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## SCHEDULES

### SCHEDULE 5

Section 86.

#### ATTRIBUTION OF GAINS TO SETTLORS WITH INTEREST IN NON-RESIDENT OR DUAL RESIDENT SETTLEMENT

##### *Construction of section 86(1)(e)*

- 1 (1) In construing section 86(1)(e) as regards a particular year of assessment, the effect of sections 3 and 77 to 79 shall be ignored.
- (2) In construing section 86(1)(e) as regards a particular year of assessment—
- (a) any deductions provided for by section 2(2) shall be made in respect of disposals of any of the settled property originating from the settlor, and
  - (b) section 16(3) shall be assumed not to prevent losses accruing to trustees in one year of assessment from being allowed as a deduction from chargeable gains accruing in a later year of assessment (so far as not previously set against gains).
- (3) In a case where—
- (a) the trustees hold shares in a company which originate from the settlor, and
  - (b) under section 13 gains or losses would be treated as accruing to the trustees in a particular year of assessment by virtue of the shares if the assumption as to residence specified in section 86(3) were made,
- the gains or losses shall be taken into account in construing section 86(1)(e) as regards that year as if they had accrued by virtue of disposals of settled property originating from the settlor.
- (4) Where, as regards a particular year of assessment, there would be an amount under section 86(1)(e) (apart from this sub-paragraph) and the trustees fall within section 86(2)(b), the following rules shall apply—
- (a) assume that the references in section 86(1)(e) and sub-paragraphs (2)(a) and (3) above to settled property originating from the settlor were to such of it as constitutes protected assets;
  - (b) assume that the reference in sub-paragraph (3)(a) above to shares originating from the settlor were to such of them as constitute protected assets;
  - (c) find the amount (if any) which would be arrived at under section 86(1)(e) on those assumptions;
  - (d) if no amount is so found there shall be deemed to be no amount for the purposes of section 86(1)(e);
  - (e) if an amount is found under paragraph (c) above it must be compared with the amount arrived at under section 86(1)(e) apart from this sub-paragraph and the smaller of the 2 shall be taken to be the amount arrived at under section 86(1)(e).

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- (5) Sub-paragraphs (2) to (4) above shall have effect subject to sub-paragraphs (6) and (7) below.
- (6) The following rules shall apply in construing section 86(1)(e) as regards a particular year of assessment (“the year concerned”) in a case where the trustees fall within section 86(2)(a)—
- (a) if the conditions mentioned in section 86(1) are not fulfilled as regards the settlement in any year of assessment falling before the year concerned, no deductions shall be made in respect of losses accruing before the year concerned;
  - (b) if the conditions mentioned in section 86(1) are fulfilled as regards the settlement in any year or years of assessment falling before the year concerned, no deductions shall be made in respect of losses accruing before that year (or the first of those years) so falling,
- but nothing in the preceding provisions of this sub-paragraph shall prevent deductions being made in respect of losses accruing in a year of assessment in which the conditions mentioned in section 86(1)(a) to (d) and (f) are fulfilled as regards the settlement.
- (7) In construing section 86(1)(e) as regards a particular year of assessment and in relation to a settlement created before 19th March 1991, no account shall be taken of disposals made before 19th March 1991 (whether for the purpose of arriving at gains or for the purpose of arriving at losses).
- (8) For the purposes of sub-paragraph (4) above assets are protected assets if—
- (a) they are of a description specified in the arrangements mentioned in section 86(2)(b), and
  - (b) were the trustees to dispose of them at any relevant time, the trustees would fall to be regarded for the purposes of the arrangements as not liable in the United Kingdom to tax on gains accruing to them on the disposal.
- (9) For the purposes of sub-paragraph (8) above—
- (a) the assumption as to residence specified in section 86(3) shall be ignored;
  - (b) a relevant time is any time, in the year of assessment concerned, when the trustees fall to be regarded for the purposes of the arrangements as resident in a territory outside the United Kingdom;
  - (c) if different assets are identified by reference to different relevant times, all of them are protected assets.

