



# Finance Act 2015

## 2015 CHAPTER 11

### PART 3

#### DIVERTED PROFITS TAX

##### *Process for imposing charge*

#### **93 Preliminary notice**

- (1) If a designated HMRC officer has reason to believe that—
  - (a) one or more of sections 80, 81 and 86 applies or apply in relation to a company for an accounting period, and
  - (b) as a result, taxable diverted profits arise to the company in the accounting period,the officer must give the company a notice (a “preliminary notice”) in respect of that period.
- (2) See sections 96 and 97 for provision about the calculation of taxable diverted profits for the purposes of a preliminary notice.
- (3) A preliminary notice must—
  - (a) state the accounting period of the company to which the notice applies;
  - (b) set out the basis on which the officer has reason to believe that one or more of sections 80, 81 and 86 applies or apply in relation to the company for that accounting period;
  - (c) explain the basis on which the proposed charge is calculated, including—
    - (i) how the taxable diverted profits to which the proposed charge would relate have been determined,
    - (ii) where relevant, details of the relevant alternative provision (see section 82(5) or 88(7)) by reference to which those profits have been determined, and
    - (iii) how the amount of interest comprised in that charge in accordance with section 79(2)(b) would be calculated,

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- (d) state who would be liable to pay the diverted profits tax;
  - (e) explain how interest is applied in accordance with section 101 of FA 2009 (late payment interest on sums due to HMRC) if the diverted profits tax is not paid, the period for which interest is charged and the rate at which it is charged.
- (4) Where the designated HMRC officer has insufficient information to determine or identify any of the matters set out in subsection (3), it is sufficient if the preliminary notice sets out those matters determined to the best of the officer's information and belief.
- (5) Subject to subsection (6) <sup>F1</sup>—
- (a) a preliminary notice may not be issued in respect of an accounting period on the basis that section 80 or 81 applies more than six months after the last day on which an amendment of the company tax return for the accounting period could be made, and
  - (b) a preliminary notice may not be issued in respect of an accounting period on the basis that section 86 applies more than 24 months after the end of that accounting period.]
- <sup>F2</sup>(5A) For the purposes of subsection (5)(a) no account is to be taken of any exception to paragraph 15(4) of Schedule 18 to FA 1998 (period for amending a company tax return).]
- (6) Where—
- (a) notification under section 92 has not been received by an officer of Revenue and Customs in respect of an accounting period of a company within the period specified in subsection (2)(b) of that section, and
  - (b) a designated HMRC officer believes, in relation to that accounting period, that an amount of diverted profits tax that ought to have been charged under this Part has not been charged,
- a designated HMRC officer may issue to the company a preliminary notice in respect of that tax within the period of 4 years after the end of the accounting period.
- (7) Where a preliminary notice is issued to a company, the officer must give a copy of the notice—
- (a) if the notice is issued on the basis that section 81 applies, to UKPE, and
  - (b) if the notice is issued on the basis that section 86 applies, to the avoided PE.

#### Textual Amendments

- F1** Words in s. 93(5) substituted (with effect in accordance with Sch. 6 para. 9(4) of the amending Act) by [Finance Act 2019 \(c. 1\), Sch. 6 para. 9\(2\)](#)
- F2** [S. 93\(5A\)](#) inserted (with effect in accordance with Sch. 6 para. 9(4) of the amending Act) by [Finance Act 2019 \(c. 1\), Sch. 6 para. 9\(3\)](#)

## 94 Representations

- (1) This section applies where a designated HMRC officer gives a preliminary notice, in respect of an accounting period, to a company under section 93 (and that notice is not withdrawn).

