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## SCHEDULES

### SCHEDULE 28AA

#### PROVISION NOT AT ARM'S LENGTH

##### Modifications etc. (not altering text)

- C1 Sch. 28AA modified (28.7.2000) by Finance Act 2000 (c. 17), Sch. 22 para. 58(1) (as amended by 2004 c. 12, s. 37, Sch. 5 para. 12) (with Sch. 22 para. 58(3))
- C2 Sch. 28AA applied (with modifications) (28.7.2000) by Finance Act 2000 (c. 17), Sch. 22 para. 59(1) (2) (as amended by 2004 c. 12, s. 37, Sch. 5 para. 13) (with Sch. 22 para. 59(4))
- C3 Sch. 28AA applied by Finance Act 1996 (c. 8), s. 100 (as substituted (with effect in accordance with s. 79(3) of the 2002 amending Act) by Finance Act 2002 (c. 23), Sch. 23 para. 6 (with s. 81(4)(5), Sch. 23 para. 25))
- C4 Sch. 28AA modified by Finance Act 1996 (c. 8), Sch. 9 para. 11A(1) (as inserted (with effect in accordance with s. 79(3) of the 2002 amending Act) by Finance Act 2002 (c. 23), Sch. 23 para. 11 (with s. 81(4)(5), Sch. 23 para. 25))

##### *Basic rule on transfer pricing etc.*

- 1 (1) This Schedule applies where—
  - (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) at the time of the making or imposition of the actual provision—
    - (i) one of the affected persons was directly or indirectly participating in the management, control or capital of the other; or
    - (ii) the same person or persons was or were directly or indirectly participating in the management, control or capital of each of the affected persons.
- (2) Subject to paragraphs 8, 10 and 13 below, 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, or (whether or not the same advantage) on each of them,

the profits and losses of the potentially advantaged person or, as the case may be, of each of the potentially advantaged persons shall be computed for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.
- (3) For the purposes of this Schedule 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 shall include the case in which

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provision is made or imposed as between any two persons but no provision would have been made as between independent enterprises; and references in this Schedule to the arm's length provision shall be construed accordingly.

VALID FROM 22/07/2004

*Provision in relation to securities: determination of arm's length provision*

- 1A (1) This paragraph 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”).
- (2) Paragraph 1(2)(a) above shall be construed 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 (see sub-paragraph (6) below),
  - (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,
- but this is subject to the following provisions of this paragraph.
- (3) In a case where—
- (a) a company makes a loan to another company with which it has a special relationship, and
  - (b) it is not part of the first company's business to make loans generally,
- the fact that it is not part of the first company's business to make loans generally shall be disregarded in construing sub-paragraph (2) above.
- (4) Paragraph 1(2)(a) above shall be construed as requiring no account to be taken, in the determination of any of the matters mentioned in sub-paragraph (5) below, 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 (see sub-paragraphs (7) and (8) below).
- (5) 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 the issue of a security by the issuing company or the making of a loan, or a loan of a particular amount, to the issuing company;
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.
- (6) In this paragraph “special relationship” means any relationship by virtue of which the condition in paragraph 1(1)(b) above is satisfied in the case of the affected persons.

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- (7) In this paragraph any reference to a guarantee includes a reference to a surety and 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 he will be paid by, or out of the assets of, one or more companies.
- (8) For the purposes of this paragraph, the cases where one company has a “participatory relationship” with another are those where—
- (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 them.
- (9) In this paragraph “security” includes securities not creating or evidencing a charge on assets.
- (10) For the purposes of this paragraph—
- (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, shall be treated as if payable or given in respect of a security issued for the advance by the company, and references in this paragraph to a security shall be construed accordingly.

VALID FROM 22/07/2004

*Guarantees etc*

- 1B (1) This paragraph 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 of those persons.
- (2) Paragraph 1(2)(a) above shall be construed 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,
- but this is subject to the following provisions of this paragraph.
- (3) In a case where—
- (a) a company provides a guarantee in respect of another company with which it has a special relationship, and

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(b) it is not part of the first company's business to provide guarantees generally, the fact that it is not part of the first company's business to provide guarantees generally shall be disregarded in construing sub-paragraph (2) above.

(4) Paragraph 1(2)(a) above shall be construed as requiring no account to be taken, in the determination of any of the matters mentioned in sub-paragraph (5) below, 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.

(5) 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 the issue of a security by the issuing company or the making of a loan, or a loan of a particular amount, to the issuing company;
- (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

(6) The following provisions of paragraph 1A above also apply for the purposes of this paragraph—

- (a) sub-paragraph (6) (meaning of special relationship);
- (b) sub-paragraph (7) (construction of references to a guarantee);
- (c) sub-paragraph (8) (meaning of participatory relationship);
- (d) sub-paragraph (9) (meaning of security);
- (e) sub-paragraph (10) (extended meaning of security).

*Principles for construing rules in accordance with OECD principles*

2 (1) This Schedule shall be construed (subject to paragraphs 8 to 11 below) in such manner as best secures consistency between—

- (a) the effect given to paragraph 1 above; and
- (b) the effect which, in accordance with the 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.

(2) In this paragraph “the OECD model” means—

- (a) the rules which, at the passing of this Act, 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.

(3) In this paragraph “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 Administrations; and
- (b) such documents published by that Organisation on or after that date as may for the purposes of this Schedule be designated, by an order made by the Treasury, as comprised in the transfer pricing guidelines.

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*Meaning of “transaction” and “series of transaction”s*

- 3
- (1) In this Schedule “transaction” includes arrangements, understandings and mutual practices (whether or not they are, or are intended to be, legally enforceable).
  - (2) References in this Schedule 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.
  - (3) A series of transactions shall not be prevented by reason only of one or more of the matters mentioned in sub-paragraph (4) below from being regarded for the purposes of this Schedule as a series of transactions by means of which provision has been made or imposed as between any two persons.
  - (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.
  - (5) In this paragraph, “arrangement” means any scheme or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable).

