

# Bill No. 7

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## PART 1

### TRANSFER PRICING

#### CHAPTER 1

##### INTRODUCTION TO PART

### 1 Part applies where provision made or imposed [\[jtp001\]](#)

- (1) This Part applies if –
- (a) provision (“the actual provision”) has been made or imposed as between any two persons (“the affected persons”) by means of a transaction or series of transactions, and
  - (b) the participation condition is met (see section 3).

[Origin: ICTA Sch.28AA para.1\(1\)](#)

- (2) This Part also applies (in accordance with section 59) if –
- (a) a person carries on an oil-related ring-fence trade (see section 60), and
  - (b) any provision (“the actual provision”) is made or imposed by the person as between –
    - (i) the oil-related ring-fence trade, and
    - (ii) any other activities carried on by the person.

[Origin: ICTA Sch.28AA para.11\(1\), \(3\)](#)

- (3) Subsections (1) and (2) are subject to subsection (4).

[Origin: ICTA Sch.28AA paras.1\(2\), 9\(1\), 11\(3\)](#)

- (4) This Part does not apply in relation to provision made or imposed by means of any transaction or deemed transaction in the case of which the price or consideration is determined in accordance with any of subsections (1) to (4) of section 493 of ICTA (transactions and deemed transactions involving oil treated as made at market value).

[Origin: ICTA Sch.28AA para.10](#)

### 2 Meaning of “affected persons” and “actual provision” [\[jtp007\]](#)

- (1) If this Part applies because of section 1(1), in this Part –
- “the actual provision”, and
  - “the affected persons”,
- have the meaning given by section 1(1).

[Origin: ICTA Sch.28AA para.14\(1\)](#)

- (2) If this Part applies because of section 1(2), in this Part –  
“the actual provision” has the meaning given by section 1(2), and  
“the affected persons” means the two persons mentioned in section 59(2).

Origin: ICTA Sch.28AA para.11(3)

### 3 The “participation condition” referred to in section 1(1)(b) [jtp002]

- (1) For the purposes of section 1(1)(b), the participation condition is met if –  
(a) condition B is met in relation to the actual provision so far as the actual provision is provision relating to financing arrangements, and  
(b) condition A is met in relation to the actual provision so far as the actual provision is not provision relating to financing arrangements.

Origin: ICTA Sch.28AA paras. 1(1), 4B(1)

- (2) Condition A is that, at the time of the making or imposition of the actual provision –  
(a) one of the affected persons was directly or indirectly participating in the management, control or capital of the other, or  
(b) the same person or persons was or were directly or indirectly participating in the management, control or capital of each of the affected persons.

Origin: ICTA Sch.28AA para.1(1)

- (3) Condition B is that, at the time of the making or imposition of the actual provision or within the period of six months beginning with the day on which the actual provision was made or imposed –  
(a) one of the affected persons was directly or indirectly participating in the management, control or capital of the other, or  
(b) the same person or persons was or were directly or indirectly participating in the management, control or capital of each of the affected persons.

Origin: ICTA Sch.28AA para.4B(1)

- (4) In this section “financing arrangements” means arrangements made for providing or guaranteeing, or otherwise in connection with, any debt, capital or other form of finance.

Origin: ICTA Sch.28AA paras.4A(6), 4B(2)

## CHAPTER 2

### PARTICIPATION IN MANAGEMENT, CONTROL OR CAPITAL OF A PERSON

#### *Meaning of "direct participation"*

### 4 Direct participation [jtp011]

- (1) Subsection (2) applies for the purposes of –  
section 3(2) and (3),  
section 7(2),  
section 27(5),

section 29(2),  
section 58(4), and  
in Part 2, section 76(2).

Origin: ICTA Sch.28AA para. 4(1); FA 1999 s.85(6)

- (2) A person is directly participating in the management, control or capital of another person at a particular time if, and only if, that other person is at that time –
- (a) a body corporate or a firm, and
  - (b) controlled by the first person.

Origin: ICTA Sch.28AA para. 4(1)

## 5 Meaning of “control” in cases involving sales of oil [jtp005]

- (1) Subsection (2) applies if –
- (a) the actual provision is made or imposed by or in relation to a sale of oil,
  - (b) the oil sold is oil which has been, or is to be, extracted under rights exercisable by a company (“the producer”) which, although it may be the seller, is not the buyer, and
  - (c) at the time of the completion of the sale or when possession of the oil passes, whichever is the earlier, not less than 20% of the producer’s ordinary share capital is owned directly or indirectly by one or more of the buyer and the companies (if any) that are linked to the buyer.

Origin: ICTA Sch.28AA para.9(1), (4)

- (2) This Part has effect in relation to the actual provision as if –
- (a) the buyer and the seller, and
  - (b) the producer, if it is not the seller,
- were all controlled by the same person at the time of the making or imposition of the actual provision.

Origin: ICTA Sch.28AA para.9(2)

- (3) For the purposes of this section, two companies are “linked” if –
- (a) one is under the control of the other, or
  - (b) both are under the control of the same person or persons.

Origin: ICTA Sch.28AA para.9(3)

- (4) For the purposes of this section –
- (a) any question whether ordinary share capital is owned directly or indirectly by a company is to be decided as for section 838 of ICTA, and
  - (b) rights to extract oil are to be taken to be exercisable by a company even if they are exercisable by that company only jointly with another company or two or more other companies.

Origin: ICTA Sch.28AA para.9(4)

- (5) In this section “oil” includes any mineral oil or relative hydrocarbon oil, as well as natural gas.

Origin: ICTA Sch.28AA para.9(5)

*Meaning of "indirect participation"***6 Indirect participation: defined by sections 7 to 10 [jtp010]**

- (1) For the purposes of sections 3(2)(a) and (3)(a) and 29(2)(a), a person is indirectly participating in the management, control or capital of another person only if section 7, 8 or 9 so provides.

Origin: ICTA Sch.28AA paras. 4(2), 4A(1), 6(4C)

- (2) For the purposes of sections 3(2)(b) and (3)(b) and 29(2)(b), a person is indirectly participating in the management, control or capital of another person only if section 7, 8 or 10 so provides.

Origin: ICTA Sch.28AA paras. 4(2), 4A(2), 6(4C)

- (3) For the purposes of –  
 (a) sections 27(5) and 58(4), and  
 (b) in Part 2, section 76(2),

a person is indirectly participating in the management, control or capital of another person only if section 7 or 8 so provides.

Origin: ICTA Sch.28AA para.4(2); FA 1999 s.85(6)

**7 Indirect participation: potential direct participant [jtp012]**

- (1) Subsection (2) applies for the purposes of sections 3(2) and (3), 27(5), 29(2), 58(4) and 76(2).

Origin: ICTA Sch.28AA para.4(2); FA 1999 s.85(6)

- (2) A person (“P”) is indirectly participating in the management, control or capital of another person (“A”) at a particular time if P would be directly participating in the management, control or capital of A at that time if the rights and powers attributed to P included all the rights and powers mentioned in subsection (3) that are not already attributed to P for the purpose of deciding under section 4 whether P is directly participating in the management, control or capital of A.

Origin: ICTA Sch.28AA para.4(2)

- (3) The rights and powers referred to in subsection (2) are –  
 (a) rights and powers which P is entitled to acquire at a future date,  
 (b) rights and powers which P will, at a future date, become entitled to acquire,  
 (c) rights and powers of persons other than P so far as they are rights or powers falling within subsection (4),  
 (d) rights and powers of any person with whom P is connected (see section 11), and  
 (e) rights and powers which would be attributed by subsection (2) to a person with whom P is connected were it being decided under that subsection whether that connected person is indirectly participating in the management, control or capital of A.

Origin: ICTA Sch.28AA para.4(3)

- (4) Rights and powers fall within this subsection so far as they –

- (a) are required, or may be required, to be exercised in any one or more of the following ways –
  - (i) on behalf of P,
  - (ii) under the direction of P, or
  - (iii) for the benefit of P, and
- (b) are not confined, in a case where a loan has been made by one person to another, to rights and powers conferred in relation to property of the borrower by the terms of any security relating to the loan.

Origin: ICTA Sch.28AA para.4(4)

- (5) In subsections (3)(c) to (e) and (4), the references to a person's rights and powers include references to any rights or powers which the person either –
  - (a) is entitled to acquire at a future date, or
  - (b) will, at a future date, become entitled to acquire.

Origin: ICTA Sch.28AA para.4(5)

- (6) In paragraph (e) of subsection (3), the reference to rights and powers which would be attributed to a connected person includes a reference to rights and powers which, by applying that paragraph wherever one person is connected with another, would be so attributed to the connected person through a number of persons each of whom is connected with at least one of the others.

Origin: ICTA Sch.28AA para.4(6)

- (7) References in this section –
  - (a) to rights and powers of a person, or
  - (b) to rights and powers which a person is or will become entitled to acquire,

include references to rights or powers which are exercisable by that person, or (when acquired by that person) will be exercisable, only jointly with one or more other persons.

Origin: ICTA Sch.28AA para.4(10)

## 8 Indirect participation: one of several major participants [jtp013]

- (1) Subsection (2) applies for the purposes of sections 3(2) and (3), 27(5), 29(2), 58(4) and 76(2).

Origin: ICTA Sch.28AA para.4(2); FA 1999 s.85(6)

- (2) A person is indirectly participating in the management, control or capital of another person at a particular time if the first person is, at that time, one of a number of major participants in that other person's enterprise.

Origin: ICTA Sch.28AA para.4(2)

- (3) For the purposes of this section, a person ("A") is a major participant in another person's enterprise at a particular time if at that time –
  - (a) that other person ("the subordinate") is a body corporate or firm, and
  - (b) the 40% test is met in the case of each of two persons –
    - (i) who, taken together, control the subordinate, and
    - (ii) of whom one is A.

Origin: ICTA Sch.28AA para.4(7)

- (4) For the purposes of this section, the 40% test is met in the case of each of two persons wherever each of them has interests, rights and powers representing at least 40% of the holdings, rights and powers in respect of which the pair of them fall to be taken as controlling the subordinate.

[Origin: ICTA Sch.28AA para.4\(8\)](#)

- (5) For the purposes of this section –
- (a) the question whether a person is controlled by any two or more persons taken together, and
  - (b) any question whether the 40% test is met in the case of a person who is one of two persons,

is to be determined after attributing to each of the persons all the rights and powers which would be attributed by section 7(2) to a person were it being decided under section 7(2) whether that person is indirectly participating in the management, control or capital of another person.

[Origin: ICTA Sch.28AA para.4\(9\)](#)

- (6) References in this section –
- (a) to rights and powers of a person, or
  - (b) to rights and powers which a person is or will become entitled to acquire,

include references to rights or powers which are exercisable by that person, or (when acquired by that person) will be exercisable, only jointly with one or more other persons.

[Origin: ICTA Sch.28AA para.4\(10\)](#)

**9 Indirect participation: sections 3(2)(a) and (3)(a) and 29(2)(a): financing cases [jtp014]**

- (1) Subsection (2) applies for the purposes of sections 3(2)(a) and (3)(a) and 29(2)(a).

[Origin: ICAT Sch.28AA paras.4A\(1\), 6\(4C\)](#)

- (2) A person (“P”) is indirectly participating in the management, control or capital of another (“A”) at the time of the making or imposition of the actual provision if –
- (a) the actual provision relates, to any extent, to financing arrangements for A,
  - (b) A is a body corporate or firm,
  - (c) P and other persons acted together in relation to the financing arrangements, and
  - (d) P would be taken to have control of A if, at any relevant time, there were attributed to P the rights and powers of each of the other persons mentioned in paragraph (c).

[Origin: ICTA Sch.28AA para.4A\(1\)](#)

- (3) It is immaterial for the purposes of subsection (2)(c) whether P and the other persons acting together in relation to the financing arrangements did so at the time of the making or imposition of the actual provision or at some earlier time.

[Origin: ICTA Sch.28AA para.4A\(3\)](#)

- (4) In subsection (2)(d) “relevant time” means –
- a time when P and the other persons were acting together in relation to the financing arrangements, or
  - a time in the period of six months beginning with the day on which they ceased so to act.

Origin: ICTA Sch.28AA para.4A(4)

- (5) In determining for the purposes of subsection (2)(d) whether P would be taken to have control of another person (“A”), the rights and powers of any person (and not just P) are to be taken to include those that would be attributed to that person by section 7(2) were it being decided under section 7(2) whether that person is indirectly participating in the management, control or capital of A.

Origin: ICTA Sch.28AA para.4A(5)

- (6) In this section “financing arrangements” means arrangements made for providing or guaranteeing, or otherwise in connection with, any debt, capital or other form of finance.

Origin: ICTA Sch.28AA para.4A(6)

#### 10 Indirect participation: sections 3(2)(b) and (3)(b) and 29(2)(b): financing cases [jtp015]

- (1) Subsection (2) applies for the purposes of sections 3(2)(b) and (3)(b) and 29(2)(b).

Origin: ICTA Sch.28AA paras.4A(2), 6(4C)

- (2) A person (“Q”) is indirectly participating in the management, control or capital of each of the affected persons at the time of the making or imposition of the actual provision if –
- the actual provision relates, to any extent, to financing arrangements for one of the affected persons (“B”),
  - B is a body corporate or firm,
  - Q and other persons acted together in relation to the financing arrangements, and
  - Q would be taken to have control of both B and the other affected person if, at any relevant time, there were attributed to Q the rights and powers of each of the other persons mentioned in paragraph (c).

Origin: ICTA Sch.28AA para.4A(2)

- (3) It is immaterial for the purposes of subsection (2)(c) whether Q and the other persons acting together in relation to the financing arrangements did so at the time of the making or imposition of the actual provision or at some earlier time.

