



# Taxation (International and Other Provisions) Act 2010

## 2010 CHAPTER 8

### PART 4

#### TRANSFER PRICING

### CHAPTER 2

#### KEY INTERPRETATIVE PROVISIONS

##### *Meaning of certain expressions that first appear in section 147*

#### **149 “Actual provision” and “affected persons”**

- (1) In this Part—
  - “the actual provision”, and
  - “the affected persons”,have the meaning given by section 147(1).
- (2) Subsection (1) does not apply if Chapters 1 and 3 to 6 apply in accordance with section 205(2) to (4) (oil-related ring-fence trades) but, in that event, in this Part—
  - “the actual provision” means the provision mentioned in section 205(1)(b),
  - and
  - “the affected persons” means the two persons mentioned in section 205(2).
- (3) Subsections (1) and (2) are subject to subsection (4).
- (4) If the participation condition (see section 148) would not be met but for section 161 or 162 (cases in which actual provision relates, to any extent, to financing arrangements), then in section 147(1)(d), (2)(b), (3), (4)(b) and (5) “the actual provision” is a reference to the actual provision so far as relating to the financing arrangements concerned.

**150 “Transaction” and “series of transactions”**

- (1) In this Part “transaction” includes arrangements, understandings and mutual practices (whether or not they are, or are intended to be, legally enforceable).
- (2) References in this Part to a series of transactions include references to a number of transactions each entered into (whether or not one after the other) in pursuance of, or in relation to, the same arrangement.
- (3) A series of transactions is not prevented by reason only of one or more of the matters mentioned in subsection (4) from being regarded for the purposes of this Part as a series of transactions by means of which provision has been made or imposed as between any two persons.
- (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 section “arrangement” means any scheme or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable).

**151 “Arm’s length provision”**

- (1) In this Part “the arm’s length provision” has the meaning given by section 147(1).
- (2) For the purposes of this Part, the cases in which provision made or imposed as between any two persons is to be taken to differ from the provision that would have been made as between independent enterprises include the case in which provision is made or imposed as between two persons but no provision would have been made as between independent enterprises; and references in this Part to the arm’s length provision are to be read accordingly.

**152 Arm’s length provision where actual provision relates to securities**

- (1) This section applies where—
  - (a) both of the affected persons are companies, and
  - (b) the actual provision is provision in relation to a security issued by one of those companies (“the issuing company”).
- (2) Section 147(1)(d) is to be read as requiring account to be taken of all factors, including—
  - (a) the question whether the loan would have been made at all in the absence of the special relationship,
  - (b) the amount which the loan would have been in the absence of the special relationship, and
  - (c) the rate of interest and other terms which would have been agreed in the absence of the special relationship.
- (3) Subsection (2) has effect subject to subsections (4) and (5).
- (4) If—

- (a) a company (“L”) makes a loan to another company with which it has a special relationship, and
  - (b) it is not part of L’s business to make loans generally,
- the fact that it is not part of L’s business to make loans generally is to be disregarded in applying subsection (2).
- (5) Section 147(1)(d) is to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.
- (6) The matters are—
- (a) the appropriate level or extent of the issuing company’s overall indebtedness,
  - (b) whether it might be expected that the issuing company and a particular person would have become parties to a transaction involving—
    - (i) the issue of a security by the issuing company, or
    - (ii) the making of a loan, or a loan of a particular amount, to the issuing company, and
  - (c) the rate of interest and other terms that might be expected to be applicable in any particular case to such a transaction.

### **153 Arm’s length provision where security issued and guarantee given**

- (1) This section applies where the actual provision is made or imposed by means of a series of transactions which include—
- (a) the issuing of a security by a company which is one of the affected persons (“the issuing company”), and
  - (b) the provision of a guarantee by a company which is the other affected person.
- (2) Section 147(1)(d) is to be read as requiring account to be taken of all factors, including—
- (a) the question whether the guarantee would have been provided at all in the absence of the special relationship,
  - (b) the amount that would have been guaranteed in the absence of the special relationship, and
  - (c) the consideration for the guarantee and other terms which would have been agreed in the absence of the special relationship.
- (3) Subsection (2) has effect subject to subsections (4) and (5).
- (4) If—
- (a) a company (“G”) provides a guarantee in respect of another company with which it has a special relationship, and
  - (b) it is not part of G’s business to provide guarantees generally,
- the fact that it is not part of G’s business to provide guarantees generally is to be disregarded in applying subsection (2).
- (5) Section 147(1)(d) is to be read as requiring that, in the determination of any of the matters mentioned in subsection (6), no account is to be taken of (or of any inference capable of being drawn from) any guarantee provided by a company with which the issuing company has a participatory relationship.

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*Status: This is the original version (as it was originally enacted).*

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

#### **154 Interpretation of sections 152 and 153**

- (1) Subsections (3) to (7) apply for the purposes of sections 152 and 153.
- (2) Subsection (6) applies also for the purposes of subsection (7)(a).
- (3) “Special relationship” means any relationship by virtue of which the participation condition is met (see section 148) in the case of the affected persons concerned.
- (4) Any reference to a guarantee includes—
  - (a) a reference to a surety, and
  - (b) a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuing company has a reasonable expectation that in the event of a default by the issuing company the person will be paid by, or out of the assets of, one or more companies.
- (5) One company (“A”) has a “participatory relationship” with another (“B”) if—
  - (a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or
  - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.
- (6) “Security” includes securities not creating or evidencing a charge on assets.
- (7) Any—
  - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
  - (b) other consideration given by a company for the use of money so advanced, is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

#### **155 “Potential advantage” in relation to United Kingdom taxation**

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

- (3) Effect A is that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of the person's profits for any chargeable period.
- (4) Effect B is that a larger amount (or, if there would not otherwise have been losses, any amount of more than nil) would be taken for tax purposes to be the amount for any chargeable period of any losses of the person.
- (5) In determining for the purposes of subsection (3) or (4) the amount that would be taken for tax purposes to be the amount of the profits or losses for a year of assessment in the case of a non-UK resident, there is to be left out of account any income of that person which is—
  - (a) disregarded income within the meaning given by section 813 of ITA 2007 (limits on liability to income tax of non-UK residents), or
  - (b) disregarded company income within the meaning given by section 816 of that Act.
- (6) For the purposes of subsections (2) to (4)—
  - (a) Part 7 (tax treatment of financing costs and income), and
  - (b) paragraph E of the list in section 1000(1) of CTA 2010 (excessive interest etc treated as a distribution),are to be disregarded.

## 156 “Losses” and “profits”

- (1) In this Part “losses” includes amounts which are not losses but in respect of which relief may be given in accordance with—
  - (a) section 57 of ITTOIA 2005 (pre-trading expenses),
  - (b) section 88 of ITA 2007 (carry forward of certain interest),
  - (c) section 61 of CTA 2009 (pre-trading expenses),
  - (d) sections 387 to 391 of CTA 2009 (insurance companies: non-trading deficits on loan relationships),
  - (e) Chapter 16 of Part 5 of CTA 2009 (non-trading deficits on loan relationships),
  - (f) section 1223 of CTA 2009 (excess of management expenses), or
  - (g) Part 5 of CTA 2010 (group relief).
- (2) In this Part “profits” includes income.