**Modifications etc. (not altering text)**

- C5** Sch. 28AA para. 3 applied (with effect in accordance with Sch. 17 para. 13 of the affecting Act) by Finance Act 2009 (c. 10), Sch. 17 para. 12(5)

*Participation in the management, control or capital of a person*

- 4
- (1) For the purposes of this Schedule 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 partnership; and
    - (b) controlled by the first person.
  - (2) For the purposes of this Schedule a person (“the potential participant”) is indirectly participating in the management, control or capital of another person at a particular time if, and only if—
    - (a) he would be taken to be directly so participating at that time if the rights and powers attributed to him included all the rights and powers mentioned in sub-paragraph (3) below that are not already attributed to him for the purposes of sub-paragraph (1) above; or
    - (b) he is, at that time, one of a number of major participants in that other person’s enterprise.
  - (3) The rights and powers referred to in sub-paragraph (2)(a) above are—

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- (a) rights and powers which the potential participant is entitled to acquire at a future date or which he will, at a future date, become entitled to acquire;
  - (b) rights and powers of persons other than the potential participant to the extent that they are rights or powers falling within sub-paragraph (4) below;
  - (c) rights and powers of any person with whom the potential participant is connected; and
  - (d) rights and powers which for the purposes of sub-paragraph (2)(a) above would be attributed to a person with whom the potential participant is connected if that connected person were himself the potential participant.
- (4) Rights and powers fall within this sub-paragraph to the extent that they—
- (a) are required, or may be required, to be exercised in any one or more of the following ways, that is to say—
    - (i) on behalf of the potential participant;
    - (ii) under the direction of the potential participant; or
    - (iii) for the benefit of the potential participant;
 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.
- (5) In sub-paragraphs (3)(b) to (d) and (4) above, the references to a person's rights and powers include references to any rights or powers which he either—
- (a) is entitled to acquire at a future date, or
  - (b) will, at a future date, become entitled to acquire.
- (6) In paragraph (d) of sub-paragraph (3) above, the reference to rights and powers which would be attributed to a connected person if he were the potential participant includes a reference to rights and powers which, by applying that paragraph wherever one person is connected with another, would be so attributed to him through a number of persons each of whom is connected with at least one of the others.
- (7) For the purposes of this paragraph a person (“the potential major participant”) 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 partnership; and
  - (b) the 40 per cent. test is satisfied in the case of each of two persons who, taken together, control the subordinate and of whom one is the potential major participant.
- (8) For the purposes of this paragraph the 40 per cent. test is satisfied in the case of each of two persons wherever each of them has interests, rights and powers representing at least 40 per cent. of the holdings, rights and powers in respect of which the pair of them fall to be taken as controlling the subordinate.
- (9) For the purposes of this paragraph—
- (a) the question whether a person is controlled by any two or more persons taken together, and
  - (b) any question whether the 40 per cent. test is satisfied in the case of a person who is one of two persons,
- shall be determined after attributing to each of the persons all the rights and powers attributed to a potential participant for the purposes of sub-paragraph (2)(a) above.

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- (10) References in this paragraph—
- (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.
- (11) For the purposes of this paragraph two persons are connected with each other if—
- (a) one of them is an individual and the other is his spouse, a relative of his or of his spouse, or the spouse of such a relative; or
  - (b) one of them is a trustee of a settlement and the other is—
    - (i) a person who in relation to that settlement is a settlor; or
    - (ii) a person who is connected with a person falling within sub-paragraph (i) above.
- (12) In sub-paragraph (11) above—
- “relative” means brother, sister, ancestor or lineal descendant; and
  - “settlement” and “settlor” have the same meanings as in Chapter IA of Part XV.

VALID FROM 20/07/2005

*Persons acting together in relation to financing arrangements*

- 4A (1) A person (“P”) shall be treated for the purposes of paragraph 1(1)(b)(i) above (but subject to sub-paragraph (7) below) as 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 partnership;
  - (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) above.
- (2) A person (“Q”) shall be treated for the purposes of paragraph 1(1)(b)(ii) above (but subject to sub-paragraph (7) below) as 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—
- (a) the actual provision relates, to any extent, to financing arrangements for one of the affected persons (“B”);
  - (b) B is a body corporate or partnership;
  - (c) Q and other persons acted together in relation to the financing arrangements; and
  - (d) 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) above.



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- (3) It is immaterial for the purposes of sub-paragraph (1)(c) or (2)(c) above whether P or 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.
- (4) In sub-paragraph (1)(d) or (2)(d) “relevant time” means—
  - (a) a time when P or Q and the other persons were acting together in relation to the financing arrangements; or
  - (b) a time in the period of six months beginning with the day on which they ceased so to act.
- (5) In determining for the purposes of sub-paragraph (1)(d) or (2)(d) whether P or Q would be taken to have control of another person, the rights and powers of any person (and not just P or Q) shall be taken to include those that would be attributed to that person in determining under paragraph 4 above whether he is indirectly participating in the management, control or capital of the other person.
- (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.
- (7) Where the condition in paragraph 1(1)(b) above would not be satisfied but for this paragraph, paragraph 1(2) above applies only to the extent that the actual provision relates to the financing arrangements in question.

VALID FROM 20/07/2005

*Financing arrangements: anticipatory provision*

- 4B
- (1) To the extent that it applies to provision relating to financing arrangements, this Schedule has effect as if in paragraph 1(1)(b) above the words “or within the period of six months beginning with the day on which the actual provision was made or imposed” were inserted immediately before sub-paragraph (i).
  - (2) In this paragraph “financing arrangements” has the same meaning as in paragraph 4A above.

*Advantage in relation to United Kingdom taxation*

- 5
- (1) For the purposes of this Schedule (but subject to sub-paragraph (2) below) the actual provision confers a potential advantage on a person in relation to United Kingdom taxation wherever, disregarding this Schedule, the effect of making or imposing the actual provision, instead of the arm's length provision, would be one or both of the following, that is to say—
    - (a) that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of that person's profits for any chargeable period; or



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- (b) 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 that person.
- (2) Subject to paragraph 11(2) below, the actual provision shall not be taken for the purposes of this Schedule to confer a potential advantage in relation to United Kingdom taxation on either of the persons as between whom it is made or imposed if—
- (a) the three conditions set out in sub-paragraphs (3) to (5) below are all satisfied in the case of each of those two persons; and
  - (b) the further condition set out in sub-paragraph (6) below is satisfied in the case of each of those persons who is an insurance company.
- (3) The first condition is satisfied in the case of any person if—
- (a) that person is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities;
  - (b) that person is not entitled to any exemption from income tax or corporation tax in respect of, or of a part of, the income or profits arising from the relevant activities in respect of which he is within that charge; and
  - (c) where that person is within the charge to income tax in respect of profits arising from those activities, he is resident in the United Kingdom in the chargeable periods in which he is so within that charge.
- (4) The second condition is satisfied in the case of any person if he is neither—
- (a) a person with an entitlement, in pursuance of any double taxation arrangements or under section 790(1), to be given credit in any chargeable period for any foreign tax on or in respect of profits arising from the relevant activities; nor
  - (b) a person who would have such an entitlement in any such period if there were any such profits or if they exceeded a certain amount.
- (5) The third condition is satisfied in the case of any person if the amounts taken into account in computing the profits or losses arising from the relevant activities to that person in any chargeable period in which he is within the charge to income tax or corporation tax in respect of profits arising from those activities do not include any income the amount of which is reduced in accordance with section 811(1) (deduction for foreign tax where no credit allowable).
- (6) The further condition is satisfied in the case of an insurance company if the profits arising from the relevant activities in respect of which the company is within the charge to corporation tax do not include—
- (a) any profits in the computation of which acquisition expenses have been brought into account in accordance with section 86 of the <sup>M1</sup>Finance Act 1989 (expenses of acquiring insurance business); or
  - (b) any profits in relation to which the rate of corporation tax is fixed by section 88 or 88A of that Act (lower rate on certain profits of insurance companies).