*Test whether settlor has interest*

- 2 (1) For the purposes of section 86(1)(d) a settlor has an interest in a settlement if—
- (a) any relevant property which is or may at any time be comprised in the settlement is, or will or may become, applicable for the benefit of or payable to a defined person in any circumstances whatever,
  - (b) any relevant income which arises or may arise under the settlement is, or will or may become, applicable for the benefit of or payable to a defined person in any circumstances whatever, or
  - (c) any defined person enjoys a benefit directly or indirectly from any relevant property which is comprised in the settlement or any relevant income arising under the settlement;

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but this sub-paragraph is subject to sub-paragraphs (4) to (6) below.

- (2) For the purposes of sub-paragraph (1) above—
  - (a) relevant property is property originating from the settlor,
  - (b) relevant income is income originating from the settlor.
- (3) For the purposes of sub-paragraph (1) above each of the following is a defined person—
  - (a) the settlor,
  - (b) the settlor's spouse;
  - (c) any child of the settlor or of the settlor's spouse;
  - (d) the spouse of any such child;
  - (e) a company controlled by a person or persons falling within paragraphs (a) to (d) above;
  - (f) a company associated with a company falling within paragraph (e) above.
- (4) A settlor does not have an interest in a settlement by virtue of paragraph (a) of sub-paragraph (1) above at any time when none of the property concerned can become applicable or payable as mentioned in that paragraph except in the event of—
  - (a) the bankruptcy of some person who is or may become beneficially entitled to the property,
  - (b) any assignment of or charge on the property being made or given by some such person,
  - (c) in the case of a marriage settlement, the death of both parties to the marriage and of all or any of the children of the marriage, or
  - (d) the death under the age of 25 or some lower age of some person who would be beneficially entitled to the property on attaining that age.
- (5) A settlor does not have an interest in a settlement by virtue of paragraph (a) of sub-paragraph (1) above at any time when some person is alive and under the age of 25 if during that person's life none of the property concerned can become applicable or payable as mentioned in that paragraph except in the event of that person becoming bankrupt or assigning or charging his interest in the property concerned.
- (6) Sub-paragraphs (4) and (5) above apply for the purposes of paragraph (b) of sub-paragraph (1) above as they apply for the purposes of paragraph (a), reading "income" for "property".
- (7) In sub-paragraph (3) above "child" includes a step-child.
- (8) For the purposes of sub-paragraph (3) above the question whether a company is controlled by a person or persons shall be construed in accordance with section 416 of the Taxes Act; but in deciding that question for those purposes no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 416(6) if he is not a participator in the company.
- (9) For the purposes of sub-paragraph (3) above the question whether a company is associated with another shall be construed in accordance with section 416 of the Taxes Act; but where in deciding that question for those purposes it falls to be decided whether a company is controlled by a person or persons, no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 416(6) if he is not a participator in the company.

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- (10) In sub-paragraphs (8) and (9) “participator” has the meaning given by section 417(1) of the Taxes Act.