Origin: ICTA Sch.28AA para.4A(3)

- (4) In subsection (2)(d) “relevant time” means –
- a time when Q and the other persons were acting together in relation to the financing arrangements, or
  - a time in the period of six months beginning with the day on which they ceased so to act.

Origin: ICTA Sch.28AA para.4A(4)

- (5) In determining for the purposes of subsection (2)(d) whether Q would be taken to have control of another person (“A”), the rights and powers of any person (and not just Q) are to be taken to include those that would be attributed to that person by section 7(2) were it being decided under section 7(2) whether that person is indirectly participating in the management, control or capital of A.

Origin: ICTA Sch.28AA para.4A(5)

- (6) In this paragraph “financing arrangements” means arrangements made for providing or guaranteeing, or otherwise in connection with, any debt, capital or other form of finance.

Origin: ICTA Sch.28AA para.4A(6)

## 11 Meaning of “connected” in section 7 [jtp016]

- (1) Subsections (2) and (3) apply for the purposes of section 7.

Origin: ICTA Sch.28AA para.4(11)

- (2) Two persons are connected with each other if one of them is an individual and the other is –

- (a) the individual’s spouse or civil partner,
- (b) a relative of the individual,
- (c) a relative of the individual’s spouse or civil partner, or
- (d) the spouse, or civil partner, of a person within paragraph (b) or (c).

Origin: ICTA Sch.28AA para.4(11)

- (3) Two persons are connected with each other if one of them is a trustee of a settlement and the other is –

- (a) a person who in relation to that settlement is a settlor, or
- (b) a person who is connected with a person within paragraph (a).

Origin: ICTA Sch.28AA para.4(11)

- (4) In this section –

“relative” means brother, sister, ancestor or lineal descendant;

“settlement” and “settlor” have the same meaning as in section 620 of ITTOIA 2005.

Origin: ICTA Sch.28AA para.4(12)

## CHAPTER 3

### BASIC RULE: SUBSTITUTION OF ARM’S LENGTH PROVISION

#### *Basic rule*

## 12 Basic transfer-pricing rule [jtp021]

- (1) Subsection (2) applies if the actual provision –

- (a) differs from the provision (“the arm’s length provision”) which would have been made as between independent enterprises, and

- (b) confers a potential advantage in relation to United Kingdom taxation on one of the affected persons.

Origin: ICTA Sch.28AA para.1(2)

- (2) The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

Origin: ICTA Sch.28AA para.1(2)

- (3) Subsection (4) applies if the actual provision –
  - (a) differs from the provision (“the arm's length provision”) which would have been made as between independent enterprises, and
  - (b) confers a potential advantage in relation to United Kingdom taxation (whether or not the same advantage) on each of the affected persons.

Origin: ICTA Sch.28AA para.1(2)

- (4) The profits and losses of each of the affected persons are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

Origin: ICTA Sch.28AA para.1(2)

- (5) If the participation condition (see section 3) would not be met but for section 9 or 10 (cases in which actual provision relates, to any extent, to financing arrangements), then in subsections (1) to (4) “the actual provision” is a reference to the actual provision so far as relating to the financing arrangements concerned.

Origin: Sch.28AA para.4A(7)

- (6) Subsections (2) and (4) have effect subject to –
  - (a) section 16 (exemption for dormant companies),
  - (b) section 17 (exemption for small and medium-sized enterprises),
  - (c) sections 67 and 68 (generally, Part does not affect calculation of capital allowances and capital gains), and
  - (d) [paragraph 8 of Schedule 28AA to ICTA (application of provisions about transfer pricing in relation to foreign exchange gains and losses and financial instruments)].

Origin: ICTA Sch.28AA para.1(2)

### 13 Meaning of “arm's length provision” [jtp020]

- (1) In this Part “the arm's length provision” –
  - (a) has the meaning given by section 12(1) if section 12(2) applies;
  - (b) has the meaning given by section 12(3) if section 12(4) applies.

Origin: ICTA Sch.28AA para.14(1)

- (2) For the purposes of this Part, the cases in which provision made or imposed as between any two persons is to be taken to differ from the provision that would have been made as between independent enterprises include the case in which provision is made or imposed as between two persons but no provision would have been made as between independent enterprises; and references in this Part to the arm's length provision are to be read accordingly.

Origin: ICTA Sch.28AA para.1(3)

**14 Meaning of “potential advantage” in relation to United Kingdom taxation [jtp035]**

- (1) Subsection (2) applies for the purposes of this Part.

Origin: ICTA Sch.28AA para.5(1)

- (2) The actual provision confers a potential advantage on a person in relation to United Kingdom taxation wherever, disregarding this Part, the effect of making or imposing the actual provision, instead of the arm’s length provision, would be one or both of Effects A and B.

Origin: ICTA Sch.28AA para.5(1)

- (3) Effect A is that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of the person’s profits for any chargeable period.

Origin: ICTA Sch.28AA para.5(1)

- (4) Effect B is that a larger amount (or, if there would not otherwise have been losses, any amount of more than nil) would be taken for tax purposes to be the amount for any chargeable period of any losses of the person.

Origin: ICTA Sch.28AA para.5(1)

- (5) In determining for the purposes of subsection (3) or (4) the amount that would be taken for tax purposes to be the amount of the profits or losses for a year of assessment in the case of a person who is not resident in the United Kingdom, there is to be left out of account any income of that person which is –

- (a) disregarded income within the meaning given by section 813 of ITA 2007 (limits on liability to income tax of non-UK residents), or
- (b) disregarded company income within the meaning given by section 816 of that Act.

Origin: ICTA Sch.28AA para.5(7)

**15 Interpreting Part in accordance with OECD principles [jtp025]**

- (1) This Part is to be read in such manner as best secures consistency between –
- (a) the effect given to sections 1, 3 and 12, and
  - (b) the effect which, in accordance with transfer pricing guidelines, is to be given, in cases where double taxation arrangements incorporate the whole or any part of the OECD model, to so much of the arrangements as does so.

Origin: ICTA Sch.28AA para.2(1)

- (2) Subsection (1) has effect subject to –
- sections 1(2), 59 and 60 (rules for oil-related ring-fence trades),
  - section 1(4) (oil-related provision to which Part does not apply),
  - section 5 (provision for sales of oil), and
  - [paragraph 8 of Schedule 28AA to ICTA (application of provisions about transfer pricing in relation to foreign exchange gains and losses and financial instruments)].

Origin: ICTA Sch.28AA para. 2(1)

- (3) In this section “the OECD model” means –
- (a) the rules which, at the passing of ICTA (which occurred on 9th February 1988), were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the Organisation for Economic Co-operation and Development, or
  - (b) any rules in the same or equivalent terms.

Origin: ICTA Sch.28AA para.2(2)

- (4) In this section “the transfer pricing guidelines” means –
- (a) all the documents published by the Organisation for Economic Co-operation and Development, at any time before 1st May 1998, as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration, and
  - (b) such documents published by that Organisation on or after that date as may for the purposes of this Part be designated, by an order made by the Treasury, as comprised in the transfer pricing guidelines.

Origin: ICTA Sch.28AA para.2(3)

- (5) In this section “double taxation arrangements” means arrangements which have effect under section 788 of ICTA (relief by agreement with territories outside the United Kingdom).

Origin: ICTA Sch.28AA para.14(1)

- (6) A statutory instrument containing an order under subsection (4)(b) is subject to annulment in pursuance of a resolution of the House of Commons.

Origin: ICTA s.828(3)

- (7) Power of the Treasury to make an order under subsection (4)(b) is exercisable by statutory instrument.

Origin: ICTA s.828(1)

*Exemptions from basic rule*

**16 Exemption from basic rule: dormant companies [jtp026]**

- (1) Section 12(2) and (4) do not apply in calculating for any chargeable period the profits and losses of a potentially advantaged person if that person is a company which meets the condition in subsection (2).

Origin: ICTA Sch.28AA para.5A(1)

- (2) The condition is that –
- (a) the company was dormant throughout the pre-qualifying period, and
  - (b) apart from section 12, the company has continued to be dormant at all times since the end of the pre-qualifying period.

Origin: ICTA Sch.28AA para.5A(2)

- (3) In subsection (2) “the pre-qualifying period” means –
- (a) if there is an accounting period of the company that ends on 31st March 2004, that accounting period, or

- (b) if there is no such accounting period, the period of 3 months ending with that date.

Origin: ICTA Sch.28AA para.5A(3)

- (4) In this paragraph “dormant” has the meaning given by section 1169 of the Companies Act 2006 (c. 46).

Origin: ICTA Sch.28AA para.5A(4); Companies Act 2006 s.1297(5)

### 17 Exemption from basic rule: small and medium-sized enterprises [jtp027]

- (1) Section 12(2) and (4) do not apply in calculating for any chargeable period the profits and losses of a potentially advantaged person if that person is a small or medium-sized enterprise for that chargeable period (see section 23).

Origin: ICTA Sch.28AA para.5B(1)

- (2) Exceptions to subsection (1) are provided –
- (a) in the case of a small enterprise, by section 18, and
  - (b) in the case of a medium-sized enterprise, by sections 18 and 19.

Origin: ICTA Sch.28AA para.5B(2)

### 18 Small and medium-sized enterprises: exceptions from exemption [jtp028]

- (1) Subsections (2) and (3) set out exceptions to section 17(1).

Origin: ICTA Sch.28AA para.5B(2)

- (2) The first exception is if the small or medium-sized enterprise elects for section 17(1) not to apply in relation to the chargeable period.  
Any such election is irrevocable.

Origin: ICTA Sch.28AA para.5B(3)

- (3) The second exception is if –
- (a) the other affected person, or
  - (b) a party to a relevant transaction,
- is, at the time when the actual provision is or was made or imposed, a resident of a non-qualifying territory (whether or not that person is also a resident of a qualifying territory).

Origin: Drafting; ICTA Sch.28AA para.5B(4)

- (4) For the purposes of subsection (3) –
- (a) a “party to a relevant transaction” is a person who, if the actual provision is or was imposed by means of a series of transactions, is or was a party to one or more of those transactions, and
  - (b) “qualifying territory” and “non-qualifying territory” are defined in section 24.

Origin: Drafting; ICTA Sch.28AA para.5B(5), (7)

- (5) In subsection (3) “resident”, in relation to a territory –
- (a) means a person who, under the laws of that territory, is liable to tax there by reason of the person’s domicile, residence or place of management, but

- (b) does not include a person who is liable to tax in that territory in respect only of income from sources in that territory or capital situated there.

Origin: Drafting; ICTA Sch.28AA para.5B(6)

## 19 Medium-sized enterprises: exception from exemption: transfer pricing notice [jtp029]

- (1) Section 17(1) does not apply in relation to any provision made or imposed if—
  - (a) the potentially advantaged person is a medium-sized enterprise for the chargeable period, and
  - (b) the Commissioners for Her Majesty's Revenue and Customs give that person a notice requiring the person to calculate the profits and losses of that chargeable period in accordance with section 12(2) or (4) in the case of that provision.

Origin: ICTA Sch.28AA para.5C(1)

- (2) A notice under subsection (1) is referred to in this Chapter as a transfer pricing notice.

Origin: ICTA Sch.28AA para.5C(1)

## 20 Giving of transfer pricing notices [jtp032]

- (1) This section applies to a transfer pricing notice given to a person.

Origin: ICTA Sch.28AA para.5C(2), (3), (4)
- (2) The notice may be given in relation to—
  - (a) any provision specified, or of a description specified, in the notice, or
  - (b) every provision in relation to which one or other of the assumptions in section 12(2) and (4) would, apart from section 17(1), be required to be made when calculating the person's profits and losses for tax purposes.

Origin: ICTA Sch.28AA para.5C(2)

- (3) The notice may be given only after a notice of enquiry has been given to the person in relation to the person's tax return for the chargeable period concerned.

Origin: ICTA Sch.28AA para.5C(3)

- (4) The notice must identify the officer of Revenue and Customs to whom any notice of appeal under section 21 is to be given.

Origin: ICTA Sch.28AA para.5C(4)

- (5) In subsection (3) "notice of enquiry" means a notice under—
  - (a) section 9A or 12AC of TMA 1970, or
  - (b) paragraph 24 of Schedule 18 to FA 1998.

Origin: ICTA Sch.28AA para.5C(12)

**21 Appeals against transfer pricing notices [jtp033]**

- (1) A person to whom a transfer pricing notice is given may appeal against the decision to give the notice, but only on the ground that the condition in section 19(1)(a) is not met.

Origin: ICTA Sch.28AA para.5C(5)

- (2) Any such appeal must be brought by giving written notice of appeal to the officer of Revenue and Customs identified in the notice in accordance with section 20(4).

Origin: ICTA Sch.28AA para.5C(6)

- (3) The notice of appeal must be given before the end of the period of 30 days beginning with the day on which the transfer pricing notice is given.

Origin: ICTA Sch.28AA para.5C(7)

**22 Tax returns where transfer pricing notice given [jtp034]**

- (1) If a transfer pricing notice is given to a person ("T"), T may amend T's tax return for the purpose of complying with the notice at any time before the end of the period of 90 days beginning with—
- (a) the day on which the notice is given, or
  - (b) if T appeals under section 21 against the decision to give the notice, the day on which the appeal is finally determined or abandoned.

Origin: ICTA Sch.28AA para.5C(8); Drafting

- (2) If a transfer pricing notice is given in the case of any tax return, no closure notice may be given in relation to that tax return until—
- (a) the end of the period of 90 days specified in subsection (1), or
  - (b) the earlier amendment of the tax return for the purpose of complying with the notice.

