

Bill 5

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PART 1

BASIC PROVISIONS

CHAPTER 1

NON-UK RESIDENT COMPANIES: CHARGEABLE PROFITS

Chargeable profits

1 Chargeable profits [j8150]

- (1) This section applies if a non-UK resident company carries on a trade in the United Kingdom through a permanent establishment in the United Kingdom.

Origin: ICTA s.11(1).

- (2) The company's chargeable profits are its income and chargeable gains, wherever arising, that are—
- (a) of a type mentioned in subsection (3), and
 - (b) attributable to the permanent establishment in accordance with sections 2 to 14.

Origin: ICTA s.11(2), (2A), s.11AA(1).

- (3) The types of income and chargeable gains referred to in subsection (2)(a) are—
- (a) trading income arising directly or indirectly through or from the establishment,
 - (b) income from property or rights used by, or held by or for, the establishment, and
 - (c) chargeable gains falling within section 10B of TCGA 1992 (non-resident company with United Kingdom permanent establishment)—
 - (i) as a result of assets being used in or for the purposes of the trade carried on by the company through the establishment, or
 - (ii) as a result of assets being used or held for the purposes of the establishment or being acquired for use by or for the purposes of the establishment.

Origin: ICTA s.11(2), (2A).

*Profits attributable to permanent establishment***2 Profits attributable to permanent establishment: introduction [j8151]**

- (1) Sections 3 to 14 apply for the purpose of determining the amount of income and chargeable gains of a non-UK resident company that are attributable to a permanent establishment of the company in the United Kingdom.

Origin: ICTA s.11AA(1).

- (2) Sections 3 to 10 contain provision about the separate enterprise principle.

Origin: Drafting.

- (3) Those sections are subject to sections 11 to 14 which contain provision about deductions.

Origin: Drafting, Annex 1, Change {jc342}.

*The separate enterprise principle***3 The separate enterprise principle [J8151a]**

- (1) The income and chargeable gains of the non-UK resident company that are attributable to the permanent establishment are those that the establishment would have made if it were a distinct and separate enterprise which –
- (a) engaged in the same or similar activities under the same or similar conditions, and
 - (b) dealt wholly independently with the non-UK resident company.

Origin: ICTA s.11AA(2).

- (2) In applying subsection (1) assume that –
- (a) the permanent establishment has the same credit rating as the non-UK resident company, and
 - (b) the permanent establishment has such equity and loan capital as it could reasonably be expected to have in the circumstances specified in that subsection.

Origin: ICTA s.11AA(3).

- (3) In sections 4 to 10 the principle in subsection (1) (read with subsection (2)) is called “the separate enterprise principle”.

Origin: ICTA Sch.A1 para.1(2).

4 Transactions treated as being on arm’s length terms [j8163]

In accordance with the separate enterprise principle, transactions between the permanent establishment and any other part of the non-UK resident company are treated as taking place on such terms as would have been agreed between parties dealing at arm’s length.

Origin: ICTA Sch.A1 para.2.

5 Provision of goods or services for permanent establishment [j8157]

- (1) This section applies if the non-UK resident company provides the permanent establishment with goods or services.

Origin: ICTA Sch.A1 para.6(1).

- (2) If the goods or services are of a kind that the company supplies, in the ordinary course of its business, to third parties dealing with it at arm's length, the matter is dealt with as a transaction to which the separate enterprise principle applies.

Origin: ICTA Sch.A1 para.6(2).

- (3) If not, the matter is dealt with as an expense incurred by the non-UK resident company for the purposes of the permanent establishment (see section 11).

Origin: ICTA Sch.A1 para.6(3).

6 Application to insurance companies [j8152]

- (1) The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision about the application of section 3(1) to insurance companies.

Origin: ICTA s.11AA(5).

- (2) The regulations may, in particular, make provision in place of section 3(2)(b) as to the basis on which, in the case of insurance companies, capital is to be attributed to a permanent establishment in the United Kingdom.

Origin: ICTA s.11AA(5).

- (3) In this section "insurance company" has the meaning given by section 431(2) of ICTA.

Origin: ICTA s.11AA(5).

The separate enterprise principle: application to non-UK resident banks

7 Non-UK resident banks: introduction [j8158]

- (1) Sections 8 to 10 contain provision in relation to the application of the separate enterprise principle if the non-UK resident company is a bank.

Origin: ICTA Sch.A1 para.7(1).

- (2) Nothing in sections 8 to 10 is to be read as preventing similar principles to those provided for in those sections from applying when the separate enterprise principle is applied to a non-UK resident company that is not a bank.

Origin: ICTA Sch.A1 para.7(2).

- (3) In this section and those sections "bank" has the meaning given by section 840A of ICTA.

Origin: ICTA Sch.A1 para.7(1).

8 Transfer of financial assets [j8159]

- (1) This section applies if—
- (a) the non-UK resident company is a bank, and
 - (b) there is a transfer of a loan or other financial asset between the permanent establishment and any other part of the company.

Origin: ICTA Sch.A1 para.7(1), 8(1).