*Exceptions from section 86*

- 3           Section 86 does not apply if the settlor dies in the year.
- 4           (1) This paragraph applies where for the purposes of section 86(1)(d) the settlor has no interest in the settlement at any time in the year except for one of the following reasons, namely, that—
- (a) property is, or will or may become, applicable for the benefit of or payable to one of the persons falling within paragraph 2(3)(b) to (d) above,
- (b) income is, or will or may become, applicable for the benefit of or payable to one of those persons, or
- (c) one of those persons enjoys a benefit from property or income.
- (2) This paragraph also applies where sub-paragraph (1) above is fulfilled by virtue of 2 or all of paragraphs (a) to (c) being satisfied by reference to the same person.
- (3) Where this paragraph applies, section 86 does not apply if the person concerned dies in the year.
- (4) In a case where—
- (a) this paragraph applies, and
- (b) the person concerned falls within paragraph 2(3)(b) or (d) above,
- section 86 does not apply if during the year the person concerned ceases to be married to the settlor or child concerned (as the case may be).
- 5           (1) This paragraph applies where for the purposes of section 86(1)(d) the settlor has no interest in the settlement at any time in the year except for the reason that there are 2 or more persons, each of whom—
- (a) falls within paragraph 2(3)(b) to (d) above, and
- (b) stands to gain for the reason stated in sub-paragraph (2) below.
- (2) The reason is that—
- (a) property is, or will or may become, applicable for his benefit or payable to him,
- (b) income is, or will or may become, applicable for his benefit or payable to him,
- (c) he enjoys a benefit from property or income, or
- (d) 2 or all of paragraphs (a) to (c) above apply in his case.
- (3) Where this paragraph applies, section 86 does not apply if each of the persons concerned dies in the year.

*Right of recovery*

- 6           (1) This paragraph applies where any tax becomes chargeable on, and is paid by, a person in respect of gains treated as accruing to him in a year under section 86(4).
- (2) The person shall be entitled to recover the amount of the tax from any person who is a trustee of the settlement.

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- (3) For the purposes of recovering that amount, the person shall also be entitled to require an inspector to give him a certificate specifying—
- (a) the amount of the gains concerned, and
  - (b) the amount of tax paid,
- and any such certificate shall be conclusive evidence of the facts stated in it.

*Meaning of “settlor”*

- 7 For the purposes of section 86 and this Schedule, a person is a settlor in relation to a settlement if the settled property consists of or includes property originating from him.

*Meaning of “originating”*

- 8 (1) References in section 86 and this Schedule to property originating from a person are references to—
- (a) property provided by that person;
  - (b) property representing property falling within paragraph (a) above;
  - (c) so much of any property representing both property falling within paragraph (a) above and other property as, on a just apportionment, can be taken to represent property so falling.
- (2) References in this Schedule to income originating from a person are references to—
- (a) income from property originating from that person;
  - (b) income provided by that person.
- (3) Where a person who is a settlor in relation to a settlement makes reciprocal arrangements with another person for the provision of property or income, for the purposes of this paragraph—
- (a) property or income provided by the other person in pursuance of the arrangements shall be treated as provided by the settlor, but
  - (b) property or income provided by the settlor in pursuance of the arrangements shall be treated as provided by the other person (and not by the settlor).
- (4) For the purposes of this paragraph—
- (a) where property is provided by a qualifying company controlled by one person alone at the time it is provided, that person shall be taken to provide it;
  - (b) where property is provided by a qualifying company controlled by 2 or more persons (taking each one separately) at the time it is provided, those persons shall be taken to provide the property and each one shall be taken to provide an equal share of it;
  - (c) where property is provided by a qualifying company controlled by 2 or more persons (taking them together) at the time it is provided, the persons who are participators in the company at the time it is provided shall be taken to provide it and each one shall be taken to provide so much of it as is attributed to him on the basis of a just apportionment;
- but where a person would be taken to provide less than one-twentieth of any property by virtue of paragraph (c) above and apart from this provision, he shall not be taken to provide any of it by virtue of that paragraph.

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- (5) For the purposes of sub-paragraph (4) above a qualifying company is a close company or a company which would be a close company if it were resident in the United Kingdom.
- (6) For the purposes of this paragraph references to property representing other property include references to property representing accumulated income from that other property.
- (7) For the purposes of this paragraph property or income is provided by a person if it is provided directly or indirectly by the person.
- (8) For the purposes of this paragraph the question whether a company is controlled by a person or persons shall be construed in accordance with section 416 of the Taxes Act; but in deciding that question for those purposes no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 416(6) if he is not a participator in the company.
- (9) In this paragraph “participator” has the meaning given by section 417(1) of the Taxes Act.
- (10) The preceding provisions of this paragraph shall apply to determine whether shares originate from the settlor for the purposes of paragraph 1(3)(a) above as they apply to determine whether property of any kind originates from a person.