Origin: ICTA Sch.28AA para.5C(9)

- (3) So far as relating to any provision made or imposed by or in relation to a person—
- (a) who is a medium-sized enterprise for a chargeable period,
  - (b) who does not make an election under section 18(2) for that period, and
  - (c) who is not excepted from section 12(2) and (4) in relation to that provision for that period because of section 18(3),

the tax return required to be made for that period is a return that disregards section 12(2) and (4).

Origin: ICTA Sch.28AA para.5C(10)

- (4) Subsection (3) does not prevent a tax return for a period becoming incorrect if in the case of any provision made or imposed—
- (a) a transfer pricing notice is given which has effect in relation to that provision for that period,
  - (b) the return is not amended in accordance with subsection (1) for the purpose of complying with the notice, and
  - (c) the return ought to have been so amended.

**Origin: ICTA Sch.28AA para.5C(11)**

- (5) In this section –
- “closure notice” means a notice under –
- (a) section 28A or 28B of TMA 1970, or
  - (b) paragraph 32 of Schedule 18 to FA 1998;
- “company tax return” means the return required to be delivered pursuant to a notice under paragraph 3 of Schedule 18 to FA 1998, as read with paragraph 4 of that Schedule;
- “tax return” means –
- (a) a return under section 8, 8A or 12AA of TMA 1970, or
  - (b) a company tax return.

**Origin: ICTA Sch.28AA para.5C(12)****23 Meaning of “small enterprise” and “medium-sized enterprise” [jtp030]**

- (1) In this Chapter –
- (a) “small enterprise” means a small enterprise as defined in the Annex;
  - (b) “medium-sized enterprise” means an enterprise which –
    - (i) falls within the category of micro, small and medium-sized enterprises as defined in the Annex, and
    - (ii) is not a small enterprise as defined in the Annex.

**Origin: ICTA Sch.28AA para.5D(1)**

- (2) For the purposes of subsection (1), the Annex has effect with the modifications set out in subsections (4) to (7).

**Origin: ICTA Sch.28AA para.5D(1)**

- (3) In this paragraph “the Annex” means the Annex to Commission Recommendation 2003/361/EC of 6th May 2003 (concerning the definition of micro, small and medium-sized businesses).

**Origin: ICTA Sch.28AA para.5D(2)**

- (4) Where any enterprise is in liquidation or administration, the rights of the liquidator or administrator (in that capacity) are to be left out of account when applying Article 3(3)(b) of the Annex in determining for the purposes of this Part whether –
- (a) that enterprise, or
  - (b) any other enterprise (including that of the liquidator or administrator), is a small or medium-sized enterprise.

**Origin: ICTA Sch.28AA para.5D(3)**

- (5) Article 3 of the Annex has effect with the omission of paragraph 5 (declaration in good faith where control cannot be determined etc).

**Origin: ICTA Sch.28AA para.5D(4)**

- (6) The first sentence of Article 4(1) of the Annex has effect as if the data to apply to –
- (a) the headcount of staff, and
  - (b) the financial amounts,

were the data relating to the chargeable period in section 17(1) (instead of the period described in that sentence) and calculated on an annual basis.

Origin: ICTA Sch.28AA para.5D(5)

- (7) Article 4 of the Annex has effect with the omission of the following provisions –
- (a) the second sentence of paragraph 1 (data to be taken into account from date of closure of accounts),
  - (b) paragraph 2 (no change of status unless ceilings exceeded for two consecutive periods), and
  - (c) paragraph 3 (genuine estimate in case of newly established enterprise).

Origin: ICTA Sch.28AA para.5D(6)

## 24 Meaning of “qualifying territory” and “non-qualifying territory” [jtp031]

- (1) In section 18(3) –
- “non-qualifying territory” means any territory which is not a qualifying territory;
  - “qualifying territory” means –
    - (a) the United Kingdom, or
    - (b) any territory in relation to which Condition A or Condition B is met.

Origin: ICTA Sch.28AA para.5E(1)

- (2) Condition A is that –
- (a) double taxation arrangements have been made in relation to the territory,
  - (b) the arrangements include a non-discrimination provision, and
  - (c) the territory is not designated as a non-qualifying territory for the purposes of this subsection in regulations made by the Treasury.

Origin: ICTA Sch.28AA para.5E(2)

- (3) Condition B is that –
- (a) double taxation arrangements have been made in relation to the territory, and
  - (b) the territory is designated as a qualifying territory for the purposes of this subsection in regulations made by the Treasury.

Origin: ICTA Sch.28AA para.5E(3)

- (4) For the purposes of subsection (2)(b) a “non-discrimination provision”, in relation to any double taxation arrangements, is a provision to the effect that nationals of a state which is a party to those arrangements (a “contracting state”) are not to be subject in any other contracting state to –
- (a) any taxation, or
  - (b) any requirement connected with taxation,
- which is other or more burdensome than the taxation and connected requirements to which nationals of that other state in the same circumstances (in particular with respect to residence) are or may be subjected.

Origin: ICTA Sch.28AA para.5E(4)

- (5) In subsection (4) “national”, in relation to a state, includes –
- (a) any individual possessing the nationality or citizenship of the state;
  - (b) any legal person, partnership or association deriving its status as such from the laws in force in that state.

Origin: ICTA Sch.28AA para.5E(5)

- (6) In this section “double taxation arrangements” means arrangements which have effect under section 788 of ICTA (double taxation relief by agreement with territories outside the United Kingdom).

Origin: ICTA Sch.28AA para.5E(2), (3), (4)

- (7) A statutory instrument containing regulations under this section is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, the House of Commons.

Origin: ICTA Sch.28AA para.5E(6)

- (8) Power of the Treasury to make regulations under this section is exercisable by statutory instrument.

Origin: ICTA 1988 s.828(1)

#### *Determination of arm's length provision*

### **25 Arm's length provision where actual provision relates to securities [jtp022]**

- (1) This section applies where –
- (a) both of the affected persons are companies, and
  - (b) the actual provision is provision in relation to a security issued by one of those companies (“the issuing company”).

Origin: ICTA Sch.28AA para.1A(1)

- (2) Section 12(1)(a) and (3)(a) are to be read as requiring account to be taken of all factors, including –
- (a) the question whether the loan would have been made at all in the absence of the special relationship,
  - (b) the amount which the loan would have been in the absence of the special relationship, and
  - (c) the rate of interest and other terms which would have been agreed in the absence of the special relationship.

Origin: ICTA Sch.28AA para.1A(2)

- (3) Subsection (2) has effect subject to subsections (4) and (5).

Origin: ICTA Sch.28AA para.1A(2)

- (4) If –
- (a) a company (“L”) makes a loan to another company with which it has a special relationship, and
  - (b) it is not part of L's business to make loans generally,
- the fact that it is not part of L's business to make loans generally is to be disregarded in applying subsection (2).

Origin: ICTA Sch.28AA para.1A(3)

- (5) Section 12(1)(a) and (3)(a) are to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.

Origin: ICTA Sch.28AA para.1A(4)

- (6) The matters are –
- (a) the appropriate level or extent of the issuing company’s overall indebtedness,
  - (b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving –
    - (i) the issue of a security by the issuing company, or
    - (ii) the making of a loan, or a loan of a particular amount, to the issuing company, and
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

Origin: ICTA Sch.28AA para.1A(5)

## 26 Arm’s length provision where security issued and guarantee given [jtp023]

- (1) This section applies where the actual provision is made or imposed by means of a series of transactions which include –
- (a) the issuing of a security by a company which is one of the affected persons (“the issuing company”), and
  - (b) the provision of a guarantee by a company which is the other affected person.

Origin: ICTA Sch.28AA para.1B(1)

- (2) Section 12(1)(a) and (3)(a) are to be read as requiring account to be taken of all factors, including –
- (a) the question whether the guarantee would have been provided at all in the absence of the special relationship,
  - (b) the amount that would have been guaranteed in the absence of the special relationship, and
  - (c) the consideration for the guarantee and other terms which would have been agreed in the absence of the special relationship.

Origin: ICTA Sch.28AA para.1B(2)

- (3) Subsection (2) has effect subject to subsections (4) and (5).

Origin: ICTA Sch.28AA para.1B(2)

- (4) In a case where –
- (a) a company (“G”) provides a guarantee in respect of another company with which it has a special relationship, and
  - (b) it is not part of G’s business to provide guarantees generally,
- the fact that it is not part of G’s business to provide guarantees generally is to be disregarded in applying subsection (2).

Origin: ICTA Sch.28AA para.1B(3)

- (5) Section 12(1)(a) and (3)(a) are to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.

Origin: ICTA Sch.28AA para.1B(4)

- (6) The matters are—
- (a) the appropriate level or extent of the issuing company's overall indebtedness,
  - (b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving—
    - (i) the issue of a security by the issuing company, or
    - (ii) the making of a loan, or a loan of a particular amount, to the issuing company, and
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

Origin: ICTA Sch.28AA para.1B(5)

## 27 Interpretation of sections 25 and 26 [jtp024]

- (1) Subsections (3) to (7) apply for the purposes of sections 25 and 26.

Origin: ICTA Sch.28AA paras.1A(6), (7), (8), (9), (10), 1B(6)

- (2) Subsection (6) applies also for the purposes of subsection (7)(a).

Origin: ICTA Sch.28AA para.1A(9)

- (3) "Special relationship" means any relationship by virtue of which the participation condition in section 3 is met in the case of the affected persons concerned.

Origin: ICTA Sch.28AA para.1A(6)

- (4) Any reference to a guarantee includes—

- (a) a reference to a surety, and
- (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

Origin: ICTA Sch.28AA para.1A(7)

- (5) One company ("A") has a "participatory relationship" with another ("B") if—
- (a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or
  - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.

Origin: ICTA Sch.28AA para.1A(8)

- (6) "Security" includes securities not creating or evidencing a charge on assets.

Origin: ICTA Sch.28AA para.1A(9)

- (7) Any –
- (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,
- is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

Origin: ICTA Sch.28AA para.1A(10)

#### CHAPTER 4

POSITION, IF ONLY ONE AFFECTED PERSON POTENTIALLY ADVANTAGED, OF OTHER  
AFFECTED PERSON

*Claim by affected person who is not advantaged*

#### 28 Claim by the affected person who is not potentially advantaged [jtp040]

- (1) Subsection (2) applies if –
- (a) only one of the affected persons (in this Chapter called “the advantaged person”) is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision, and
  - (b) the other affected person (in this Chapter called “the disadvantaged person”) is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities.

Origin: ICTA Sch.28AA para.6(1)

- (2) On the making of a claim by the disadvantaged person –
- (a) the profits and losses of the disadvantaged person are to be calculated for tax purposes as if the arm’s length provision had been made or imposed instead of the actual provision, and
  - (b) despite any limit in the Tax Acts on the time within which any adjustment may be made, all such adjustments are to be made in the disadvantaged person’s case as may be required to give effect to the assumption that the arm’s length provision was made or imposed instead of the actual provision.

Origin: ICTA Sch.28AA para.6(2)

- (3) Provision about claims under this section is made by –
- section 29 (claim not allowed in some cases where actual provision relates to a security issued by one of the affected persons),
  - section 30 (claim cannot be made unless advantaged person has made return on the basis that the arm’s length provision applies),
  - section 31 (when claim may be made or amended), and
  - sections 35 to 38 (option to make claims in accordance with section 36 in some cases where actual provision relates to a security issued by one of the affected persons).

Origin: ICTA Sch.28AA para.6(2); drafting

- (4) Subsection (2) has effect subject to –
- section 34 (closing trading stock and closing work in progress in a trade),
  - sections 42 and 43 (effect of claims under this section on double taxation relief),
  - Chapter 5 (provision, where liabilities of an affected person under securities issued by that person are guaranteed, for attribution to guarantor of things done by that affected person), and
  - [paragraph 8 of Schedule 28AA to ICTA (application of provisions about transfer pricing in relation to foreign exchange gains and losses and financial instruments)].

Origin: ICTA Sch.28AA paras.6(2), 6A(1)

## 29 Claims under section 28 where actual provision relates to a security [jtp042]

- (1) A claim under section 28 may not be made if –
- (a) the participation condition (see section 3) would not be satisfied but for section 9 or 10,
  - (b) the actual provision is provision in relation to a security issued by one of the affected persons (“the issuer”), and
  - (c) a guarantee is provided in relation to the security by a person with whom the issuer has a participatory relationship.

Origin: ICTA Sch.28AA para.6(4A)

- (2) For the purposes of subsection (1), one person (“A”) has a “participatory relationship” with another (“B”) if –
- (a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or
  - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.

Origin: ICTA Sch.28AA para.6(4B)

- (3) In subsections (1)(b) and (4)(a) “security” includes securities not creating or evidencing a charge on assets.

Origin: ICTA Sch.28AA paras. 1A(9), 6(4A)

- (4) For the purposes of subsection (1)(b), any –
- (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,

is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

Origin: ICTA Sch.28AA paras. 1A(10), 6(4A)

- (5) The reference in subsection (1)(c) to a guarantee includes –
- (a) a reference to a surety, and
  - (b) if the issuer is a company, a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuer has a

reasonable expectation that in the event of a default by the issuer the person will be paid by, or out of the assets of, one or more companies.

Origin: ICTA Sch.28AA paras.1A(7), 6(4A)

### 30 Claims under section 28: advantaged person must have made return [jtp041]

- (1) A claim may not be made under section 28 unless a calculation has been made in the case of the advantaged person on the basis that the arm's length provision was made or imposed instead of the actual provision.

Origin: ICTA Sch.28AA para.6(3)

- (2) A claim made under section 28 must be consistent with the calculation made on that basis in the case of the advantaged person.