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**Marginal Citations**

**M1** 1989 c. 26.

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*Exemption for dormant companies*

- 5A (1) Paragraph 1(2) above does not apply in computing for any chargeable period the profits and losses of a potentially advantaged person if that person is a company which satisfies the condition in sub-paragraph (2) below.
- (2) The condition is that—
- (a) the company was dormant throughout the pre-qualifying period, and
  - (b) apart from paragraph 1 above, the company has continued to be dormant at all times since the end of the pre-qualifying period.
- (3) In sub-paragraph (2) above “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.
- (4) In this paragraph “dormant” has the same meaning as in section 249AA of the Companies Act 1985 (see subsections (4) to (7) of that section).

VALID FROM 22/07/2004

*Exemption for small or medium-sized enterprises*

- 5B (1) Paragraph 1(2) above does not apply in computing 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 paragraph 5D below).
- (2) Exceptions to sub-paragraph (1) above are provided—
- (a) in the case of a small enterprise, by sub-paragraphs (3) and (4) below, and
  - (b) in the case of a medium-sized enterprise, by sub-paragraphs (3) and (4) and paragraph 5C below.
- (3) The first exception is where the small or medium-sized enterprise elects for sub-paragraph (1) above not to apply in relation to the chargeable period.
- Any such election is irrevocable.
- (4) The second exception is where, at the time when the actual provision is or was made or imposed,—
- (a) the other affected person, or
  - (b) a party to a relevant transaction (see sub-paragraph (5) below),
- is a resident (see sub-paragraph (6) below) of a non-qualifying territory (whether or not that person is also a resident of a qualifying territory).

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- (5) For the purposes of sub-paragraph (4) above, a “party to a relevant transaction” is a person who, in a case where 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.
- (6) In this paragraph “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 his 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.
- (7) The definitions of “qualifying territory” and “non-qualifying territory” are in paragraph 5E below.

**Modifications etc. (not altering text)**

- C6** Sch. 28AA paras. 5B, 5C excluded (19.7.2006) by Finance Act 2006 (c. 25), s. 113(6), **Sch. 17 para. 12(2)(3)**
- C7** Sch. 28AA paras. 5B, 5C excluded by The Authorised Investment Funds (Tax) Regulations 2006 (S.I. 2006/964), **reg. 69X(6)** (as inserted (6.4.2008) by The Authorised Investment Funds (Tax) (Amendment) Regulations 2008 (S.I. 2008/705), **regs. 1, 5**)

VALID FROM 22/07/2004

*Additional provisions for medium-sized enterprises*

- 5C (1) Paragraph 5B(1) above does not apply as respects any provision made or imposed if—
- (a) the potentially advantaged person in question is a medium-sized enterprise for the chargeable period in question, and
  - (b) the Board gives that person a notice under this sub-paragraph (a “transfer pricing notice”) requiring him to compute the profits and losses of that chargeable period in accordance with paragraph 1(2) above in the case of that provision.
- (2) A transfer pricing notice may be given in respect of —
- (a) any provision specified, or of a description specified, in the notice, or
  - (b) every provision in relation to which the assumption in paragraph 1(2) above would fall to be made apart from paragraph 5B(1) above.
- (3) A transfer pricing notice may be given only after a notice of enquiry has been given to the potentially advantaged person in respect of his tax return for the chargeable period.
- (4) A transfer pricing notice must identify the officer of the Board to whom any notice of appeal under this paragraph is to be given.
- (5) A person to whom a transfer pricing notice is given may appeal against the decision to give the notice, but only on the grounds that the condition in sub-paragraph (1) (a) above is not satisfied.

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- (6) Any such appeal must be brought by giving written notice of appeal to the officer of the Board identified for the purpose in the transfer pricing notice in accordance with sub-paragraph (4) above.
- (7) 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.
- (8) A person to whom a transfer pricing notice is given may amend his 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 he appeals against the notice, the day on which the appeal is finally determined or abandoned.
- (9) Where 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 sub-paragraph (8) above, or
  - (b) the earlier amendment of the tax return for the purpose of complying with the notice.
- (10) 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 paragraph 5B(3) above for that period, and
  - (c) who is not excepted from paragraph 5B(1) above by virtue of paragraph 5B(4) above in relation to that provision for that period,
- the tax return required to be made for that period is a return that disregards paragraph 1(2) above.
- (11) Sub-paragraph (10) above 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 sub-paragraph (8) above for the purpose of complying with the notice, and
  - (c) the return ought to have been so amended.
- (12) In this paragraph—
- “closure notice” means a notice under—
- (a) section 28A or 28B of the Management Act, or
  - (b) paragraph 32 of Schedule 18 to the Finance Act 1998;
- “company tax return” means the return required to be delivered pursuant to a notice under paragraph 3 of Schedule 18 to the Finance Act 1998, as read with paragraph 4 of that Schedule;
- “notice of enquiry” means a notice under—
- (a) section 9A or 12AC of the Management Act, or
  - (b) paragraph 24 of Schedule 18 to the Finance Act 1998;
- “tax return” means—
- (a) a return under section 8, 8A or 12AA of the Management Act, or
  - (b) a company tax return.