*Qualifying settlements, and commencement*

- 9 (1) A settlement created on or after 19th March 1991 is a qualifying settlement for the purposes of section 86 and this Schedule in—
  - (a) the year of assessment in which it is created, and
  - (b) subsequent years of assessment.
- (2) A settlement created before 19th March 1991, and as regards which any of the 4 conditions set out in sub-paragraphs (3) to (6) below becomes fulfilled, is a qualifying settlement for the purposes of section 86 and this Schedule in—
  - (a) the year of assessment in which any of those conditions becomes fulfilled, and
  - (b) subsequent years of assessment.
- (3) The first condition is that on or after 19th March 1991 property or income is provided directly or indirectly for the purposes of the settlement—
  - (a) otherwise than under a transaction entered into at arm’s length, and
  - (b) otherwise than in pursuance of a liability incurred by any person before that date;

but if the settlement’s expenses relating to administration and taxation for a year of assessment exceed its income for the year, property or income provided towards meeting those expenses shall be ignored for the purposes of this condition if the value of the property or income so provided does not exceed the difference between the amount of those expenses and the amount of the settlement’s income for the year.
- (4) The second condition is that—
  - (a) the trustees become on or after 19th March 1991 neither resident nor ordinarily resident in the United Kingdom, or

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- (b) the trustees, while continuing to be resident and ordinarily resident in the United Kingdom, become on or after 19th March 1991 trustees who fall to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom.
- (5) The third condition is that on or after 19th March 1991 the terms of the settlement are varied so that any person falling within sub-paragraph (7) below becomes for the first time a person who will or might benefit from the settlement.
- (6) The fourth condition is that—
  - (a) on or after 19th March 1991 a person falling within sub-paragraph (7) below enjoys a benefit from the settlement for the first time, and
  - (b) the person concerned is not one who (looking only at the terms of the settlement immediately before 19th March 1991) would be capable of enjoying a benefit from the settlement on or after that date.
- (7) Each of the following persons falls within this sub-paragraph—
  - (a) a settlor;
  - (b) the spouse of a settlor;
  - (c) any child of a settlor or of a settlor’s spouse;
  - (d) the spouse of any such child;
  - (e) a company controlled by a person or persons falling within paragraphs (a) to (d) above;
  - (f) a company associated with a company falling within paragraph (e) above.
- (8) In sub-paragraph (7) above “child” includes a step-child.
- (9) For the purposes of sub-paragraph (7) above the question whether a company is controlled by a person or persons shall be construed in accordance with section 416 of the Taxes Act; but in deciding that question for those purposes no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 416(6) if he is not a participator in the company.
- (10) For the purposes of sub-paragraph (7) above the question whether one company is associated with another shall be construed in accordance with section 416 of the Taxes Act; but where in deciding that question for those purposes it falls to be decided whether a company is controlled by a person or persons, no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 416(6) if he is not a participator in the company.
- (11) In sub-paragraphs (9) and (10) “participator” has the meaning given by section 417(1) of the Taxes Act.

*Information*

10 An inspector may by notice require any person who is or has been a trustee of, a beneficiary under, or a settlor in relation to, a settlement to give him within such time as he may direct (which must not be less than 28 days beginning with the day the notice is given) such particulars as he thinks necessary for the purposes of section 86 and this Schedule and specifies in the notice.

F11 .....

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**Textual Amendments**

**F1** Sch. 5 paras. 11-14 repealed (with effect in accordance with s. 97(5) of the amending Act) by [Finance Act 1994 \(c. 9\)](#), s. 97(4), **Sch. 26 Pt. V(10)**

<sup>F1</sup>12 . . . . .

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