Origin: ICTA Sch.28AA para.6(3)

- (3) For the purposes of subsections (1) and (2), a calculation is to be taken to have been made in the case of the advantaged person on the basis that the arm's length provision was made or imposed instead of the actual provision if (and only if) –

- (a) the calculations made for the purposes of any return by the advantaged person have been made on that basis because of this Part, or
- (b) a relevant notice (see section 44) given to the advantaged person takes account of a determination in pursuance of this Part of an amount to be brought into account for tax purposes on that basis.

Origin: ICTA Sch.28AA para.6(4)

### 31 Time for making, or amending, claim under section 28 [jtp043]

- (1) A claim under section 28 can be made only in the period mentioned in subsection (2) or (3).

Origin: ICTA Sch.28AA para.6(5)

- (2) If a return has been made by the advantaged person on the basis mentioned in section 30(1), the period is the two years beginning with the day of the making of the return.

Origin: ICTA Sch.28AA para.6(5)

- (3) If a relevant notice (see section 44) taking account of such a determination as is mentioned in section 30(3)(b) has been given to the advantaged person, the period is the two years beginning with the day on which that notice was given.

Origin: ICTA Sch.28AA para.6(5)

- (4) Subsection (5) applies if –

- (a) a claim under section 28 is made in relation to a return made on the basis mentioned in section 30(1), and
- (b) a relevant notice taking account of such a determination as is mentioned in section 30(3)(b) is subsequently given to the advantaged person.

Origin: ICTA Sch.28AA para.6(6)

- (5) The disadvantaged person is entitled, within the period mentioned in subsection (3), to make any such amendment of the claim as may be appropriate in consequence of the determination contained in the relevant notice.

Origin: ICTA Sch.28AA para.6(6)

- (6) Subsections (1) and (5) have effect subject to section 40(3) (which provides for the extension of the period for making or amending a claim).

Origin: ICTA Sch.28AA para.6(5), (6)

### **32 Meaning of “return” in sections 30 and 31 [jtp044]**

- (1) In sections 30 and 31 “return” means—
- (a) any return required to be made under TMA 1970 or under Schedule 18 to FA 1998 for income tax or corporation tax purposes, or
  - (b) any voluntary amendment of a return within paragraph (a).

Origin: ICTA Sch.28AA para.6(7)

- (2) In subsection (1)(b) “voluntary amendment” means—
- (a) an amendment under section 9ZA or 12ABA of TMA 1970 (amendment of personal, trustee or partnership return by taxpayer), or
  - (b) an amendment under Schedule 18 to FA 1998 other than one made in response to the giving of a relevant notice (see section 44).

Origin: ICTA Sch.28AA para.6(7)

*Claims: special cases*

### **33 Compensating payment if advantaged person is controlled foreign company [jtp050]**

- (1) Subsection (2) applies if—
- (a) the actual provision is provision made or imposed in relation to a controlled foreign company,
  - (b) in determining for the purposes of Chapter 4 of Part 17 of ICTA the amount of that company’s chargeable profits for an accounting period, its profits and losses are to be calculated in accordance with section 12(2) or (4) in the case of that provision,
  - (c) the whole of those chargeable profits are to be apportioned under section 747(3) of ICTA to one or more companies resident in the United Kingdom, and
  - (d) tax is chargeable under section 747(4) of ICTA in respect of the whole of those chargeable profits, as so apportioned to those companies.

Origin: ICTA Sch.28AA para.6B(1)

- (2) Sections 28 to 32 have effect as if the controlled foreign company were a person on whom a potential advantage in relation to United Kingdom taxation were conferred by the actual provision.

Origin: ICTA Sch.28AA para.6B(2)

- (3) In applying sections 28 to 32 in a case in which they apply because of subsection (2) –
- (a) references to the advantaged person in sections 30(3)(a) and (b) and 31(2), (3) and (4)(b) include a reference to any of the companies mentioned in subsection (1)(c), and
  - (b) references to corporation tax include a reference to tax chargeable under section 747(4) of ICTA.

Origin: ICTA Sch.28AA para.6B(3)

- (4) In this section –
- “controlled foreign company” has the same meaning as in Chapter 4 of Part 17 of ICTA;
- “accounting period”, in relation to a controlled foreign company, has the same meaning as in that Chapter.

Origin: ICTA Sch.28AA para.6B(4)

**34 Application of section 28(2)(a) in relation to transfers of trading stock etc [jtp049]**

- (1) Section 28(2)(a) does not affect the credits to be brought into account by the disadvantaged person in respect of –
- (a) closing trading stock, or
  - (b) closing work in progress in a trade,
- for accounting periods ending on or after the day given by subsection (2).

Origin: ICTA Sch.28AA para.6A(1)

- (2) That day is the last day of the accounting period of the advantaged person in which the actual provision was made or imposed.

Origin: ICTA Sch.28AA para. 6A(1), (2)

- (3) For the purposes of this section “trading stock”, in relation to any trade, has the meaning given by –
- (a) section 174 of ITTOIA 2005, or
  - (b) section [156] [j035510] of [the Corporation Tax Act 2009].

Origin: ICTA Sch.28AA para.6A(3)

*Alternative way of claiming if a security is involved*

**35 Section 36 applies to claims where actual provision relates to a security [jtp045]**

- (1) Subsection (2) applies if –
- (a) both of the affected persons are companies, and
  - (b) the actual provision is provision in relation to a security issued by one of those companies.

Origin: ICTA Sch.28AA para.6C(1)

- (2) A claim under section 28 may be made in accordance with section 36.

Origin: ICTA Sch.28AA para.6C(2)

- (3) For the purposes of this Part, a “section 36 claim” is a claim under section 28 made in accordance with section 36.

Origin: ICTA Sch.28AA para.6C(2)

- (4) In subsections (1)(b) and (5)(a) “security” includes securities not creating or evidencing a charge on assets.

Origin: ICTA Sch.28AA paras. 1A(9), 6C(1)

- (5) For the purposes of subsection (1)(b), any –
- (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,

is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

Origin: ICTA Sch.28AA paras. 1A(10), 6C(1)

### **36 Making of section 36 claims [jtp046]**

- (1) A section 36 claim may be made by –
- (a) the disadvantaged person, or
  - (b) the advantaged person.

Origin: ICTA Sch.28AA para.6C(3)

- (2) A section 36 claim made by the advantaged person is to be taken to be made on behalf of the disadvantaged person.

Origin: ICTA Sch.28AA para.6C(3)

- (3) A section 36 claim may be made before or after a calculation within section 30(1) has been made.

Origin: ICTA Sch.28AA para.6C(4)

- (4) A section 36 claim must be made either –
- (a) at any time before the end of the period mentioned in section 31(2), or
  - (b) within the period mentioned in section 31(3).

Origin: ICTA Sch.28AA para.6C(5)

- (5) Subsection (4) has effect subject to section 40(3) (which provides for the extension of the period for making a claim).

Origin: ICTA Sch.28AA para.6C(5)

### **37 Giving effect to section 36 claims [jtp047]**

- (1) A section 36 claim is not a claim within paragraph 57 or 58 of Schedule 18 to FA 1998 (company tax returns, assessments and related matters).

Origin: ICTA Sch.28AA para.6C(6)

- (2) Accordingly, paragraph 59 of that Schedule (application of Schedule 1A to TMA 1970) has effect in relation to a section 36 claim.

Origin: ICTA Sch.28AA para.6C(6)

- (3) Where –
- (a) a section 36 claim is made before a calculation within section 30(1) has been made,
  - (b) such a calculation is subsequently made, and
  - (c) the claim is not consistent with the calculation,
- the affected persons are to be treated as if (instead of the claim actually made) a claim had been made that was consistent with the calculation.

Origin: ICTA Sch.28AA para.6C(7)

- (4) All such adjustments are to be made (including by the making of assessments) as are required to give effect to subsection (3).

Origin: ICTA Sch.28AA para.6C(8)

- (5) Subsection (4) has effect despite any limit on the time within which any adjustment may be made.

Origin: ICTA Sch.28AA para.6C(9)

### **38 Amending a section 36 claim if it is followed by relevant notice [jtp048]**

- (1) Subsection (2) applies if –
- (a) a section 36 claim is made,
  - (b) a return is subsequently made by the advantaged person on the basis mentioned in section 30(1), and
  - (c) a relevant notice (see section 44) taking account of such a determination as is mentioned in section 30(3)(b) is subsequently given to the advantaged person.

Origin: ICTA Sch.28AA para.6C(10)

- (2) If any amendment of the claim is appropriate in consequence of the determination contained in the relevant notice, the amendment may be made by –
- (a) the disadvantaged person, or
  - (b) the advantaged person.

Origin: ICTA Sch.28AA para.6C(11)

- (3) If an amendment under subsection (2) is made by the advantaged person it is to be taken to be made on behalf of the disadvantaged person.

Origin: ICTA Sch.28AA para.6C(11)

- (4) Any amendment under subsection (2) must be made within the period mentioned in section 31(3).

Origin: ICTA Sch.28AA para.6C(12)

- (5) Subsection (4) has effect subject to section 40(3) (which provides for the extension of the period for making an amendment).

Origin: ICTA Sch.28AA para.6C(12)

*Notification to persons who may be disadvantaged***39 Notice to potential claimants [jtp084]**

- (1) Subsection (2) applies if—
- (a) a relevant notice (see section 44) is given to any person,
  - (b) the notice, or anything contained it, takes account of a transfer-pricing determination, and
  - (c) it appears to an officer that there is a person (“DP”) who is or may be a disadvantaged person by reference to the subject-matter of the determination.

Origin: FA 1998 s.111(1)

- (2) The officer must give to DP a notice containing particulars of the determination.

Origin: FA 1998 s.111(1), (2)

- (3) A contravention of subsection (2) does not affect the validity—
- (a) of the relevant notice, or
  - (b) of any determination to which the notice relates.

Origin: FA 1998 s.111(4)

- (4) For the purposes of this section, a person is a disadvantaged person by reference to the subject-matter of a transfer-pricing determination if (and only if) the person—
- (a) is entitled, in consequence of the making of the determination, to make or amend a claim under section 28, or
  - (b) will be entitled, because of section 66(4), to appear and be heard by the Special Commissioners in any proceedings on an appeal relating to the determination.

Origin: FA 1998 s.111(5)

- (5) In this section—
- “officer” means officer of Revenue and Customs, and
- “transfer-pricing determination” means a determination of an amount that is to be brought into account for tax purposes in respect of—
- (a) any assumption made under section 12(2) or (4), or
  - (b) any advance-pricing-agreement assumptions (see section 79(6)).

Origin: FA 1998 s.111(1); FA 1999 s.87(5)

**40 Extending claim period if notice under section 39 not given or given late [jtp085]**

- (1) If there is a contravention of section 39(2), the Commissioners must consider whether, as a result of the contravention, any person has been prejudiced with respect to the making or amendment of a claim under section 28.

Origin: FA 1998 s.111(3)

- (2) Subsection (3) applies if—

- (a) there is a contravention of section 39(2), or
- (b) a notice required by section 39(2) is given after the relevant notice concerned.

Origin: FA 1998 s.111(3)

- (3) The Commissioners may, if they think fit, treat the period for the making or amendment of a claim under section 28 in the case concerned as extended by such further period as appears to them to be appropriate.

Origin: FA 1998 s.111(3)

- (4) In this section “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs.

Origin: FA 1998 s.111(3)

*Treatment of interest where claim made*

**41 Tax treatment if actual interest exceeds arm’s length interest [jtp055]**

- (1) Subsection (6) applies if the following conditions are met.

Origin: ICTA Sch.28AA para.6E

- (2) Condition A is that interest is paid by any person under the actual provision.

Origin: ICTA Sch.28AA para.6E

- (3) Condition B is that section 12(2) or (4) applies in relation to the actual provision.

Origin: ICTA Sch.28AA para.6E

- (4) Condition C is—

- (a) that the amount (“ALINT”) of interest that would have been payable under the arm’s length provision is less than the amount of interest paid under the actual provision, or
- (b) that there would not have been any interest payable under the arm’s length provision (so that ALINT is nil).

Origin: ICTA Sch.28AA para.6E

- (5) Condition D is that the person receiving the interest paid under the actual provision makes—

- (a) a claim under section 28, or
- (b) a section 36 claim.

Origin: ICTA Sch.28AA para.6E

- (6) The interest payable under the actual provision, so far as it exceeds ALINT—
  - (a) is not to be regarded as chargeable under Chapter 2 of Part 4 of ITTOIA 2005,
  - (b) is not subject to the provisions of Part 15 of ITA 2007 (deduction of income tax at source), and
  - (c) is not to be regarded as chargeable under Part 6 of CTA 2009 (loan relationships).

[Origin: ICTA Sch.28AA para.6E](#)

*Adjustment of double taxation relief where claim made*

**42 Double taxation relief under section 788 or 790 of ICTA [jtp056]**

- (1) Subsection (2) applies if –
- (a) a claim is made under section 28, and
  - (b) the disadvantaged person (“DP”) is entitled on that claim to make a calculation, or to have an adjustment made, on the basis that the arm’s length provision was made or imposed instead of the actual provision.

[Origin: ICTA Sch.28AA para.7\(1\)](#)

- (2) Assumptions A and B are to be made in DP’s case in relation to any credit for foreign tax which DP has been, or may be, given –
- (a) under any double taxation arrangements, or
  - (b) under section 790(1) of ICTA (unilateral relief for foreign tax).

[Origin: ICTA Sch.28AA para.7\(1\)](#)

- (3) Subsection (2) has effect subject to section 43(2).