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- (2) The company has 30 days beginning with the day the notice is issued to send written representations to the officer in respect of the notice.
- (3) Representations made in accordance with subsection (2) are to be considered by the officer only if they are made on the following grounds—
  - (a) that there is an arithmetical error in the calculation of the amount of the diverted profits tax or the taxable diverted profits or an error in a figure on which an assumption in the notice is based;
  - (b) that the small or medium-sized enterprise requirement is not met;
  - (c) that in a case where the preliminary notice states that section 80 or 81 applies—
    - (i) the participation condition is not met,
    - (ii) the 80% payment test is met, or
    - (iii) the effective tax mismatch outcome is an excepted loan relationship outcome;
  - (d) that in a case where the preliminary notice states that section 86 applies—
    - (i) section 87 (exception for companies with limited UK-related sales or expenses) operates to prevent section 86 from applying for the accounting period, or
    - (ii) the avoided PE is “excepted” within the meaning of section 86(5);
  - (e) that in a case where the preliminary notice states that section 86 applies and that the mismatch condition (within the meaning of section 86(2)) is met, the condition is not met because—
    - (i) the participation condition is not met,
    - (ii) the 80% payment test is met, or
    - (iii) the effective tax mismatch outcome is an excepted loan relationship outcome (within the meaning of section 109(2)).
- (4) But, unless they are representations under subsection (3)(a) in respect of arithmetical errors, nothing in subsection (3) requires the officer to consider any representations if, and to the extent that, they relate to—
  - (a) any provision of Part 4 of TIOPA 2010 (transfer pricing), or
  - (b) the attribution of profits of a company to a permanent establishment in the United Kingdom through which the company carries on a trade (including any notional attribution made for the purposes of section 89, 90 or 91).
- (5) “The small or medium-sized enterprise requirement” is—
  - (a) where the notice was issued on the basis that section 80 or 81 applies, the requirement in section 80(1)(g), and
  - (b) where the notice was issued on the basis that section 86 applies to the company, the requirement in subsection (1)(h) or (2)(f) of that section.
- (6) “The participation condition” means—
  - (a) where the notice was issued on the basis that section 80 or 81 applies, the condition in section 80(1)(c), and
  - (b) where the notice was issued on the basis that section 86 applies to the company, the condition in subsection (2)(b) of that section.
- (7) “The 80% payment test” means the requirement in section 107(3)(d).

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## **95 Charging notice**

- (1) This section applies where a designated HMRC officer has given a company a preliminary notice under section 93 in relation to an accounting period.
- (2) Having considered any representations in accordance with section 94, the officer must determine whether to—
  - (a) issue a notice under this section (a “charging notice”) to the company for that accounting period, or
  - (b) notify the company that no charging notice will be issued for that accounting period pursuant to that preliminary notice,
 and must take that action before the end of the period of 30 days immediately following the period of 30 days mentioned in section 94(2).
- (3) A notification under subsection (2)(b) does not prevent a charging notice being issued for the same accounting period pursuant to any other preliminary notice the person may be given in respect of that period.
- (4) See sections 96 and 97 for provision about the calculation of taxable diverted profits for the purposes of a charging notice.
- (5) A charging notice must—
  - (a) state the amount of the charge to diverted profits tax imposed by the notice;
  - (b) set out the basis on which the officer considers that section 80, 81 or 86 applies;
  - (c) state the accounting period of the company to which the notice applies;
  - (d) set out an explanation of the basis on which the charge is calculated, including—
    - (i) how the taxable diverted profits to which the charge relates have been determined,
    - (ii) where relevant, details of the relevant alternative provision (see section 82(5) or 88(7)) by reference to which those profits have been determined, and
    - (iii) how the amount of interest comprised in the charge under section 79(2)(b) has been calculated;
  - (e) state who is liable to pay the diverted profits tax;
  - (f) state when the tax is due and payable;
  - (g) explain how interest is applied in accordance with section 101 of FA 2009 (late payment interest on sums due to HMRC) if the diverted profits tax is not paid, the period for which interest is charged and the rate at which it is charged.
- (6) Where a charging notice is issued to a company, the officer must give a copy of the notice—
  - (a) if the notice is issued by reason of section 81 applying, to UKPE, and
  - (b) if the notice is issued by reason of section 86 applying, to the avoided PE.

## **96 Section 80 or 81 cases: estimating profits for preliminary and charging notices**

- (1) Where taxable diverted profits arising to a company in an accounting period fall to be determined under section 84 or 85, for the purposes of issuing a preliminary notice under section 93 or a charging notice under section 95 the taxable diverted profits to be

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specified in the notice, in relation to the material provision in question, are determined in accordance with this section.

- (2) The taxable diverted profits are such amount (if any) as the designated HMRC officer issuing the notice determines, on the basis of the best estimate that can reasonably be made at that time, to be the amount calculated in accordance with sections 84 or 85 (as the case may be).

But this is subject to subsections (4) to (6).