- (2) In accordance with the separate enterprise principle, the transfer is recognised only if it would have taken place between independent enterprises.

Origin: ICTA Sch.A1 para.8(1).

- (3) The transfer is not recognised if it cannot reasonably be considered that it is carried out for valid commercial reasons.

Origin: ICTA Sch.A1 para.8(2).

- (4) For this purpose the obtaining of a tax advantage is not a valid commercial reason.

Origin: ICTA Sch.A1 para.8(2).

9 Loans: attribution of financial assets and profits arising [j8160]

- (1) This section applies if—
- (a) the non-UK resident company is a bank, and
 - (b) the non-UK resident company makes a loan.

Origin: ICTA Sch.A1 para.7(1), 9(1).

- (2) In accordance with the separate enterprise principle, the loan, and other financial assets and profits arising from it, are attributed to the permanent establishment so far as they can reasonably be regarded as having been generated by the activities of the permanent establishment.

Origin: ICTA Sch.A1 para.9(1).

- (3) For the purposes of subsection (2), particular account is to be taken of the extent to which the permanent establishment is responsible for—

- (a) obtaining the offer of new business,
- (b) establishing the potential borrower's credit rating and the risk involved in providing credit,
- (c) negotiating the terms of the loan with the borrower, and
- (d) deciding whether, and if so on what conditions, to make or extend the loan.

Origin: ICTA Sch.A1 para.9(3).

- (4) For those purposes, account may also be taken of the extent to which the permanent establishment is responsible for—

- (a) concluding the loan agreement and disbursing the proceeds of the loan, and
- (b) administering the loan (including handling and monitoring the service of it) and holding and controlling any securities pledged.

Origin: ICTA Sch.A1 para.9(4).

- (5) References in this section to a financial asset include any financial risk in relation to a loan, or potential loan, if—
- the financial risk is capable of giving rise to fees or other receipts, and
 - the holding of capital is required for the financial risk (or would be required if the transaction were between parties at arm's length).

Origin: ICTA Sch.A1 para.9(5).

10 Borrowing: permanent establishment acting as agent or intermediary [j8161]

- (1) This section applies if—
- the non-UK resident company is a bank, and
 - the permanent establishment borrows funds for the purposes of another part of the company and (in relation to that borrowing) acts only as an agent or intermediary.

Origin: ICTA Sch.A1 para.7(1), 10(1).

- (2) In accordance with the separate enterprise principle—
- the income and chargeable gains attributable to the permanent establishment, and
 - the capital attributable to the permanent establishment under section 3(2)(b),

are to be those appropriate in the case of an agent acting at arm's length, taking into account the risks and costs borne by the establishment.

Origin: ICTA Sch.A1 para.10(2).

Rules about deductions

11 Allowable deductions [j8162]

- (1) A deduction is allowed for any allowable expenses incurred for the purposes of the permanent establishment.

Origin: ICTA s.11AA(4).

- (2) Expenses incurred for the purposes of the permanent establishment include executive and general administrative expenses so incurred, whether in the United Kingdom or elsewhere.

Origin: ICTA s.11AA(4).

- (3) It does not matter whether the expenses are incurred by, or reimbursed by, the permanent establishment.

Origin: ICTA Sch.A1 para.3(1).

- (4) The amount of expenses to be taken into account under subsection (1) is the actual cost to the non-UK resident company.

Origin: ICTA Sch.A1 para.3(2).

- (5) “Allowable expenses” means expenses of a kind in respect of which a deduction would be allowed for corporation tax purposes if incurred by a UK resident company.

Origin: ICTA s.11AA(4).

12 Restriction on deductions: costs [j8164]

No deduction is allowed for costs in excess of those which would have been incurred on the assumptions in section 3(2).

Origin: ICTA s.11AA(3).

13 Restriction on deductions: payments in respect of intangible assets [j8155]

- (1) No deduction is allowed for royalties paid, or other similar payments made, by the permanent establishment to any other part of the non-UK resident company in respect of the use of intangible assets held by the company.

Origin: ICTA Sch.A1 para.4(1).

- (2) This does not prevent a deduction for any contribution by the permanent establishment to the costs of creation of an intangible asset.

Origin: ICTA Sch.A1 para.4(2).

- (3) In this section “intangible asset” has the meaning it has for accounting purposes, and includes any intellectual property (as defined in paragraph 2(2) of Schedule 29 to FA 2002).

Origin: ICTA Sch.A1 para.4(3).

14 Restriction on deductions: interest or other financing costs [j8156]

- (1) No deduction is allowed for payments of interest or other financing costs by the permanent establishment to any other part of the non-UK resident company.

Origin: ICTA Sch.A1 para.5(1).

- (2) But the restriction in subsection (1) does not apply to interest or other financing costs that are payable in respect of borrowing by the permanent establishment in the ordinary course of a financial business carried on by it.

Origin: ICTA Sch.A1 para.5(2).

- (3) In subsection (2) “financial business” means any of the following—
- (a) banking, deposit-taking, money-lending or debt-factoring, or a business similar to any of those, and
 - (b) dealing in commodity or financial futures.

Origin: ICTA Sch.A1 para.5(3).