[Origin: ICTA Sch.28AA para.7\(1\)](#)

- (4) Assumption A is that the foreign tax paid or payable by DP does not include any amount of foreign tax which would not be or have become payable were it to be assumed for the purposes of that tax that the arm’s length provision had been made or imposed instead of the actual provision.

[Origin: ICTA Sch.28AA para.7\(2\)](#)

- (5) Assumption B is that the amount of DP’s relevant profits in respect of which DP is given credit for foreign tax does not include the amount (if any) by which DP’s relevant profits are treated as reduced in accordance with section 28(1).

[Origin: ICTA Sch.28AA para.7\(2\)](#)

- (6) If any adjustment is required to be made for the purpose of giving effect to any of the preceding provisions of this section –
- (a) it may be made by setting the amount of the adjustment against any relief or repayment to which DP is entitled in pursuance of DP’s claim under section 28, and
  - (b) nothing in the Tax Acts limiting the time within which any assessment is to be or may be made or amended shall prevent that adjustment from being so made.

[Origin: ICTA Sch.28AA para.7\(5\)](#)

- (7) In subsection (5) “DP’s relevant profits” means the profits arising to DP from the carrying on of the relevant activities.

[Origin: ICTA Sch.28AA para.7\(6\)](#)

- (8) In this section –
- “double taxation arrangements” means arrangements which have effect under section 788 of ICTA (double taxation relief by agreement with territories outside the United Kingdom);

“foreign tax” means –

- (a) any tax under the law of a territory outside the United Kingdom, or
- (b) any amount that, for the purposes of any double taxation arrangements, is to be treated as if it were tax under the law of a territory outside the United Kingdom.

Origin: ICTA Sch.28AA para.14(1)

- (9) In determining for the purposes of this section whether a person is –
- (a) under any double taxation arrangements, or
  - (b) under section 790(1) of ICTA,
- to be given credit for foreign tax, ignore any requirement that a claim is made before such a credit is given.

Origin: ICTA Sch.28AA para.14(3)

#### **43 Double taxation relief under section 811 of ICTA [jtp057]**

- (1) Subsection (2) applies if –
- (a) a claim is made under section 28,
  - (b) the disadvantaged person (“DP”) is entitled on that claim to make a calculation, or to have an adjustment made, on the basis that the arm’s length provision was made or imposed instead of the actual provision,
  - (c) the application of that basis in the calculation of DP’s profits or losses for any chargeable period involves a reduction in the amount of any income, and
  - (d) that income is also income that falls to be treated as reduced in accordance with section 811(1) of ICTA (deduction for foreign tax where no credit allowable).

Origin: ICTA Sch.28AA para.7(3)

- (2) If this subsection applies –
- (a) the reduction mentioned in subsection (1)(c) is to be treated as made before any reduction under section 811(1) of ICTA, and
  - (b) tax paid, in the place in which any income arises, on so much of that income as is represented by the amount of the reduction mentioned in subsection (1)(c) shall be disregarded for the purposes of section 811(1) of ICTA.

Origin: ICTA Sch.28AA para.7(4)

- (3) If any adjustment is required to be made for the purpose of giving effect to any of the preceding provisions of this section –
- (a) it may be made by setting the amount of the adjustment against any relief or repayment to which DP is entitled in pursuance of DP’s claim under section 28, and
  - (b) nothing in the Tax Acts limiting the time within which any assessment is to be or may be made or amended shall prevent that adjustment from being so made.

Origin: ICTA Sch.28AA para.7(5)

*Interpretation of Chapter***44 Meaning of “relevant notice” [jtp086]**

In this Chapter “relevant notice” means –

- (a) a closure notice under section 28A(1) of TMA 1970 in relation to an enquiry into a return under section 8 or 8A of TMA 1970,
- (b) a closure notice under section 28B(1) of TMA 1970 in relation to an enquiry into a partnership return,
- (c) a closure notice under paragraph 32 of Schedule 18 to FA 1998 in relation to an enquiry into a company tax return,
- (d) a notice under section 30B(1) of TMA 1970 amending a partnership return,
- (e) a notice of an assessment under section 29 of TMA 1970,
- (f) a notice of a discovery assessment under paragraph 41 of Schedule 18 to FA 1998 (which includes a discovery assessment under that paragraph as applied by paragraph 52 of that Schedule), or
- (g) a notice of a discovery determination under paragraph 41 of Schedule 18 to FA 1998.

Origin: ICTA Sch.28AA paras.6(7), 6C(10); FA 1998 s.111(6)

**CHAPTER 5**

POSITION OF GUARANTOR OF AFFECTED PERSON’S LIABILITIES UNDER A SECURITY ISSUED BY THE PERSON

**45 When sections 46 to 48 apply [jtp051]**

- (1) Sections 46 to 48 apply if –
  - (a) one of the affected persons (“the issuing company”) is a company that has liabilities under a security issued by it,
  - (b) those liabilities are to any extent the subject of a guarantee provided by a company (“the guarantor company”),
  - (c) in calculating the profits and losses of the issuing company for tax purposes, the amounts to be deducted in respect of interest or other amounts payable under the security are required to be reduced (whether or not to nil) under section 12(2) or (4), and
  - (d) that reduction is required because of section 26.

Origin: ICTA Sch.28AA, para.6D(1)

- (2) In subsections (1)(a) and (3)(a) “security” includes securities not creating or evidencing a charge on assets.

Origin: ICTA Sch.28AA, paras.1A(9), 6D(10)

- (3) For the purposes of subsection (1)(a), any –
  - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,

is to be treated as if payable or given in respect of a security issued for the advance by the company, and the reference in subsection (1)(a) to a security is to be read accordingly.

Origin: ICTA Sch.28AA, paras.1A(10), 6D(10)

- (4) In subsection (1)(b) the reference to a guarantee includes –
- (a) a reference to a surety, and
  - (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

Origin: ICTA Sch.28AA, paras.1A(7), 6D(10)

- (5) In this Chapter –
- “the guarantor company” has the meaning given by subsection (1)(b);
  - “the issuing company” has the meaning given by subsection (1)(a);
  - “the security” means the security mentioned in subsection (1)(a).

Origin: ICTA Sch.28AA, para.6D(1)

#### 46 Attribution to guarantor company of things done by issuing company [jtp052]

- (1) On the making of a claim, the guarantor company is, to the extent of the reduction mentioned in section 45(1)(c), to be treated for all purposes of the Taxes Acts as if it (and not the issuing company) –
- (a) had issued the security,
  - (b) owed the liabilities under it, and
  - (c) had paid any interest or other amounts paid under it by the issuing company.

Origin: ICTA Sch.28AA para.6D(2)

- (2) Subsection (1) is subject to subsection (3).

Origin: ICTA Sch.28AA para.6D(2)

- (3) Where the issuing company's liabilities under the security are the subject of two or more guarantees (whether or not provided by the same person), TD must not exceed TR, where –

TD is the total of the amounts brought into account by the guarantor companies because of subsection (1), and

TR is the total amount of the reductions within section 45(1)(c).

Origin: ICTA Sch.28AA para.6D(3)

- (4) Provision about claims under subsection (1) is made by –
- section 47 (interaction between claims under subsection (1) and claims under section 28), and
  - section 48 (general provision about claims under subsection (1)).

Origin: ICTA Sch.28AA para.6D(2)

- (5) In subsection (1) “the Taxes Acts” has the meaning given by section 118(1) of TMA 1970.

Origin: ICTA Sch.28AA para.6D(11)

- (6) In subsection (3) any reference to a guarantee includes –
- (a) a reference to a surety, and
  - (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

Origin: ICTA Sch.28AA paras.1A(7), 6D(10)

#### **47 Interaction between claims under sections 28 and 46(1) [jtp053]**

- (1) In this section “the loan provision” means the actual provision made or imposed between –
- (a) the issuing company, and
  - (b) another company (“the lending company”),
- which is provision in relation to the security.

Origin: ICTA Sch.28AA para. 6D(4)

- (2) Subsections (3) and (4) apply if –
- (a) the guarantor company makes a claim under section 46(1), and
  - (b) the lending company makes a claim under section 28 in relation to the loan provision.

Origin: ICTA Sch.28AA para. 6D(5)

- (3) In determining the arm's length provision for the purposes of section 28(2)(a) in relation to the lending company's claim, additional amounts are to be brought into account as credits corresponding to the debits that fall to be brought into account by the guarantor company because of section 46(1).

Origin: ICTA Sch.28AA para. 6D(6)

- (4) If –
- (a) the lending company makes its claim under section 28 before the guarantor company makes its claim under section 46(1), and
  - (b) the calculation on which the lending company's claim is based does not comply with subsection (3),
- the guarantor company's claim is to be disallowed.

Origin: ICTA Sch.28AA para. 6D(7)

#### **48 Claims under section 46(1): general provisions [jtp054]**

- (1) A claim under section 46(1) may be made –
- (a) by the guarantor company,
  - (b) where there are two or more guarantor companies, by those companies acting together, or
  - (c) by the issuing company.

Origin: ICTA Sch.28AA para.6D(8)

- (2) A claim made under section 46(1) by the issuing company is to be taken to be made on behalf of the guarantor company or companies.

Origin: ICTA Sch.28AA para.6D(8)

- (3) Sections 29 to 31 apply in relation to a claim under section 46(1) made by or on behalf of any person or persons as they apply in relation to a claim under section 28 made by the disadvantaged person, but taking –
- (a) references in sections 30 and 31 to the advantaged person as references to the issuing company, and
  - (b) the reference in section 31 to the disadvantaged person as a reference to the guarantor company or companies.

Origin: ICTA Sch.28AA para.6D(9)

## CHAPTER 6

### BALANCING PAYMENTS

#### 49 Qualifying conditions for purposes of section 50 [jtp068]

- (1) Conditions A to D are “the qualifying conditions” for the purposes of section 50.

Origin: ICTA Sch.28AA para. 7A(1)

- (2) Condition A is that only one of the affected persons (“the advantaged person”) is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision.

Origin: ICTA Sch.28AA para. 7A(1)

- (3) Condition B is that the other affected person (“the disadvantaged person”) is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities.

Origin: ICTA Sch.28AA para. 7A(1)

- (4) Condition C is that –
- (a) a payment (the “balancing payment”) is made, or
  - (b) two or more payments (the “balancing payments”) are made, to the advantaged person by the disadvantaged person.

Origin: ICTA Sch.28AA para. 7A(1)

- (5) Condition D is that the sole or main reason for making that payment or those payments is that section 12(2) or (4) applies.

Origin: ICTA Sch.28AA para. 7A(1)

#### 50 Balancing payments between affected persons: no charge to, or relief from, tax [jtp058]

- (1) If the qualifying conditions (see section 49) are met, subsection (2) applies –
- (a) to the balancing payment if, or so far as, its amount does not exceed the available compensating adjustment, or

- (b) to the balancing payments if, or so far as, their total amount does not exceed the available compensating adjustment.

Origin: ICTA Sch.28AA para.7A(1), (2)

- (2) Any payment to which this subsection applies –
  - (a) is not to be taken into account in calculating profits or losses of either of the affected persons for the purposes of income tax or corporation tax, and
  - (b) is not for any purpose of the Corporation Tax Acts to be regarded as a distribution.

Origin: ICTA Sch.28AA para.7A(2)

- (3) In subsection (1) “the available compensating adjustment” means the difference between PL1 and PL2 where –
  - PL1 is the profits and losses of the disadvantaged person calculated for tax purposes on the basis of the actual provision, and
  - PL2 is the profits and losses of the disadvantaged person as (or as they would be) calculated for tax purposes on a claim under section 28.

Origin: ICTA Sch.28AA para.7A(3)

- (4) For the purposes of subsection (3), take PL1 or PL2 –
  - (a) as a positive amount if it is an amount of profits, and
  - (b) as a negative amount if it is an amount of losses.

Origin: ICTA Sch.28AA para.7A(3)

- (5) In this section, the following expressions have the meaning given by section 49 –
  - “balancing payment” and “balancing payments”;
  - “disadvantaged person”.

Origin: Drafting

## 51 Qualifying conditions for purposes of section 52 [jtp069]

- (1) Conditions A to F are the qualifying conditions for the purposes of section 52.

Origin: ICTA Sch.28AA para.7C(1)

- (2) Condition A is that one of the affected persons (“the issuing company”) is a company that has liabilities under a security issued by it.

Origin: ICTA Sch.28AA para.7C(1)

- (3) Condition B is that those liabilities are to any extent the subject of a guarantee provided by a company (“the guarantor company”).

Origin: ICTA Sch.28AA para.7C(1)

- (4) Condition C is that, in calculating the profits and losses of the issuing company for tax purposes, the amounts to be deducted in respect of interest or other amounts payable under the security are required to be reduced (whether or not to nil) under section 12(2) or (4).