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**Modifications etc. (not altering text)**

- C8** Sch. 28AA paras. 5B, 5C excluded (19.7.2006) by Finance Act 2006 (c. 25), s. 113(6), **Sch. 17 para. 12(2)(3)**
- C9** Sch. 28AA paras. 5B, 5C excluded by The Authorised Investment Funds (Tax) Regulations 2006 (S.I. 2006/964), **reg. 69X(6)** (as inserted (6.4.2008) by The Authorised Investment Funds (Tax) (Amendment) Regulations 2008 (S.I. 2008/705), **regs. 1, 5**)

VALID FROM 22/07/2004

*Meaning of “small enterprise” and “medium-sized enterprise”*

- 5D (1) In this Schedule—
- (a) “small enterprise” means a small enterprise as defined in the Annex to the Commission Recommendation,
  - (b) “medium-sized enterprise” means an enterprise which—
    - (i) falls within the category of micro, small and medium-sized enterprises as defined in that Annex, and
    - (ii) is not a small enterprise as defined in that Annex,but for these purposes that Annex has effect with the modifications set out in sub-paragraphs (3) to (6) of this paragraph.
- (2) In this paragraph—
- “the Annex” means the Annex to the Commission Recommendation;
- “the Commission Recommendation” means Commission Recommendation 2003/361/EC of 6th May 2003 (concerning the definition of micro, small and medium-sized enterprises).
- (3) Where any enterprise is in liquidation or administration, the rights of the liquidator or administrator (in that capacity) shall be left out of account when applying Article 3(3)(b) of the Annex in determining for the purposes of this Schedule whether—
- (a) that enterprise, or
  - (b) any other enterprise (including that of the liquidator or administrator),
- is a small or medium-sized enterprise.
- (4) Article 3 of the Annex shall have effect with the omission of paragraph 5 (declaration in good faith where control cannot be determined etc).
- (5) The first sentence of Article 4(1) of the Annex shall have 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 paragraph 5B(1) above (instead of the period described in that sentence) and calculated on an annual basis.
- (6) Article 4 of the Annex shall have effect with the omission of the following provisions—

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- (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);
- (c) paragraph 3 (bona fide estimate in case of newly established enterprise).

VALID FROM 22/07/2004

*Meaning of “qualifying territory” and “non-qualifying territory”*

5E (1) In this Schedule—

“non-qualifying territory” means any territory which is not a qualifying territory;

“qualifying territory” means—

- (a) the United Kingdom, or
- (b) any territory as respects which Condition 1 or Condition 2 below is satisfied.

(2) Condition 1 is that—

- (a) arrangements to which section 788 applies (double taxation relief by agreement with other territories) have been made in relation to the territory;
- (b) those arrangements contain a non-discrimination provision (see sub-paragraphs (4) and (5) below); and
- (c) the territory is not designated as a non-qualifying territory for the purposes of this sub-paragraph in regulations made by the Treasury.

(3) Condition 2 is that—

- (a) arrangements to which section 788 applies have been made in relation to the territory; and
- (b) the territory is designated as a qualifying territory for the purposes of this sub-paragraph in regulations made by the Treasury.

(4) For the purposes of this paragraph a “non-discrimination provision”, in relation to any arrangement to which section 788 applies, 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.

(5) In this paragraph, “national”, in relation to a contracting state, includes—

- (a) any individual possessing the nationality or citizenship of the contracting state,
- (b) any legal person, partnership or association deriving its status as such from the laws in force in that contracting state.



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

*Elimination of double counting*

- 6 (1) This paragraph applies where—
- (a) 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; but
  - (b) the other affected person (“the disadvantaged person”) is a person in relation to whom the condition set out in sub-paragraph (3) of paragraph 5 above either—
    - (i) is satisfied, or
    - (ii) were any such exemption as is mentioned in paragraph (b) of that sub-paragraph to be disregarded, would be satisfied.
- (2) Subject to sub-paragraphs (3) to (6) and paragraph 7 below, on the making of a claim by the disadvantaged person for the purposes of this paragraph—
- (a) the disadvantaged person shall be entitled to have his profits and losses computed for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision; and
  - (b) notwithstanding any limit in the Tax Acts on the time within which any adjustment may be made, all such adjustments shall be made in his 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.
- (3) A claim made by the disadvantaged person for the purposes of this paragraph—
- (a) shall not be made unless a computation 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; and
  - (b) must be consistent with the computation made on that basis in the case of the advantaged person.
- (4) For the purposes of sub-paragraph (3) above a computation shall 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 computations made for the purposes of any return by the advantaged person have been made on that basis by virtue of this Schedule; or
  - (b) a relevant notice given to the advantaged person takes account of a determination in pursuance of this Schedule of an amount falling to be brought into account for tax purposes on that basis.
- (5) Subject to section 111(3)(b) of the Finance Act 1998 (which provides for the extension of the period for making a claim), a claim for the purposes of this paragraph shall not be made except within one of the following periods—
- (a) in a case where a return has been made by the advantaged person on the basis mentioned in sub-paragraph (3)(a) above, the period of two years beginning with the day of the making of the return; and



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- (b) in any case where a relevant notice taking account of such a determination as is mentioned in sub-paragraph (4)(b) above has been given to the advantaged person, the period of two years beginning with the day on which that notice was given.
- (6) Subject to section 111(3)(b) of the Finance Act 1998, where—
- (a) a claim for the purposes of this paragraph is made by the disadvantaged person in relation to a return made on the basis mentioned in sub-paragraph (3)(a) above, and
- (b) a relevant notice taking account of such a determination as is mentioned in sub-paragraph (4)(b) above is subsequently given to the advantaged person, the disadvantaged person shall be entitled, within the period mentioned in sub-paragraph (5)(b) above, to make any such amendment of the claim as may be appropriate in consequence of the determination contained in that notice.
- (7) In this paragraph—
- “relevant notice” means—
- (a) [<sup>F1</sup>a closure notice under section 28A(1) or 28B(1) of the Management Act in relation to an enquiry into a return under section 8 or 8A of that Act or into a partnership return;
- (b) a closure notice under paragraph 32 of Schedule 18 to the Finance Act 1998 in relation to an enquiry into a company tax return;
- (c) a notice of an assessment under section 29 of the Management Act;
- (d) a notice of any discovery assessment or discovery determination under paragraph 41 of Schedule 18 to the Finance Act 1998 (including any notice of an assessment by virtue of paragraph 52 of that Schedule);
- (e) a notice under section 30B(1) of the Management Act amending a [<sup>F2</sup>partnership return];
- “return” means any return required to be made under the Management Act or Schedule 18 to the Finance Act 1998 for income tax or corporation tax purposes or any voluntary amendment of such a return; and
- “voluntary amendment”, in relation to a return, means [<sup>F3</sup>—
- (a) an amendment under section 9ZA or 12ABA of the Management Act (amendment of personal, trustee or partnership return by taxpayer), or
- (b) an amendment under Schedule 18 to the Finance Act 1998 other than one made in response to the giving of a relevant notice.]]

