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# Finance Act 1994

## 1994 CHAPTER 9

### PART IV

#### INCOME TAX, CORPORATION TAX AND CAPITAL GAINS TAX

### CHAPTER II

#### INTEREST RATE AND CURRENCY CONTRACTS

##### *Anti-avoidance and related provisions*

#### **165 Transfers of value by qualifying companies.**

- (1) Subsection (2) below applies where, as a result of—
  - (a) a qualifying company entering into a relevant transaction on or after its commencement day, or
  - (b) the expiry on or after a qualifying company's commencement day of an option held by the company which, until its expiry, was a qualifying contract,there is a transfer of value by the qualifying company to an associated company or an associated third party.
- (2) For the accounting period of the qualifying company in which the transaction was entered into or the option expired, there shall be deducted from amount B or, as the case may require, added to amount A an amount equal to the value transferred by that company.
- (3) For the purposes of subsection (1) above there is a transfer of value by the qualifying company to an associated company or an associated third party if, immediately after the transaction or expiry—
  - (a) the value of the qualifying company's net assets is less, and
  - (b) the value of the associated company's or associated third party's net assets is more,

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than it would have been but for the transaction or expiry; and the amount by which the value mentioned in paragraph (a) above is less is the value transferred by the qualifying company for the purposes of subsection (2) above.

- (4) Any reference in subsection (3) above to the value of a person's net assets being less or more than it would have been but for the transaction or expiry includes a reference to the value of that person's net liabilities being more or, as the case may be, less than it would have been but for the transaction or expiry.
- (5) In applying subsection (3) above, no account shall be taken of any such payment as is mentioned in section 151(2)(a) or (b) above.
- (6) A third party, that is to say, a person who is not an associated company, is an associated third party for the purposes of this section at the time when the relevant transaction is entered or the option expires if, at that time, each of the two conditions mentioned below is fulfilled.
- (7) The first condition is that the relevant transaction is entered into or the option is allowed to expire in pursuance of arrangements made with the third party.
- (8) The second condition is that, in pursuance of those arrangements, a transfer of value has been or will be made to an associated company (directly or indirectly) by the third party or by a company which was at the time when the arrangements were made an associated company of that party.
- (9) Where it appears to the inspector that there is a transfer of value by the qualifying company to a third party, he may by notice in writing require the company, within such time (which shall not be less than 30 days) as may be specified in the notice, to furnish to the inspector such information—
  - (a) as is in its possession or power, and
  - (b) as the inspector reasonably requires for the purpose of determining whether the third party is an associated third party for the purposes of this section.
- (10) Subsection (3) above shall (with the necessary modifications) apply for the purposes of subsections (7) to (9) above as it applies for the purposes of subsection (1) above.
- (11) In this section—
 

“associated company” shall be construed in accordance with section 416 of the Taxes Act 1988;

“relevant transaction” means a transaction as a result of which—

  - (a) a qualifying company becomes party to a qualifying contract, or
  - (b) the terms of a qualifying contract to which a qualifying company is party are varied;

and any reference to an associated company is, unless the contrary intention appears, a reference to an associated company of the qualifying company.

## 166 Transfers of value to associated companies.

- (1) Subsection (2) below applies where subsection (2) of section 165 above applies and either—
  - (a) the transfer of value by the qualifying company is to an associated company which is itself a qualifying company; or

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- (b) the transfer of value by the qualifying company is to an associated third party, and the transfer of value mentioned in subsection (8) of that section—
  - (i) is to an associated company which is itself a qualifying company, and
  - (ii) results from that company entering into a relevant transaction.
- (2) For the corresponding accounting period or periods of the associated company, there shall be deducted from amount A or, as the case may require, added to amount B an amount equal to the value transferred to the associated company.
- (3) Subsection (3) of section 165 above shall (with the necessary modifications) apply for the purposes of subsection (2) above as it applies for the purposes of subsection (2) of that section.
- (4) In subsection (2) above “corresponding accounting period or periods”, in relation to the associated company, means the accounting period or periods of that company comprising or together comprising the accounting period of the qualifying company in which the transaction was entered into or the option expired, and any necessary apportionment shall be made between corresponding accounting periods if more than one.
- (5) In this section any expressions which are also used in section 165 above shall be construed in accordance with the provisions of that section.