Origin: ICTA Sch.28AA para.7C(1)

- (5) Condition D is that that reduction is required because of section 26.  
[Origin: ICTA Sch.28AA para.7C\(1\)](#)
- (6) Condition E is that—  
 (a) a payment (the “balancing payment”) is made, or  
 (b) two or more payments (the “balancing payments”) are made,  
 by the guarantor company to the issuing company.  
[Origin: ICTA Sch.28AA para.7C\(1\)](#)
- (7) Condition F is that the sole or main reasons for making that payment or those payments are—  
 (a) that section 12(2) or (4) applies because of section 26, or  
 (b) that sections 46 to 48 apply.  
[Origin: ICTA Sch.28AA, para.7C\(1\)](#)
- (8) In subsections (2) and (9)(a) “security” includes securities not creating or evidencing a charge on assets.  
[Origin: ICTA Sch.28AA, paras.1A\(9\), 7C\(1\)](#)
- (9) For the purposes of subsection (2), any—  
 (a) interest payable by a company on money advanced without the issue of a security for the advance, or  
 (b) other consideration given by a company for the use of money so advanced,  
 is to be treated as if payable or given in respect of a security issued for the advance by the company, and the reference in subsection (2) to a security is to be read accordingly.  
[Origin: ICTA Sch.28AA, paras.1A\(10\), 7C\(1\)](#)
- (10) In subsection (3) the reference to a guarantee includes—  
 (a) a reference to a surety, and  
 (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

[Origin: ICTA Sch.28AA, paras.1A\(7\), 7C\(1\)](#)

**52 Balancing payments by guarantor to issuer: no charge to, or relief from, tax [jtp062]**

- (1) If the qualifying conditions (see section 51) are met, subsection (2) applies to the balancing payments made by all of the guarantor companies if, or so far as, the total amount of those payments does not exceed the total amount of the reductions within section 51(4).  
[Origin: ICTA Sch.28AA para.7C\(1\), \(2\)](#)
- (2) Payments to which this subsection applies—

- (a) are not to be taken into account in calculating for the purposes of corporation tax the profits or losses of the guarantor company or companies or the issuing company, and
- (b) are not for any purpose of the Corporation Tax Acts to be regarded as distributions.

Origin: ICTA Sch.28AA para.7C(2)

- (3) In this section, the following expressions have the meaning given by section 51 –
  - “balancing payments”;
  - “guarantor company”;
  - “issuing company”.

Origin: Drafting

### **53 Pre-conditions for making election under section 54(1) [jtp059]**

- (1) Conditions A to E are the pre-conditions for the purposes of section 54.  
Origin: ICTA Sch.28AA para.7B(1), (2)
- (2) Condition A is that both of the affected persons are companies.  
Origin: ICTA Sch.28AA para.7B(1)
- (3) Condition B is that only one of the affected persons (“the advantaged person”) is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision.  
Origin: ICTA Sch.28AA para.7B(1)
- (4) Condition C is that the other affected person (“the disadvantaged person”) is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities.  
Origin: ICTA Sch.28AA para.7B(1)
- (5) Condition D is that the actual provision is provision in relation to a security (the “relevant security”).  
Origin: ICTA Sch.28AA para.7B(1)
- (6) Condition E is that the capital market condition is met (see section 58).  
Origin: ICTA Sch.28AA para.7B(3)
- (7) In subsections (5) and (8)(a) “security” includes securities not creating or evidencing a charge on assets.  
Origin: ICTA Sch.28AA paras.1A(9), 7B(10)
- (8) For the purposes of subsection (5), any –
  - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,

is to be treated as if payable or given in respect of a security issued for the advance by the company, and the reference in subsection (5) to a security is to be read accordingly.

Origin: ICTA Sch.28AA paras.1A(10), 7B(10)

#### 54 Election to pay tax rather than make balancing payments [jtp061]

- (1) If the pre-conditions (see section 53) are met, the disadvantaged person may make an election—
  - (a) to make no balancing payment within section 50 to the advantaged person in connection with section 12(2) or (4) applying because of section 25 in relation to the relevant security in a chargeable period, but
  - (b) instead, to undertake sole responsibility for discharging the advantaged person's liability to tax for that period so far as resulting from section 12(2) or (4) applying because of section 25 in relation to the relevant security.

Origin: ICTA Sch.28AA para.7B(2), (4)

- (2) Section 57 contains provision about the making and effect of elections under subsection (1).

Origin: Drafting

- (3) In this section, the following expressions have the meaning given by section 53—
  - “advantaged person”;
  - “disadvantaged person”;
  - “relevant security”.

Origin: Drafting

#### 55 Pre-conditions for making election under section 56(1) [jtp063]

- (1) Conditions A to E are the pre-conditions for the purposes of section 56.

Origin: ICTA Sch.28AA paras.7B(2), 7D(1), (2)
- (2) Condition A is that both of the affected persons are companies.

Origin: ICTA Sch.28AA para.7D(1)
- (3) Condition B is that only one of the affected persons (“the advantaged person”) is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision.

Origin: ICTA Sch.28AA para.7D(1)
- (4) Condition C is that the other affected person (“the disadvantaged person”) is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities.

Origin: ICTA Sch.28AA para.7D(1)
- (5) Condition D is that the actual provision is made or imposed by means of a series of transactions which include—

- (a) the issuing of a security (“the relevant security”) by one of the affected persons (“the issuing company”), and
- (b) the provision of a guarantee by the other affected person.

Origin: ICTA Sch.28AA para.7D(1), (3)

- (6) Condition E is that the capital market condition is met (see section 58).

Origin: ICTA Sch.28AA paras.7B(2), 7D(2)

- (7) In subsections (5) and (8)(a) “security” includes securities not creating or evidencing a charge on assets.

Origin: ICTA Sch.28AA paras.1A(9), 7D(1)

- (8) For the purposes of subsection (5), any –
  - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced,

is to be treated as if payable or given in respect of a security issued for the advance by the company, and the reference in subsection (5) to a security is to be read accordingly.

Origin: ICTA Sch.28AA paras.1A(10), 7D(1)

- (9) In subsection (5) the reference to a guarantee includes –
  - (a) a reference to a surety, and
  - (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.

Origin: ICTA Sch.28AA, paras.1A(7), 7D(1)

## 56 Election, in guarantee case, to pay tax rather than make balancing payments [jtp064]

- (1) If the pre-conditions (see section 55) are met, the disadvantaged person may make an election –
  - (a) to make no balancing payment within section 52 to the advantaged person in connection with section 12(2) or (4) applying because of section 26 in relation to the relevant security in a chargeable period, but
  - (b) instead, to undertake sole responsibility for discharging the advantaged person’s liability to tax for that period so far as resulting from section 12(2) or (4) applying because of section 26 in relation to the relevant security.

Origin: ICTA Sch.28AA paras.7B(2), (4), 7D(2)

- (2) Section 57 contains provision about the making and effect of elections under subsection (1).

Origin: Drafting

- (3) In this section, the following expressions have the meaning given by section 55 –

“advantaged person”;  
“disadvantaged person”;  
“relevant security”.

Origin: Drafting

**57 Elections under section 54(1) or 56(1) [jtp060]**

- (1) In this section “election” means election under section 54(1) or 56(1).

Origin: ICTA Sch.28AA paras.7B(5), (6), (7), 7D(2)

- (2) An election must be made by being included (whether by amendment or otherwise) in the disadvantaged person’s company tax return for the chargeable period in which the relevant security is issued.

Origin: ICTA Sch.28AA paras.7B(6), 7D(2)

- (3) An election is irrevocable.

Origin: ICTA Sch.28AA paras.7B(6), 7D(2)

- (4) An election has effect in relation to each of the affected persons for the chargeable period in which the relevant security is issued and all subsequent chargeable periods.

Origin: ICTA Sch.28AA paras.7B(6), 7D(2)

- (5) An election is of no effect if the Commissioners for Her Majesty’s Revenue and Customs give the disadvantaged person a notice refusing to accept the election.

Origin: ICTA Sch.28AA paras.7B(7), 7D(2)

- (6) A notice under subsection (5) may be given only after a notice of enquiry in respect of the company tax return containing the election has been given to the disadvantaged person.

(Paragraph 24 of Schedule 18 to FA 1998 makes provision about notices of enquiry in respect of company tax returns.)

Origin: ICTA Sch.28AA paras.7B(8), 7D(2); Drafting

- (7) If an election has effect in relation to an accounting period of the advantaged person, the tax mentioned in paragraph (b) of the subsection under which the election is made –

- (a) is recoverable from the disadvantaged person as if it were an amount of corporation tax due and owing from that person, and
- (b) is not recoverable from the advantaged person.

Origin: ICTA Sch.28AA paras.7B(5), 7D(2)

- (8) In this section –

“advantaged person”, “disadvantaged person” and “relevant security” –

- (a) in relation to an election under section 54(1), have the meaning given by section 53, and
- (b) in relation to an election under section 56(1), have the meaning given by section 55;

“company tax return” means the return required to be delivered pursuant to a notice under paragraph 3 of Schedule 18 to FA 1998, as read with paragraph 4 of that Schedule.

Origin: ICTA Sch.28AA paras.7B(9), 7D(2); Drafting

- (9) For the purposes of subsections (2) and (4), if the relevant security was issued in a chargeable period beginning before 1st April 2004 it shall be treated as if it had been issued in the chargeable period beginning on that date.

Origin: ICTA Sch.28AA paras.7B(6), 7D(2)

## 58 Meaning of “capital market condition” in sections 53 and 55 [jtp065]

- (1) For the purposes of section 53(6) or 55(6), the capital market condition is met if –
- the actual provision forms part of a capital market arrangement,
  - the capital market arrangement involves the issue of a capital market investment,
  - the securities that represent the capital market investment are issued wholly or mainly to independent persons, and
  - the total value of the capital market investments made under the capital market arrangement is at least £50 million.

Origin: ICTA Sch.28AA paras.7B(3), 7D(2)

- (2) In this section –
- “capital market arrangement” has the same meaning as in section 72B(1) of the Insolvency Act 1986 (c. 45) (see paragraph 1 of Schedule 2A to that Act);
- “capital market investment” has the same meaning as in section 72B(1) of the Insolvency Act 1986 (see paragraphs 2 and 3 of Schedule 2A to that Act);
- “independent person” means a person –
- who is not the disadvantaged person, and
  - who does not have a participatory relationship with either of the affected persons.

Origin: ICTA Sch.28AA para.7B(9)

- (3) In subsection (2) “the disadvantaged person” –
- for the purposes of the application of this section in relation to section 53(6) has the meaning given by section 53(4), and
  - for the purposes of the application of this section in relation to section 55(6) has the meaning given by section 55(4).

Origin: ICTA Sch.28AA para.7B(1)

- (4) For the purposes of subsection (2), a person (“A”) who is a company has a “participatory relationship” with one of the affected persons (“B”) if –
- one of A and B is directly or indirectly participating in the management, control or capital of the other, or
  - the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.

Origin: ICTA Sch.28AA paras.1A(8), 7B(10)

## CHAPTER 7

## OIL-RELATED RING-FENCE TRADES

**59 Provision made or imposed between ring-fence trade and other activities [jtp003]**

- (1) Subsections (2) to (4) apply if this Part applies by reason of section 1(2) (Part applies if provision made or imposed between a person's oil-related ring-fence trade and the person's other activities).

Origin: ICTA Sch.28AA para.11(3)

- (2) Chapters 3 to 6 (read in accordance with Chapters 2 and 8) apply in relation to the provision mentioned in section 1(2) as if –
- the oil-related ring-fence trade, and the person's other activities, were carried on by two different persons,
  - the provision were made or imposed as between those two persons by means of a transaction,
  - those two persons were both controlled by the same person at the time when the provision was made or imposed, and
  - a potential advantage in relation to United Kingdom taxation were conferred by the provision on each of those two persons.

Origin: ICTA Sch.28AA para.11(3)

- (3) Subsection (2) has effect subject to subsection (4).

Origin: ICTA Sch.28AA para.11(3)

- (4) Chapters 3 to 6 apply in relation to the provision only if the effect of their applying is –
- that a larger amount is taken for tax purposes to be the amount of the profits of the oil-related ring-fence trade for any chargeable period, or
  - that a smaller amount (including nil) is taken for tax purposes to be the amount for any chargeable period of any losses of the oil-related ring-fence trade.

Origin: ICTA Sch.28AA para. 11(4)

- (5) In subsection (4)(a), the reference to a larger amount includes, if there would not otherwise have been profits, an amount of more than nil.

Origin: ICTA Sch.28AA para. 11(4)

**60 Meaning of “oil-related ring-fence trade” in sections 1, 59 and 75 [jtp006]**

- (1) This section has effect for the interpretation of –
- sections 1 and 59, and
  - in Part 2, section 75(2)(f).

Origin: ICTA Sch.28AA para.11(1); FA 1999 s.85(7)

- (2) Activities carried on by a person are an “oil-related ring-fence trade” carried on by that person if subsection (3) or (4) applies to the activities.

Origin: ICTA Sch.28AA para.11(1); FA 1999 s.85(7)

- (3) This subsection applies to the activities if –
- (a) they are carried on by the person as part of a trade, and
  - (b) in accordance with section 16(1) of ITTOIA 2005 or section [40(1)] [j034801] of [the Corporation Tax Act 2009] (tax treatment of oil extraction activities), they are to be treated for any tax purposes as a separate trade distinct from all other activities carried on by the person as part of the trade.

Origin: ICTA Sch.28AA para.11(1); FA 1999 s.85(7)

- (4) This subsection applies to the activities if –
- (a) they are carried on by the person as a trade, and
  - (b) in accordance with section 16(1) of ITTOIA 2005 or section [40(1)] [j034801] of [the Corporation Tax Act 2009] they would, if the person did carry on any other activities as part of the trade, be treated for any tax purposes as a separate trade distinct from all other activities carried on by the person as part of the trade.

Origin: ICTA Sch.28AA para.11(1); FA 1999 s.85(7)

## CHAPTER 8

### SUPPLEMENTARY PROVISIONS AND INTERPRETATION OF PART

#### *Unit trusts*

#### **61 Application of Part to unit trusts [jtp073]**

- (1) This Part has effect as follows.
- Origin: ICTA Sch.28AA para.14(5)
- (2) As if a unit trust scheme were a company that is a body corporate.
- Origin: ICTA Sch.28AA para.14(5)
- (3) As if the rights of the unit holders under a unit trust scheme were shares in the company that the scheme is deemed to be.
- Origin: ICTA Sch.28AA para.14(5)
- (4) As if rights and powers of a person in the capacity of a person entitled to act for the purposes of a unit trust scheme were rights and powers of the scheme.
- Origin: ICTA Sch.28AA para.14(5)
- (5) As if provision made or imposed as between –
- (a) a person in the capacity of a person entitled to act for the purposes of a unit trust scheme, and
  - (b) another person,
- were made or imposed as between the scheme and that other person.