#### Textual Amendments

- F1** Sch. 28AA para. 6(7): in definition of "relevant notice", para. (a) substituted (with effect in accordance with s. 88(3) of the amending Act) by Finance Act 2001 (c. 9), Sch. 29 para. 35(3)(a)
- F2** Sch. 28AA para. 6(7): in definition of "relevant notice", words in para. (e) substituted (with effect in accordance with s. 88(3) of the amending Act) by Finance Act 2001 (c. 9), Sch. 29 para. 35(3)(b)
- F3** Sch. 28AA para. 6(7): in definition of "voluntary amendment", paras. (a)(b) substituted for words (with effect in accordance with s. 88(3) of the amending Act) by Finance Act 2001 (c. 9), Sch. 29 para. 35(4)

#### Modifications etc. (not altering text)

- C10** Sch. 28AA paras. 6, 7 modified (27.7.1999) by Finance Act 1999 (c. 16), s. 87(1)-(3) (with s. 87(4))

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VALID FROM 22/07/2004

*Application of paragraph 6 in relation to transfers of trading stock etc*

- 6A (1) Paragraph 6(2)(a) above 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 last day of the relevant accounting period of the advantaged person.
- (2) For the purposes of sub-paragraph (1) above, the relevant accounting period of the advantaged person is the accounting period in which the actual provision was made or imposed.
- (3) For the purposes of this paragraph “trading stock”, in relation to any trade, has the same meaning as it has for the purposes of section 100 (valuation of trading stock at discontinuance of trade) (see subsection (2) of that section).

VALID FROM 22/07/2004

*Compensating adjustment where advantaged person is a controlled foreign company*

- 6B (1) This paragraph applies in any case where—
- (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 the amount of that company's chargeable profits for an accounting period, its profits and losses fall to be computed in accordance with paragraph 1(2) above in the case of that provision,
  - (c) the whole of those chargeable profits fall to be apportioned under section 747(3) to one or more companies resident in the United Kingdom, and
  - (d) tax is chargeable by virtue of section 747(4) in respect of the whole of those chargeable profits, as so apportioned to those companies.
- (2) Where this paragraph applies, paragraph 6 above shall 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.
- (3) In the application of paragraph 6 above by virtue of this paragraph—
- (a) references to the advantaged person in sub-paragraphs (4)(a) and (b), (5) (a) and (b) and (6)(b) of that paragraph include a reference to any of the companies mentioned in sub-paragraph (1)(c) above, and
  - (b) references to corporation tax include a reference to tax chargeable by virtue of section 747(4).

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(4) In this paragraph—

“controlled foreign company” has the same meaning as in Chapter 4 of Part 17;

“accounting period”, in relation to a controlled foreign company, has the same meaning as in Chapter 4 of Part 17.

VALID FROM 22/07/2004

*Claims under paragraph 6 where paragraph 1A applies*

6C (1) Where paragraph 1A above applies in relation to any provision, this paragraph has effect in relation to that provision.

(2) A claim under paragraph 6(2) above may be made in accordance with this paragraph.

For the purposes of this Schedule a “paragraph 6C claim” is a claim under paragraph 6(2) above made in accordance with this paragraph.

(3) A paragraph 6C claim may be made by—

- (a) the disadvantaged person, or
- (b) the advantaged person,

but any such claim made by the advantaged person shall be taken to be made on behalf of the disadvantaged person.

(4) A paragraph 6C claim may be made before or after a computation falling within paragraph 6(3)(a) above has been made.

(5) A paragraph 6C claim must be made either—

- (a) at any time before the end of the period mentioned in paragraph 6(5)(a) above, or
- (b) within the period mentioned in paragraph 6(5)(b) above,

but this is subject to section 111(3)(b) of the Finance Act 1998 (extension of period for making a claim).

(6) A paragraph 6C claim is not a claim within paragraph 57 or 58 of Schedule 18 to the Finance Act 1998 (company tax returns, assessments and related matters).

Accordingly, paragraph 59 of that Schedule (application of Schedule 1A to the Management Act) has effect in relation to a paragraph 6C claim.

(7) Where—

- (a) a paragraph 6C claim is made before a computation falling within paragraph 6(3)(a) above has been made,
- (b) such a computation is subsequently made, and
- (c) the claim is not consistent with the computation,

the affected persons shall be treated as if (instead of the claim actually made) a claim had been made that was consistent with the computation.

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- (8) All such adjustments shall be made (whether by discharge or repayment of tax, the making of assessments or otherwise) as are required to give effect to sub-paragraph (7) above.
- (9) Sub-paragraph (8) above has effect notwithstanding any limit on the time within which any adjustment may be made.
- (10) Where—
- (a) a paragraph 6C claim is made,
  - (b) a return is subsequently made by the advantaged person on the basis mentioned in paragraph 6(3)(a) above, and
  - (c) a relevant notice (within the meaning of paragraph 6 above) taking account of such a determination as is mentioned in paragraph 6(4)(b) above is subsequently given to the advantaged person,
- sub-paragraph (11) below applies.
- (11) Where this sub-paragraph applies, any such amendment of the paragraph 6C claim as may be appropriate in consequence of the determination contained in the relevant notice may be made by—
- (a) the disadvantaged person, or
  - (b) the advantaged person,
- but any such amendment made by the advantaged person shall be taken to be made on behalf of the disadvantaged person.
- (12) Any such amendment must be made within the period mentioned in paragraph 6(5)(b) above.
- But that is subject to section 111(3)(b) of the Finance Act 1998 (extension of period for making amendment).

VALID FROM 22/07/2004

*Compensating adjustment for guarantor company etc where paragraph 1B applies*

- 6D (1) This paragraph applies in any case where—
- (a) a company (“the issuing company”) has liabilities under a security issued by the company,
  - (b) those liabilities are to any extent the subject of a guarantee provided by a company (“the guarantor company”), and
  - (c) in computing 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 fall to be reduced (whether or not to nil) under paragraph 1(2) above by virtue of paragraph 1B above.
- (2) On the making of a claim in any such case, the guarantor company shall, to the extent of that reduction, 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

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(c) had paid any interest or other amounts paid under it by the issuing company, and in computing the profits and losses of the guarantor company for those purposes amounts shall be brought into account accordingly.

This sub-paragraph is subject to the following provisions of this paragraph.

(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 by virtue of sub-paragraph (2) above, and

TR is the total amount of the reductions that fall within sub-paragraph (1) (c) above.

(4) In this paragraph “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.

(5) Where—

- (a) the guarantor company makes a claim under sub-paragraph (2) above, and
- (b) the lending company makes a claim under paragraph 6 above in respect of the loan provision,

sub-paragraphs (6) and (7) below apply.

(6) In determining, in a case where this sub-paragraph applies, the arm's length provision for the purposes of paragraph 6(2)(a) above in relation to the lending company's claim, additional amounts shall be brought into account as credits corresponding to the debits that fall to be brought into account by virtue of sub-paragraph (2) above in relation to the guarantor company.

(7) If, in a case where this sub-paragraph applies,—

- (a) the lending company makes its claim under paragraph 6 above before the guarantor company makes its claim under sub-paragraph (2) above, and
- (b) the computation on which the lending company's claim is based does not comply with sub-paragraph (6) above,

the guarantor company's claim shall be disallowed.