#### **167 Transactions not at arm’s length.**

- (1) A transaction entered into on or after a qualifying company’s commencement day is a relevant transaction for the purposes of this section if as a result of the transaction—
  - (a) the qualifying company becomes party to a qualifying contract, or
  - (b) the terms of a qualifying contract to which the qualifying company is party are varied.
- (2) Subsections (3) to (5) below apply where—
  - (a) if the parties to a relevant transaction had been dealing at arm’s length, the transaction—
    - (i) would not have been entered into at all, or
    - (ii) would have been entered into on different terms,<sup>F1</sup> . . .
  - <sup>F1</sup>(b) . . . . .but subject, in a case falling within paragraph (a)(ii) above, to the modifications made by subsection (7) below.
- (3) For each relevant accounting period for the whole of which the other party is a qualifying company, the following deductions shall be made—
  - (a) from amount B, a deduction of such amount as may be necessary to reduce amount B to nil, and
  - (b) from amount A, a deduction of such amount as may be necessary to reduce amount A to nil.
- (4) For each relevant accounting period for any part of which the other party is not a qualifying company, the following deductions shall be made—
  - (a) from amount B, a deduction of such amount as may be necessary to reduce amount B to nil, and

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- (b) from amount A, a deduction of the same amount or (where that amount exceeds amount A) a deduction of so much of that amount as may be necessary to reduce amount A to nil.
- (5) For each relevant accounting period (except the first) for any part of which the other party is not a qualifying company, there shall also be deducted from amount A or, as the case may require, added to amount B such amount as may be necessary to secure that amount C does not exceed amount D where—
- (a) amount C is any amount by which the aggregate of adjusted amounts A exceeds the aggregate of adjusted amounts B, and
- (b) amount D is any amount by which the aggregate of unadjusted amounts A exceeds the aggregate of unadjusted amounts B.
- (6) In subsection (5) above—
- “adjusted” means adjusted under subsections (4) and (5) above and “unadjusted” shall be construed accordingly;
- “the aggregate of adjusted amounts A”, in relation to a relevant accounting period, means the aggregate of—
- (a) adjusted amount A for that period, and
- (b) adjusted amount A for each preceding relevant accounting period,
- and similar expressions shall be construed accordingly.
- (7) In a case falling within subsection (2)(a)(ii) above—
- (a) subsections (3) to (5) above shall have effect as if any reference to amount A or amount B were a reference to the relevant proportion of that amount; and
- (b) the definitions in subsection (6) above of “the aggregate of adjusted amounts A” and similar expressions shall have effect as if any reference to adjusted amount A were a reference to the adjusted relevant proportion of amount A;
- and in this subsection “the relevant proportion” means such proportion as may be just and reasonable having regard to the differences between the terms mentioned in subsection (2)(a)(ii) above and the terms on which the relevant transaction was actually entered into.
- (8) In applying subsections (2) and (7) above—
- (a) no account shall be taken of any transfer of value in respect of which an adjustment is made under section 165 or 166 above, but
- (b) subject to that, all factors shall be taken into account.
- (9) The factors which may be so taken into account include—
- (a) in a case where the qualifying contract is an interest rate contract or option, any notional principal amounts and rates of interest that would have been involved;
- (b) in a case where the qualifying contract is a currency contract or option, any currencies and amounts that would have been involved;
- [<sup>F2</sup>(ba) in a case where the qualifying contract is a debt contract or option, the amount of the debt by reference to which any loan relationship that would have been involved would have subsisted, and any terms as to repayment, redemption or interest that, in the case of that debt or any asset representing it, would have been involved; and]
- (c) in [<sup>F3</sup>any such] case, any transactions which are related to the relevant transaction.

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- (10) In this section “relevant accounting period”, in relation to a relevant transaction, means—
- (a) the accounting period of the qualifying company in which the transaction was entered into, and
  - (b) each subsequent accounting period of that company for the whole or part of which it is party to the contract.