Origin: ICTA Sch.28AA para.14(5)

*Determinations requiring Commissioners' sanction***62 The determinations which require the Commissioners' sanction [jtp080]**

- (1) A determination requires the Commissioners' sanction if it—
- (a) is a transfer-pricing determination made for any of the specified purposes, and
  - (b) is not excepted by section 63 from the requirement for the Commissioners' sanction.

Origin: FA 1998 s.110(4)

- (2) In subsection (1) “transfer-pricing determination” means a determination of an amount to be brought into account for tax purposes in respect of any assumption made under section 12(2) or (4).

Origin: FA 1998 s.110(4)

- (3) For the purposes of subsection (1), each of the following is a specified purpose—

- (a) the giving of a closure notice under section 28A(1) of TMA 1970 in relation to an enquiry into a return under section 8 or 8A of TMA 1970,
- (b) the giving of a closure notice under section 28B(1) of TMA 1970 in relation to an enquiry into a partnership return,
- (c) the giving of a closure notice under paragraph 32 of Schedule 18 to FA 1998 in relation to an enquiry into a company tax return,
- (d) the giving of a notice under section 30B(1) of TMA 1970 amending a partnership return,
- (e) the making of an assessment under section 29 of TMA 1970,
- (f) the making of a discovery assessment under paragraph 41 of Schedule 18 to FA 1998 (which includes a discovery assessment under that paragraph as applied by paragraph 52 of that Schedule), and
- (g) the making of a discovery determination under paragraph 41 of Schedule 18 to FA 1998.

Origin: FA 1998 s.110(1), (9)

- (4) In this section “the Commissioners” means the Commissioners for Her Majesty's Revenue and Customs.

Origin: FA 1998 s.110(4)

**63 Determinations exempt from requirement for Commissioners' sanction [jtp081]**

- (1) A transfer-pricing determination made for a purpose specified in section 62(3) (“the specified purpose”) does not require the Commissioners' sanction if—
- (a) an agreement about the matters to which the determination relates has been made between an officer and the person in whose case the determination is made,
  - (b) the agreement is in force at the relevant time, and
  - (c) the matters to which the agreement relates include the amount determined by the transfer-pricing determination.

Origin: FA 1998 s.110(5)

- (2) For the purposes of subsection (1)(b) –
- (a) if the specified purpose is within section 62(3)(a) to (d), “the relevant time” is when the notice is given,
  - (b) if the specified purpose is within section 62(3)(e) or (f), “the relevant time” is when any notice of the assessment is given, and
  - (c) if the specified purpose is within section 62(3)(g), “the relevant time” is when any notice of the discovery determination is given.

Origin: FA 1998 s.110(5)

- (3) For the purposes of subsection (1)(b), an agreement made between an officer and any person in relation to any matter is “in force” at any time if (and only if) –
- (a) the agreement is one that has been made or confirmed in writing,
  - (b) that time is after the end of the cooling-off period, and
  - (c) the person has not, before the end of the cooling-off period, served a notice on an officer stating that the person is repudiating or resiling from the agreement.

Origin: FA 1998 s.110(6)

- (4) In subsection (3) “the cooling-off period” means –
- (a) if the agreement is made in writing, the 30 days beginning with the day when the agreement is made, and
  - (b) in any other case, the 30 days beginning with the day when the agreement is confirmed in writing.

Origin: FA 1998 s.110(6)

- (5) For the purposes of subsections (3) and (4), an agreement made between an officer and any person is “confirmed in writing” if an officer serves on the person a notice in writing –
- (a) stating that the agreement has been made, and
  - (b) setting out the terms of the agreement.

Origin: FA 1998 s.110(7)

- (6) In this section –
- “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs,
  - “officer” means officer of Revenue and Customs, and
  - “transfer-pricing determination” has the meaning given by section 62(2).

Origin: FA 1998 s.110(5); Drafting

#### 64 The requirement for the Commissioners’ sanction [jtp082]

- (1) Subsection (2) applies in relation to a transfer-pricing determination made for a purpose specified in section 62(3)(a) to (d) if, under section 62(1), the determination requires the Commissioners’ sanction.

Origin: FA 1998 s.110(1)

- (2) If the closure notice, or notice under section 30B(1) of TMA 1970, is given to a person –

- (a) without the determination, so far as it is taken into account in the notice, having been approved by the Commissioners, or
- (b) without a copy of the Commissioners' approval having been served on the person at or before the time when the notice is given to the person, the notice has effect as if given in the terms (if any) in which it would have been given had the determination not been taken into account.

Origin: FA 1998 s.110(2)

- (3) Subsection (3) applies in relation to a transfer-pricing determination made for a purpose specified in section 62(3)(e) to (g) if, under section 62(1), the transfer-pricing determination requires the Commissioners' sanction.

Origin: FA 1998 s.110(1)

- (4) If notice of the assessment, or notice of the discovery determination, is given to a person –
  - (a) without the transfer-pricing determination, so far as it is taken into account in the assessment or discovery determination, having been approved by the Commissioners, or
  - (b) without a copy of the Commissioners' approval having been served on the person at or before the time when the notice is given to the person, the assessment or discovery determination has effect as if made (and notified) in the terms (if any) in which it would have been made had the transfer-pricing determination not been taken into account.

Origin: FA 1998 s.110(2)

- (5) For the purposes of subsections (2) and (4), the Commissioners' approval of a transfer-pricing determination requiring their sanction –
  - (a) must be given specifically in relation to the case concerned and must apply to the amount determined, but
  - (b) subject to that, may be given by the Commissioners (either before or after the determination is made) in any such form or manner as the Commissioners may determine.

Origin: FA 1998 s.110(3)

- (6) In this section “the Commissioners” means the Commissioners for Her Majesty's Revenue and Customs.

Origin: FA 1998 s.110(1), (3)

## 65 Restriction of right to appeal against Commissioners' approval [jtp083]

- (1) In subsection (2) –
  - “appeal” means an appeal by virtue of any provision of –
    - (a) TMA 1970, or
    - (b) Schedule 18 to FA 1998 (company tax returns and related matters), and
  - “approved determination” means a determination that, for the purposes of section 64(2) or (4), has been approved by the Commissioners.

Origin: FA 1998 s.110(8)

- (2) The matters that may be questioned on so much of an appeal as relates to an approved determination do not include the Commissioners' approval.

[Origin: FA 1998 s.110\(8\)](#)

- (3) Subsection (2) does not apply so far as the grounds for questioning the approval are the same as the grounds for questioning the determination.

[Origin: FA 1998 s.110\(8\)](#)

- (4) In this section “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs.

[Origin: FA 1998 s.110\(8\)](#)

### *Appeals*

#### **66 Appeals [jtp070]**

- (1) The appeals within this subsection are—
- (a) an appeal under section 31 of, or Schedule 1A to, TMA 1970,
  - (b) an appeal under paragraph 34(3) of Schedule 18 to FA 1998 against an amendment of a company’s return, and
  - (c) an appeal under paragraph 48 of that Schedule against a discovery assessment or a discovery determination.

[Origin: ICTA Sch.28AA para.12\(2\)](#)

- (2) The question in dispute on an appeal within subsection (1) is to be determined by the Special Commissioners so far as the question—
- (a) is or involves a determination of whether, or how, this Part has effect as respects any provision made or imposed as between any two persons, and
  - (b) is not a question required to be determined by the Special Commissioners apart from this subsection.

[Origin: ICTA Sch.28AA para.12\(1\)](#)

- (3) Subsection (4) applies if—
- (a) because of subsection (2) a question is to be determined by the Special Commissioners,
  - (b) they are determining the question for the purposes of any proceedings before them, and
  - (c) the question relates to any provision made or imposed as between two persons each of whom is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities.

[Origin: ICTA Sch.28AA para.12\(3\)](#)

- (4) If this subsection applies—
- (a) each of the persons as between whom the actual provision was made or imposed is entitled to appear and be heard by the Special Commissioners, or to make representations to them in writing,
  - (b) the Special Commissioners shall determine the question separately from any other question in the proceedings, and
  - (c) their determination on the question has effect as if made in an appeal to which each of those persons was a party.

[Origin: ICTA Sch.28AA para.12\(4\)](#)

- (5) In this paragraph –  
“discovery assessment” means a discovery assessment under paragraph 41 of Schedule 18 to FA 1998 (which includes a discovery assessment under that paragraph as applied by paragraph 52 that Schedule);  
“discovery determination” means a discovery determination under paragraph 41 of that Schedule.

Origin: ICTA Sch.28AA para.12(5)

*Effect of Part on capital allowances and chargeable gains*

**67 Capital allowances [jtp076]**

- (1) Nothing in this Part is to be read as affecting the calculation of the amount of any capital allowance or balancing charge made under CAA 2001.

Origin: ICTA Sch.28AA para.13(1)

- (2) Subsection (1) does not apply in relation to claims under section 28.

Origin: ICTA Sch.28AA para.13(2)

**68 Chargeable gains [jtp077]**

- (1) Nothing in this Part is to be read as affecting the calculation in accordance with TCGA 1992 of the amount of any chargeable gain or allowable loss.

Origin: ICTA Sch.28AA para.13(1)

- (2) Nothing in this Part requires the profits and losses of any person to be calculated for tax purposes as if, in the person’s case, instead of income or losses to be brought into account in connection with the taxation of income, there were gains or losses to be brought into account in accordance with TCGA 1992.

Origin: ICTA Sch.28AA para.13(1)

- (3) Subsections (1) and (2) do not apply in relation to claims under section 28.

Origin: ICTA Sch.28AA para.13(2)

*Adjustments*

**69 Manner of making adjustments to give effect to Part [jtp072]**

Any adjustments required to be made under this Part may be made by way of discharge or repayment of tax, by the modification of any assessment or otherwise.

Origin: ICTA Sch.28AA paras.6C(8), 14(4)

### Definitions

#### 70 Meaning of “transaction” and “series of transactions” [jtp004]

- (1) In this Part “transaction” includes arrangements, understandings and mutual practices (whether or not they are, or are intended to be, legally enforceable).

Origin: ICTA Sch.28AA para.3(1)

- (2) References in this Part to a series of transactions include references to a number of transactions each entered into (whether or not one after the other) in pursuance of, or in relation to, the same arrangement.

Origin: ICTA Sch.28AA para.3(2)

- (3) A series of transactions are not prevented by reason only of one or more of the matters mentioned in subsection (4) from being regarded for the purposes of this Part as a series of transactions by means of which provision has been made or imposed as between any two persons.

Origin: ICTA Sch.28AA para.3(3)

- (4) Those matters are –
- (a) that there is no transaction in the series to which both those persons are parties,
  - (b) that the parties to any arrangement in pursuance of which the transactions in the series are entered into do not include one or both of those persons, and
  - (c) that there is one or more transactions in the series to which neither of those persons is a party.

Origin: ICTA Sch.28AA para.3(4)

- (5) In this section “arrangement” means any scheme or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable).

Origin: ICTA Sch.28AA para.3(5)

#### 71 Meaning of “the relevant activities” [jtp089]

- (1) In this Part “the relevant activities”, in relation to a person (“A”) who is one of the persons as between whom any provision is made or imposed, means activities that –

- (a) are within subsection (2), and
- (b) are not within subsection (3).

Origin: ICTA Sch.28AA para.14(1)

- (2) The activities within this subsection are those of A’s activities that comprise the activities in the course of which, or with respect to which, that provision is made or imposed.

Origin: ICTA Sch.28AA para.14(1)

- (3) The activities within this subsection are any of A’s activities carried on –
- (a) separately from the activities mentioned in subsection (2), or
  - (b) for the purposes of a different part of A’s business.

Origin: ICTA Sch.28AA para.14(1)

## 72 Meaning of “control” [jtp090]

- (1) References in this Part to a person controlling a body corporate or firm are to be read in accordance with section 840 of ICTA.

Origin: ICTA Sch.28AA para.14(2)

- (2) Subsection (1) has effect subject to sections 5(2) and 59(2).

Origin: ICTA Sch.28AA para.14(2)

## 73 Meaning of “losses” and “profits” [jtp091]

- (1) In this Part “losses” includes amounts which are not losses but in respect of which relief may be given in accordance with—
- (a) Part 10 of ICTA (loss relief and group relief),
  - (b) sections [393] [j696114] to [397] [j696114AA] of [the Corporation Tax Act 2009] (insurance companies: non-trading deficits on loan relationships),
  - (c) Chapter [14] of Part [6] of [the Corporation Tax Act 2009] (non-trading deficits on loan relationships), or
  - (d) section [1147] [j2002] of [the Corporation Tax Act 2009] (excess of management expenses).

Origin: ICTA Sch.28AA para.14(1)

- (2) In this Part “profits” includes income.

Origin: ICTA Sch.28AA para.14(1)

## 74 Index of expressions defined for the purposes of the Part or a Chapter [jtp092]

- (1) Schedule 2 (index of defined expressions that apply for the purposes of this Part or for the purposes of a particular Chapter) has effect.
- (2) That Schedule lists the places where some of the expressions used in this Part are defined or otherwise explained.