(8) A claim under sub-paragraph (2) above may be made by—

- (a) the guarantor company,
- (b) where there are two or more guarantor companies, those companies acting together, or
- (c) the issuing company,

but any claim made by the issuing company shall be taken to be made on behalf of the guarantor company or companies.

(9) Sub-paragraphs (3) to (6) of paragraph 6 above (claims and time limits) shall apply in relation to a claim under sub-paragraph (2) above made by or on behalf of any person or persons as they apply in relation to a claim under that paragraph made by the disadvantaged person, but taking references in those sub-paragraphs—

- (a) to the advantaged person, as references to the issuing company, and

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- (b) to the disadvantaged person, as references to the guarantor company or companies.
- (10) The following provisions of paragraph 1A above also apply for the purposes of this paragraph—
- (a) sub-paragraph (7) (construction of references to a guarantee);
  - (b) sub-paragraph (9) (meaning of security);
  - (c) sub-paragraph (10) (extended meaning of security).
- (11) In this paragraph “the Taxes Acts” has the meaning given in section 118(1) of the Management Act.

VALID FROM 22/07/2004

*Certain interest not to be regarded as chargeable under Case III of Schedule D*

- 6E Where—
- (a) interest is paid by any person under the actual provision,
  - (b) paragraph 1(2) above applies in relation to the actual provision,
  - (c) the amount 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 there would not have been any interest payable),
  - (d) the person receiving the interest makes a claim under paragraph 6 above or a paragraph 6C claim,
- the interest paid under the actual provision, to the extent that it exceeds the amount of interest that would have been payable under the arm's length provision, shall not be regarded as chargeable under Case III of Schedule D.

*Adjustment of disadvantaged person's double taxation relief*

- 7 (1) Subject to sub-paragraph (4) below, where—
- (a) a claim is made for the purposes of paragraph 6 above, and
  - (b) the disadvantaged person is entitled, on that claim, to make a computation, or to have an adjustment made in his case, on the basis that the arm's length provision was made or imposed instead of the actual provision,
- the assumptions specified in sub-paragraph (2) below shall apply, in the disadvantaged person's case, as respects any credit for foreign tax which the disadvantaged person has been or may be given in pursuance of any double taxation arrangements or under section 790(1).
- (2) Those assumptions are—
- (a) that the foreign tax paid or payable by the disadvantaged person 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; and



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- (b) that the amount of the relevant profits of the disadvantaged person in respect of which he is given credit for foreign tax does not include the amount (if any) by which his relevant profits are treated as reduced in accordance with paragraph 6 above.
- (3) Sub-paragraph (4) below applies if—
- (a) a claim is made for the purposes of paragraph 6 above;
  - (b) the disadvantaged person is entitled, on that claim, to make a computation, or to have an adjustment made in his case, 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 computation of the disadvantaged person'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).
- (4) Where this sub-paragraph applies—
- (a) the reduction mentioned in sub-paragraph (3)(c) above shall be treated as made before any reduction under section 811(1); 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 sub-paragraph (3)(c) above shall be disregarded for the purposes of section 811(1).
- (5) Where, in a case in which a claim has been made for the purposes of paragraph 6 above, any adjustment is required to be made for the purpose of giving effect to any of the preceding provisions of this paragraph—
- (a) it may be made in any case by setting the amount of the adjustment against any relief or repayment to which the disadvantaged person is entitled in pursuance of that claim; 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.
- (6) References in this paragraph to relevant profits of the disadvantaged person are references to profits arising to the disadvantaged person from the carrying on of the relevant activities.

**Modifications etc. (not altering text)**

C11 Sch. 28AA paras. 6, 7 modified (27.7.1999) by Finance Act 1999 (c. 16), s. 87(1)-(3) (with s. 87(4))

VALID FROM 22/07/2004

*Balancing payments between affected persons: no charge to, or relief from, tax*

- 7A (1) This paragraph applies where—
- (a) the circumstances are as described in paragraph 6(1) above,



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- (b) one or more payments (the “balancing payments”) are made to the advantaged person by the disadvantaged person, and
  - (c) the sole or main reason for making those payments is that paragraph 1(2) above applies.
- (2) To the extent that the balancing payments do not in the aggregate exceed the amount of the available compensating adjustment, those payments—
- (a) shall not be taken into account in computing profits or losses of either of the affected persons for the purposes of income tax or corporation tax, and
  - (b) shall not for any of the purposes of the Corporation Tax Acts be regarded as distributions or charges on income.
- (3) In this paragraph “the available compensating adjustment” means the difference between PL1 and PL2 where—
- PL1 is the profits and losses of the disadvantaged person computed for tax purposes on the basis of the actual provision, and
  - PL2 is the profits and losses of the disadvantaged person as they fall (or would fall) to be computed for tax purposes on a claim under paragraph 6 above,
- for this purpose taking PL1 or PL2 as a positive amount if it is an amount of profits and as a negative amount if it is an amount of losses.

VALID FROM 22/07/2004

*Securities: election to discharge tax liability instead of making balancing payments*

- 7B (1) This paragraph applies in any case where—
- (a) both of the affected persons are companies,
  - (b) the circumstances are as described in paragraph 6(1) above, and
  - (c) the actual provision is provision in relation to a security (the “relevant security”).
- (2) The disadvantaged person may make an election under this paragraph in respect of the relevant security if the condition in sub-paragraph (3) below is satisfied.
- (3) The condition is that—
- (a) the actual provision forms part of a capital market arrangement,
  - (b) the capital market arrangement involves the issue of a capital market investment,
  - (c) the securities that represent the capital market investment are issued wholly or mainly to independent persons (see sub-paragraph (9) below), and
  - (d) the total value of the capital market investments made under the capital market arrangement is at least £50 million.
- (4) An election under this paragraph in respect of the relevant security is an election for the disadvantaged person—
- (a) to make no balancing payment within paragraph 7A above to the advantaged person in respect of the application of paragraph 1(2) above

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in relation to the relevant security in a chargeable period by virtue of paragraph 1A above, but

- (b) instead, to undertake sole responsibility for discharging the advantaged person's liability to tax for that period so far as resulting from the application of paragraph 1(2) above in relation to the relevant security by virtue of paragraph 1A above.

- (5) Where an election under this paragraph has effect in relation to an accounting period of the advantaged person, the tax mentioned in sub-paragraph (4)(b) above—

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

- (6) Any election under this paragraph in respect of the relevant security—

- (a) 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,
- (b) 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, and
- (c) is irrevocable.

For the purposes of this sub-paragraph a security issued in a chargeable period beginning before 1st April 2004 shall be treated as if it had been issued in the chargeable period beginning on that date.