- (3) For the purposes of this section, “the inflated expenses condition” is met if—
- (a) the material provision results in expenses of the company for which a deduction has been taken into account by the company in computing—
    - (i) in a case where section 80 applies, its liability for corporation tax for the accounting period, and
    - (ii) in a case where section 81 applies, its chargeable profits attributable (in accordance with sections 20 to 32 of CTA 2009) to UKPE,
  - (b) the expenses result, or a part of the expenses results, in the effective tax mismatch outcome mentioned in section 80(1)(d), and
  - (c) in consequence of paragraphs (a) and (b), the designated HMRC officer issuing the notice considers that the relevant expenses might be greater than they would have been if they had resulted from provision made or imposed as between independent persons dealing at arm's length.
- (4) Subsection (5) applies where the designated HMRC officer issuing the notice considers that—
- (a) the inflated expenses condition is met, and
  - (b) it is reasonable to assume that section 84 or 85(4) applies.
- (5) Where this subsection applies, the best estimate made by the officer in accordance with subsection (2) is to be made on the assumption that—
- (a) so much of the deduction mentioned in subsection (3)(a) as relates to the relevant expenses is reduced by 30%, and
  - (b) in relation to the relevant expenses, Part 4 of TIOPA 2010 (transfer pricing) is ignored.
- (6) But—
- (a) if the deduction for the expenses taken into account by the company in computing its liability for corporation tax takes account of an adjustment required by Part 4 of TIOPA 2010 (transfer pricing) which is reflected in the company's company tax return prior to the issue of the charging notice, and
  - (b) as a result that deduction is less than it would otherwise have been,
- the reduction required by subsection (5)(a) is reduced (but not below nil) to take account of that adjustment.
- (7) For the purposes of this section, sections 83(3) and 84(2)(c) have effect as if (in each case) the words “before the end of the review period” were omitted.
- (8) The Treasury may by regulations, made by statutory instrument, substitute a different percentage for the percentage for the time being specified in subsection (5)(a).
- (9) Regulations under this section are subject to annulment in pursuance of a resolution of the House of Commons.

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(10) In this section—

“the material provision” has the same meaning as in section 80;

“the relevant expenses” means so much of the expenses mentioned in subsection (3)(a) as result in the effective tax mismatch outcome as mentioned in subsection (3)(b).

**97 Section 86 cases: estimating profits for preliminary and charging notices**

- (1) Where taxable diverted profits arising to the foreign company in an accounting period fall to be determined under section 89, 90 or 91, for the purposes of issuing a preliminary notice under section 93 or a charging notice under section 95 the taxable diverted profits to be specified in the notice are determined instead in accordance with this section.
- (2) The taxable diverted profits are such amount as the designated HMRC officer issuing the notice determines, on the basis of the best estimate that can reasonably be made at that time, to be the amount calculated in accordance with section 89, 90 or 91 (as the case may be).

But this is subject to subsections (4) and (5).

- (3) For the purposes of subsection (4), “the inflated expenses condition” is met if—
  - (a) the mismatch condition is met,
  - (b) the material provision results in expenses of the foreign company for which (ignoring Part 4 of TIOPA 2010 (transfer pricing)) a deduction for allowable expenses would be allowed in computing the notional PE profits of the foreign company for the accounting period,
  - (c) the expenses result, or a part of the expenses results, in the effective tax mismatch outcome mentioned in section 86(2)(c), and
  - (d) in consequence of paragraphs (a) to (c), the designated HMRC officer issuing the notice considers that the relevant expenses might be greater than they would have been if they had resulted from provision made or imposed as between independent persons dealing at arm's length.
- (4) Subsection (5) applies where the designated HMRC officer issuing the notice considers that—
  - (a) the inflated expenses condition is met, and
  - (b) it is reasonable to assume that section 90 or 91(4) applies.
- (5) Where this subsection applies, the best estimate made by the officer in accordance with subsection (2) is to be made on the assumption that—
  - (a) so much of the deduction mentioned in subsection (3)(b) as relates to the relevant expenses is reduced by 30%, and
  - (b) in relation to the relevant expenses, Part 4 of TIOPA 2010 (transfer pricing) is ignored.
- (6) The Treasury may by regulations, made by statutory instrument, substitute a different percentage for the percentage for the time being specified in subsection (5)(a).
- (7) Regulations under this section are subject to annulment in pursuance of a resolution of the House of Commons.
- (8) In this section—

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- (a) “the relevant expenses” means so much of the expenses mentioned in subsection (3)(b) as result in the effective tax mismatch outcome as mentioned in section 86(2)(c), and
- (b) “the foreign company”, “the material provision” and “the mismatch condition” have the same meaning as in section 86.

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