### PART 2

#### ADVANCE PRICING AGREEMENTS

## 75 Meaning of “advance pricing agreement” [jtp852]

- (1) In this Part “advance pricing agreement” means a written agreement that—
- (a) is made by the Commissioners with any person (“A”) as a consequence of an application by A under section 80,
  - (b) relates to one or more of the matters mentioned in subsection (2), and
  - (c) declares that it is an agreement made for the purposes of this section.

Origin: FA 1999 s.85(1)

- (2) Those matters are—

- (a) if A is not a company, the attribution of income to a branch or agency through which A has been carrying on a trade in the United Kingdom or is proposing to carry on a trade in the United Kingdom,
- (b) if A is a company, the attribution of income to a permanent establishment through which A has been carrying on a trade in the United Kingdom or is proposing to carry on a trade in the United Kingdom,
- (c) the attribution of income to any permanent establishment of A's, wherever situated, through which A has been carrying on, or is proposing to carry on, any business,
- (d) the extent to which income that has arisen or may arise to A is to be taken for any purpose to be income arising in a country or territory outside the United Kingdom,
- (e) the treatment for tax purposes of any provision made or imposed, whether before or after the date of the agreement, as between A and any associate (see section 76) of A's, and
- (f) the treatment for tax purposes of any provision made or imposed, whether before or after the date of the agreement, as between an oil-related ring-fence trade carried on by A (see section 60) and any other activities carried on by A.

Origin: FA 1999 s.85(2)

#### 76 Meaning of “associate” in section 75(2)(e) [jtp853]

- (1) This section applies for the purposes of section 75(2)(e).

Origin: FA 1999 s.85(6)

- (2) Two persons are associates in relation to provision made or imposed as between them if at the time of the making or imposition of the provision –
  - (a) one of them is directly or indirectly participating in the management, control or capital of the other, or
  - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of the two persons.

Origin: FA 1999 s.85(6)

- (3) Two persons are also associates in relation to any provision if section 5(2) (which applies to provision made or imposed in connection with sales of oil) requires the persons to be treated as controlled by the same person at the time of the making or imposition of that provision.

Origin: FA 1999 s.85(6)

- (4) For the interpretation of subsection (2), see sections 4(1), 6(3), 7(1) and 8(1) (which have the effect that references in subsection (2) to direct or indirect participation are to be read in accordance with provisions of Chapter 2 of Part 1).

Origin: FA 1999 s.85(6)

#### 77 Advance pricing agreement: effect on party to agreement [jtp850]

- (1) Subsection (2) applies if a chargeable period is one to which an advance pricing agreement relates.

Origin: FA 1999 s.85(1)

- (2) The Tax Acts have effect in relation to the chargeable period as if, in the case of the person with whom the Commissioners made the agreement, questions relating to the matters mentioned in section 75(2) are to be determined –
- (a) in accordance with the agreement, and
  - (b) without reference to the provisions in accordance with which they would otherwise be determined.

Origin: FA 1999 s.85(3)

- (3) Subsection (2) is subject to –
- subsections (4) and (5), and
  - section 78.

Origin: FA 1999 s.85(3)

- (4) A question is to be determined as mentioned in subsection (2) only so far as the agreement provides for the question to be determined in that way.

Origin: FA 1999 s.85(3)

- (5) In the case of so much of a question as –
- (a) relates to any matter mentioned in paragraph (e) or (f) of section 75(2), and
  - (b) is not comprised in a question that relates to a matter within another paragraph of section 75(2),
- reference to a provision is capable of being excluded under subsection (2) by an advance pricing agreement only if the provision is in Part 1.

Origin: FA 1999 s.85(4)

**78 Advance pricing agreement: effect of revocation or breach of conditions [jtp858]**

- (1) An advance pricing agreement does not have effect in accordance with section 77(2) in relation to any determination of a question if any of conditions A, B and C is met.

Origin: FA 1999 s.86(2)

- (2) Condition A is that a time to which the question relates is after a time as from which an officer has revoked the agreement in accordance with the agreement's terms.

Origin: FA 1999 s.86(2)

- (3) Condition B is that the question relates to a time after, or in relation to which, there has been a failure by a party to comply with a significant provision of the agreement.

Origin: FA 1999 s.86(2)

- (4) Condition C is that the question relates to a matter as respects which a key condition has not been met or is no longer met.

Origin: FA 1999 s.86(2)

- (5) In subsection (3) “party” means a party to the agreement, other than the Commissioners.

Origin: FA 1999 s.86(2); Change jc701.

- (6) A provision of the agreement is “significant” for the purposes of subsection (3) if compliance with that provision is, under the terms of the agreement, to be a condition of the agreement’s having effect.

Origin: FA 1999 s.86(2)

- (7) Any other condition that, under the terms of the agreement, is to be a condition of the agreement’s having effect is a “key condition” for the purposes of subsection (4).

Origin: FA 1999 s.86(2)

**79 Advance pricing agreement: effect on non-parties [jtp851]**

- (1) Subsections (2), (5) and (6) apply if –
- (a) an advance pricing agreement has effect in relation to any provision (“the actual provision”) made or imposed as between any person (“A”) and another (“B”), and
  - (b) section 77(2) has the effect in A’s case of requiring a question relating to the actual provision to be determined in accordance with the agreement rather than by reference to rules which would otherwise be applicable because of Part 1.

Origin: FA 1999 s.87(1)

- (2) The provisions mentioned in subsection (3) have effect in B’s case on the assumption that any question within subsection (4) is to be determined, to the same extent as in A’s case, by reference to the agreement.

Origin: FA 1999 s.87(2)

- (3) The provisions are –
- sections 28 to 32 (transfer pricing: claim by disadvantaged person), and
  - sections 42 and 43 (transfer pricing: adjustment of double taxation relief if claim made).

Origin: FA 1999 s.87(2)

- (4) The questions are –
- (a) whether A is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision, and
  - (b) what constitutes the arm’s length provision in relation to the actual provision.

Origin: FA 1999 s.87(3)

- (5) Subsection (2) has effect subject to any advance pricing agreement made between the Commissioners and B.

Origin: FA 1999 s.87(4)

- (6) Any assumptions to be made because of the agreement are “advance-pricing-agreement assumptions” for the purposes of paragraph (b) of the definition in section 39(5) of “transfer-pricing determination”.

Origin: FA 1999 s.87(5)

**80 Advance pricing agreement: application for agreement [jtp855]**

- (1) For the purposes of section 75(1)(a), an application by a person (“A”) is an application under this section if it complies with subsections (2) to (5).

Origin: FA 1999 s.85(1), (5)

- (2) It must be an application to the Commissioners for the clarification by agreement of the effect in A’s case of provisions by reference to which questions relating to any one or more of the matters mentioned in section 75(2) are to be, or might be, determined.

Origin: FA 1999 s.85(1)

- (3) It must set out A’s understanding of what would in A’s case be the effect, in the absence of any agreement, of the provisions in relation to which clarification is sought.

Origin: FA 1999 s.85(5)

- (4) It must set out the respects in which it appears to A that clarification is required in relation to those provisions.

Origin: FA 1999 s.85(5)

- (5) It must set out how A proposes that matters should be clarified in a manner consistent with the understanding mentioned in subsection (3).

Origin: FA 1999 s.85(5)

**81 Advance pricing agreement: years ended or begun before agreement made [jtp856]**

- (1) An advance pricing agreement may contain provision relating to chargeable periods ending before the agreement is made.

Origin: FA 1999 s.86(1)

- (2) If an advance pricing agreement—
- (a) relates to a chargeable period beginning or ending before the agreement is made, and
  - (b) provides for the manner in which adjustments are to be made for tax purposes in consequence of the agreement,
- the adjustments are to be made for those purposes in the manner provided for in the agreement.

Origin: FA 1999 s.86(7)

**82 Advance pricing agreement: modification and revocation [jtp857]**

- (1) Subsection (2) applies if an advance pricing agreement provides for the modification, or revocation, of the agreement—
- (a) by the Commissioners, or
  - (b) by an officer.

Origin: FA 1999 s.86(6)

- (2) The agreement may provide for the modification or revocation to take effect as from such time as the Commissioners or officer may determine.

Origin: FA 1999 s.86(6)

- (3) A time determined under subsection (2) may be (but need not be) a time before the modification is made or the agreement is revoked.

Origin: FA 1999 s.86(6)

**83 Advance pricing agreement: annulment for misrepresentation [jtp859]**

- (1) Subsection (6) applies if conditions A to D are met.

Origin: FA 1999 s.86(5)

- (2) Condition A is that the Commissioners and any person (“A”) have at any time purported to enter into an advance pricing agreement.

Origin: FA 1999 s.86(5)

- (3) Condition B is that, before that time, A fraudulently or negligently provided the Commissioners with information which was false or misleading.

Origin: FA 1999 s.86(5)

- (4) Condition C is that the information was so provided –
  - (a) for or in connection with the application to the Commissioners for the making of the agreement, or
  - (b) otherwise in connection with the preparation of the agreement.

Origin: FA 1999 s.86(5)

- (5) Condition D is that the Commissioners have notified A that the agreement is nullified by reason of the misrepresentation.

Origin: FA 1999 s.86(5)

- (6) The agreement is to be treated as never made.

Origin: FA 1999 s.86(5)

**84 Advance pricing agreement: penalty for misrepresentation [jtp863]**

A person is liable to a penalty of not more than £10,000 if the person fraudulently or negligently makes a false or misleading statement to the Commissioners or an officer –

- (a) for or in connection with any application to the Commissioners for them to enter into an advance pricing agreement, or
- (b) otherwise in connection with the preparation of an advance pricing agreement.

Origin: FA 1999 s.86(8)

**85 Advance pricing agreement: party’s duty to provide information [jtp861]**

- (1) A party to an advance pricing agreement must provide the Commissioners from time to time with all reports and other information that the party may be required to provide –

- (a) under the agreement, or
- (b) as a result of a request made by an officer in accordance with the agreement.

Origin: FA 1999 s.86(4)

- (2) In subsection (1), a reference to a party to an advance pricing agreement does not include the Commissioners.

Origin: Change jc701.

## 86 Advance pricing agreement: modifications for double taxation purposes [jtp860]

- (1) Subsection (2) applies if a mutual agreement made under and for the purposes of any double taxation arrangements is not consistent with the terms of an advance pricing agreement.

Origin: FA 1999 s.86(3)

- (2) The Commissioners must ensure that the advance pricing agreement is modified so far as may be necessary for enabling effect to be given to the mutual agreement in relation to the subject-matter of the advance pricing agreement.

Origin: FA 1999 s.86(3)

- (3) The Commissioners may comply with subsection (2) by exercising powers conferred on them by the advance pricing agreement or otherwise.

Origin: FA 1999 s.86(3)

- (4) In this section “double taxation arrangements” means arrangements which have effect under section 788 of ICTA (double taxation relief by agreement with territories outside the United Kingdom).

Origin: FA 1999 s.86(10)

## 87 Interpretation of Part: meaning of “Commissioners” and “officer” [jtp862]

In this Part—

“the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs;

“officer” means an officer of Revenue and Customs.

Origin: FA 1999 s.85(1), (5), s.86(2), (3), (4), (5), (6), (8)

### PART 3

#### REPEALS

#### *Repeals*

## 88 Repeals [jtp099]

Schedule 1 (repeals) has effect.

## SCHEDULES

## SCHEDULE 1

Section 88

## TRANSFER-PRICING AND ADVANCE-PRICING-AGREEMENTS REPEALS [JTP099S]

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Income and Corporation Taxes Act 1988 (c. 1)	Section 770A.[Introduces Schedule 28AA of ICTA] Schedule 28AA.
Finance Act 1998 (c. 36)	Section 108(1) and (2).[AE] Sections 110 and 111. Schedule 16.[AE]
Finance Act 1999 (c. 16)	Sections 85, 86(1) to (8) and (10) and 87.
Capital Allowances Act 2001 (c. 2)	In Schedule 2, paragraph 68.[AE]
Finance Act 2001 (c. 9)	In Schedule 29, paragraphs 35(3) and (4) and 38(2) and (3).[AE]
Finance Act 2002 (c. 23)	In Schedule 23, paragraph 21.[AE] In Schedule 27, paragraph 15.[AE]
Finance Act 2004 (c. 12)	Sections 30 to 32.[AE] Section 34(2) and (3).[AE] Sections 35 and 36.[AE]
Finance (No. 2) Act 2005 (c. 22)	In Schedule 8, paragraph 1.[AE]
Income Tax (Trading and Other Income) Act 2005 (c. 5)	In Schedule 1, paragraph 351 [AE].

- 1 In this table of repeals, [AE] indicates that the statutory provision concerned is an amending enactment for which a matching entry in the Bill's Table of Destinations will not be required.

## SCHEDULE 2

Section 74

## TRANSFER PRICING: INDEX OF DEFINED EXPRESSIONS [JTP092s]

the actual provision	section 2(1) and (2)
the advantaged person (in Chapter 4)	section 28(1)

the affected persons	section 2(1) and (2)
the arm's length provision	section 13
control (of a body corporate or firm)	section 72
the disadvantaged person (in Chapter 4)	section 28(1)
the guarantor company (in Chapter 5)	section 45(5)
the issuing company (in Chapter 5)	section 45(5)
losses	section 73(1)
medium-sized enterprise (in Chapter 3)	section 23
participation (direct or indirect) in the management, control or capital of another person	Chapter 2
potential advantage in relation to United Kingdom taxation	section 14(2)
profits	section 73(2)
relevant notice (in Chapter 4)	section 44
the relevant activities	section 71
section 36 claim	section 35(3)
the security (in Chapter 5)	section 45(5)
small enterprise (in Chapter 3)	section 23
transaction, and series of transactions	section 70
transfer pricing notice (in Chapter 3)	section 19(2)