- (7) An election under this paragraph by a person is of no effect if the Board give that person a notice under this sub-paragraph refusing to accept the election.

- (8) A notice under sub-paragraph (7) above 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.

- (9) In this paragraph—

“capital market arrangement” has the same meaning as in section 72B(1) of the Insolvency Act 1986 (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);

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

“independent person” means a person—

- (a) who is not the disadvantaged person, and
- (b) who does not have a participatory relationship with either of the affected persons.

- (10) The following provisions of paragraph 1A above also apply for the purposes of this paragraph—

- (a) sub-paragraph (8) (meaning of participatory relationship);
- (b) sub-paragraph (9) (meaning of security);

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(c) sub-paragraph (10) (extended meaning of security).

VALID FROM 22/07/2004

*Balancing payments by guarantor to issuer: no charge to, or relief from, tax*

- 7C (1) This paragraph applies in any case where—
- (a) the circumstances are as described in paragraph 6D(1) above,
  - (b) one or more payments (the “balancing payments”) are made by the guarantor company to the issuing company, and
  - (c) the sole or main reasons for making those payments are that paragraph 1(2) above applies by virtue of paragraph 1B above or that paragraph 6D above applies.
- (2) To the extent that the balancing payments made by all the guarantor companies do not in the aggregate exceed the amount TR in paragraph 6D(3) above (total reductions within paragraph 6D(1)(c) above), those payments—
- (a) shall not be taken into account in computing for the purposes of corporation tax the profits or losses of the guarantor company or companies or the issuing company, and
  - (b) shall not for any purpose of the Corporation Tax Acts be regarded as distributions or charges on income.

VALID FROM 22/07/2004

*Guarantees: election to discharge tax liability instead of making balancing payments*

- 7D (1) This paragraph applies where the following conditions are satisfied—
- (a) both of the affected persons are companies,
  - (b) the circumstances are as described in paragraph 6(1) above,
  - (c) the actual provision falls within paragraph 1B(1) above.
- (2) Sub-paragraphs (2) to (8) of paragraph 7B above apply in a case where this paragraph applies as they apply in a case where that paragraph applies, but with the modifications in sub-paragraphs (3) and (4) below.
- (3) The relevant security is the security in paragraph 1B(1)(a) above.
- (4) In sub-paragraph (4) (nature of the election)—
- (a) for “paragraph 7A above” substitute paragraph 7C below;
  - (b) for “paragraph 1A”, in both places, substitute paragraph 1B.

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### *Foreign exchange gains and losses and financial instruments*

- 8 (1) [<sup>F4</sup>Subject to sub-paragraph (3)] [<sup>F5</sup>and sub-paragraph (4)] below, this Schedule shall not require the amounts brought into account in any person's case under—
- [<sup>F6</sup>(a) Chapter 2 of Part 4 of the Finance Act 1996 (loan relationships) in respect of exchange gains or losses from loan relationships (as defined in section 103(1A) and (1B) of that Act), or]
- [<sup>F7</sup>(b) Schedule 26 to the Finance Act 2002 (derivative contracts) in respect of exchange gains and losses (as defined in paragraph 54 of that Schedule),]
- to be computed in that person's case on the assumption that the arm's length provision had been made or imposed instead of the actual provision.
- [<sup>F8</sup>(3) Sub-paragraph (1) above shall not affect so much of paragraph 11A of Schedule 9 to the Finance Act 1996 (loan relationships: exchange gains or losses where loan not on arm's length terms) as has effect by reference to whether profits or losses fall to be computed by virtue of this Schedule as if the whole or any part of a loan had not been made.]
- [<sup>F9</sup>(4) Sub-paragraph (1) above shall not affect so much of paragraph 27 of Schedule 26 to the Finance Act 2002 (derivative contracts: exchange gains or losses where derivative contract not on arm's length terms) as has effect by reference to whether profits or losses fall to be computed by virtue of this Schedule as if a company were not party to a derivative contract or as if the terms of the contract to which it is party were different.]

#### **Textual Amendments**

- F4** Words in Sch. 28AA para. 8(1) substituted (with effect in accordance with s. 79(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 23 para. 21(2)(a)** (with s. 81(4)(5), Sch. 23 para. 25)
- F5** Words in Sch. 28AA para. 8(1) inserted (with effect in accordance with s. 83(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 27 para. 15(2)(a)** (with Sch. 28)
- F6** Sch. 28AA para. 8(1)(a) substituted (with effect in accordance with s. 79(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 23 para. 21(2)(b)** (with s. 81(4)(5), Sch. 23 para. 25)
- F7** Sch. 28AA para. 8(1)(b) substituted (with effect in accordance with s. 83(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 27 para. 15(2)(b)** (with Sch. 28)
- F8** Sch. 28AA para. 8(3) substituted for para. 8(2) (with effect in accordance with s. 79(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 23 para. 21(3)** (with s. 81(4)(5), Sch. 23 para. 25)
- F9** Sch. 28AA para. 8(4) inserted (with effect in accordance with s. 83(3) of the amending Act) by Finance Act 2002 (c. 23), **Sch. 27 para. 15(3)** (with Sch. 28)

### *Special rules for sales etc. of oil*

- 9 (1) Subject to paragraph 10 below, this paragraph applies to provision made or imposed by or in relation to the terms of a sale of oil if—
- (a) 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

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- (b) at the time of the sale not less than 20 per cent. of the producer's ordinary share capital is owned directly or indirectly by one or more of the following, that is to say, the buyer and the companies (if any) that are linked to the buyer.
- (2) Where this paragraph applies to provision made or imposed by or in relation to the terms of a sale of oil, this Schedule shall have effect as respects that provision as if the buyer, the seller and (if it is not the seller) the producer were all controlled by the same person at the time of the making or imposition of that provision.
- (3) For the purposes of this paragraph 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.
- (4) For the purposes of this paragraph—
  - (a) any question whether ordinary share capital is owned directly or indirectly by a company shall be determined as for section 838;
  - (b) rights to extract oil shall be taken to be exercisable by a company even if they are exercisable by that company only jointly with one or more other companies; and
  - (c) a sale of oil shall be deemed to take place at the time of the completion of the sale or when possession of the oil passes, whichever is the earlier.
- (5) In this paragraph "oil" includes any mineral oil or relative hydrocarbon, as well as natural gas.

*Transactions and deemed transactions involving oil*

- 10 This Schedule 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 (transactions and deemed transactions involving oil treated as made at market value).

