricted by that provision.

Clause 27{j7768Ea} of this Bill (restriction on relief for non-trading loss on intangible fixed assets) is based on section 768E of ICTA, and clauses 29{j7768Dd} and 30{j7768Df} of this Bill (disallowance of UK property business losses and disallowance of overseas property business losses) are based on section 768D of ICTA. Clauses 27{j7768Ea}(2), 29{j7768Dd}(2) and 30{j7768Df}(2) of this Bill mirror the restriction in section 768C(6) of that Act. They therefore expressly restrict the application of clauses 27{j7768Ea}, 29{j7768Dd} and 30{j7768Df} of the Bill.

This limitation is a change in the law, since it will prevent HMRC arguing that any of these restrictions has a wider scope.

This change is in taxpayers' favour in principle. But it is expected to have no practical effect as it is in line with generally accepted practice.