*Special provision for companies carrying on ring fence trades*

- 11 (1) This paragraph applies where any person ("the taxpayer") carries on as, or as part of, a trade any activities ("the ring fence trade") which, in accordance with section 492(1) either—
  - (a) fall to be treated for any tax purposes as a separate trade, distinct from all other activities carried on by him as part of the trade; or
  - (b) would so fall if the taxpayer did carry on any other activities as part of that trade.
- (2) Subject to paragraph 10 above and sub-paragraph (4) below, where provision made or imposed as between the taxpayer and another person by means of a transaction or series of transactions—
  - (a) falls, in relation to the taxpayer, to be regarded as made or imposed in the course of, or with respect to, the ring fence trade; but

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- (b) falls, in relation to the other person, to be regarded as made or imposed in the course of, or with respect to, activities of that other person which do not fall within section 492(1),

this Schedule shall have effect in relation to that provision with the omission of paragraph 5(2) above.

- (3) Subject to paragraph 10 above and sub-paragraph (4) below, this Schedule shall have effect as respects any provision made or imposed by the taxpayer as between the ring fence trade and any other activities carried on by him as if—
  - (a) that trade and those activities were carried on by two different persons;
  - (b) that provision were made or imposed as between those two persons by means of a transaction;
  - (c) a potential advantage in relation to United Kingdom taxation were conferred by that provision on each of those two persons;
  - (d) those two persons were both controlled by the same person at the time of the making or imposition of that provision; and
  - (e) paragraphs 5 to 7 above were omitted.
- (4) This Schedule shall apply in accordance with this paragraph in relation to any provision mentioned in sub-paragraph (2) or (3) above only where the effect of its application in relation to that provision is either—
  - (a) that a larger amount (including, if there would not otherwise have been profits, an amount of more than nil) is taken for tax purposes to be the amount of the profits of the ring fence trade for any chargeable period; or
  - (b) that a smaller amount (including nil) is taken for tax purposes to be the amount for any chargeable period of any losses of that trade.

### *Appeals*

- 12 (1) In so far as the question in dispute on any appeal falling within sub-paragraph (2) below—
  - (a) is or involves a determination of whether this Schedule has effect as respects any provision made or imposed as between any two persons, or of how it so has effect, and
  - (b) is not a question that would fall to be determined by the Special Commissioners apart from this sub-paragraph,
 that question shall be determined by them.
- (2) The appeals falling within this sub-paragraph are—
  - (a) any appeal under section 31 of, or Schedule 1A to, the Management Act;
  - (b) any appeal under paragraph 34(3) of Schedule 18 to the Finance Act 1998 against an amendment of a company's return; and
  - (c) any appeal under paragraph 48 of that Schedule against a discovery assessment or a discovery determination.
- (3) Sub-paragraph (4) below applies where—
  - (a) any such question as is mentioned in sub-paragraph (1) above falls to be determined by the Special Commissioners for the purposes of any proceedings before them; and

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- (b) that question relates to any provision made or imposed as between two persons each of whom is a person in relation to whom the condition set out in paragraph 5(3) above is satisfied.
- (4) Where this sub-paragraph applies—
- (a) each of the persons as between whom the actual provision was made or imposed shall be entitled to appear and be heard by the Special Commissioners, or to make representations to them in writing;
- (b) the Special Commissioners shall determine that question separately from any other questions in those proceedings; and
- (c) their determination on that question shall have effect as if made in an appeal to which each of those persons was a party.
- (5) In this paragraph—
- “discovery assessment” means a discovery assessment under paragraph 41 of Schedule 18 to the Finance Act 1998 (including one by virtue of paragraph 52 of that Schedule); and
- “discovery determination” means a discovery determination under paragraph 41 of that Schedule.

*Saving for the provisions relating to capital allowances and capital gains*

- 13 Nothing in this Schedule shall be construed as affecting—
- (a) the computation of the amount of any capital allowance or balancing charge made under [F10 the Capital Allowances Act]; or
- (b) the computation in accordance with the 1992 Act of the amount of any chargeable gain or allowable loss;
- and nothing in this Schedule shall require the profits or losses of any person to be computed for tax purposes as if, in his case, instead of income or losses falling to be brought into account in connection with the taxation of income, there were gains or losses falling to be brought into account in accordance with the 1992 Act.

#### Textual Amendments

**F10** Words in Sch. 28AA para. 13(a) substituted (with effect in accordance with s. 579 of the amending Act) by Capital Allowances Act 2001 (c. 2), Sch. 2 para. 68

*General interpretation etc.*

- 14 (1) In this Schedule—
- “the actual provision” and “the affected persons” shall be construed in accordance with paragraph 1(1) above;
- “the arm’s length provision” shall be construed in accordance with paragraph 1(2) and (3) above;
- “double taxation arrangements” means arrangements having effect by virtue of section 788;



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“foreign tax” means any tax under the law of a territory outside the United Kingdom or any amount which falls for the purposes of any double taxation arrangements to be treated as if it were such tax;

“insurance company” has the same meaning as in Chapter I of Part XII;

“losses” includes amounts which are not losses but in respect of which relief may be given in accordance with any of the following enactments—

- (a) section 75(3) (excess of management expenses);
- (b) section 468L(5) (allowance for interest distributions of a unit trust);
- (c) Part X (loss relief and group relief);
- (d) section 83 of and Schedule 8 to the <sup>M2</sup>Finance Act 1996 or paragraph 4 of Schedule 11 to that Act (deficits on loan relationships);

“profits” includes income;

“the relevant activities”, in relation to a person who is one of the persons as between whom any provision is made or imposed, means such of his activities as—

- (i) comprise the activities in the course of which, or with respect to which, that provision is made or imposed; and
- (ii) are not activities carried on either separately from those activities or for the purposes of a different part of that person’s business;

“transaction” and “series of transactions” shall be construed in accordance with paragraph 3 above.

- (2) Without prejudice to paragraphs 9(2) and 11(3) above, references in this Schedule to a person controlling a body corporate or a partnership shall be construed in accordance with section 840.
- (3) In determining for the purposes of this Schedule whether a person has an entitlement, in pursuance of any double taxation arrangements or under section 790(1), to be given credit for foreign tax, any requirement that a claim is made before such a credit is given shall be disregarded.
- (4) Any adjustments required to be made by virtue of this Schedule may be made by way of discharge or repayment of tax, by the modification of any assessment or otherwise.
- (5) This Schedule shall have effect as if—
  - (a) a unit trust scheme were a company that is a body corporate;
  - (b) the rights of the unit holders under such a scheme were shares in the company that the scheme is deemed to be;
  - (c) rights and powers of a person in the capacity of a person entitled to act for the purposes of the scheme were rights and powers of the scheme; and
  - (d) provision made or imposed as between any person in such a capacity and another person were made or imposed as between the scheme and that other person.

#### Marginal Citations

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