#### Textual Amendments

- F1** S. 167(2)(b) and the preceding word “and” repealed (31.7.1998 with effect as mentioned in s. 109(4) of the repealing Act) by 1998 c. 36, s. 165, **Sch. 27 Pt. III(26)**, Note
- F2** S. 167(9)(ba) inserted (29.4.1996 with effect as mentioned in s. 105(1) of the amending Act) by 1996 c. 8, s. 104, **Sch. 14 para. 76(1)** (with savings etc. in Pt. IV Chapter II (ss. 80-105))
- F3** Words in s. 167(9)(c) substituted (29.4.1996 with effect as mentioned in s. 105(1) of the amending Act) by 1996 c. 8, s. 104, **Sch. 14 para. 76(2)** (with savings etc. in Pt. IV Chapter II (ss. 80-105))

### 168 Qualifying contracts with non-residents.

- (1) Subject to subsections (3) to (5) below, subsections (4) and (5) of section 167 above (“the relevant subsections”) also apply where, as a result of any transaction entered into on or after a qualifying company’s commencement day—
- (a) the qualifying company and a non-resident, that is, a person who is not resident in the United Kingdom, both become party to a qualifying contract;
  - (b) the qualifying company becomes party to a qualifying contract to which a non-resident is party; or
  - (c) a non-resident becomes party to a qualifying contract to which the qualifying company is party.
- (2) For the purposes of the relevant subsections as so applied, the definition of “relevant accounting period” in subsection (10) of that section shall have effect as if—
- (a) any reference to a relevant transaction were a reference to the transaction mentioned in subsection (1) above; and
  - (b) in paragraph (b), for the words “it is” there were substituted the words “both it and the non-resident are”.
- (3) The relevant subsections shall not apply where the qualifying company is a bank, building society or financial trader and—
- (a) it holds the qualifying contract solely for the purposes of a trade or part of a trade carried on by it in the United Kingdom, and
  - (b) it is party to the contract otherwise than as agent or nominee of another person.
- (4) The relevant subsections shall not apply where—
- (a) the non-resident holds the qualifying contract solely for the purposes of a trade or part of a trade carried on by him in the United Kingdom through a branch or agency, and
  - (b) he is party to the contract otherwise than as agent or nominee of another person.
- (5) The relevant subsections shall not apply where arrangements made with the government of the territory in which the non-resident is resident—

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- (a) have effect by virtue of section 788 of the Taxes Act 1988, and
  - (b) make provision, whether for relief or otherwise, in relation to interest (as defined in the arrangements).
- (6) Where the non-resident is party to the contract as agent or nominee of another person, subsection (5) above shall have effect as if the reference to the territory in which the non-resident is resident were a reference to the territory in which that other person is resident.

VALID FROM 24/07/2002

#### **[<sup>F4</sup>168A Qualifying contracts for unallowable purposes**

- (1) Where in any accounting period a qualifying contract to which a company is party has an unallowable purpose, any amounts which for that period fall, in the case of the company, to be brought into account for the purposes of section 155 above as part of amount B shall (subject to subsection (2) below) not include so much of the amounts given by the accounting method used as respects the contract as, on a just and reasonable apportionment, is referable to the unallowable purpose.
- (2) The total of any amounts which by virtue of subsection (1) above are not to be brought into account in the accounting period as part of amount B may not exceed the maximum amount.
- (3) For the purposes of subsection (2) above, the maximum amount, in relation to the accounting period, is—
  - (a) if in the accounting period amount B exceeds amount A, the amount by which amount B exceeds amount A; and
  - (b) if in the accounting period amount A exceeds or equals amount B, nil.
- (4) For the purposes of subsection (3) above, amount A and amount B shall be determined in relation to the qualifying contract in accordance with section 155 above and, in so determining amount B, so much of any amount as is referable to the unallowable purpose of the contract shall (notwithstanding subsection (1) above) be brought into account.
- (5) For the purposes of this section a qualifying contract to which a company is party shall be taken to have an unallowable purpose in an accounting period where the purposes for which, at times during that period, the company is party to the contract include a purpose (“the unallowable purpose”) which is not amongst the business or other commercial purposes of the company.
- (6) For the purposes of this section the business and other commercial purposes of a company do not include the purposes of any part of its activities in respect of which it is not within the charge to corporation tax.
- (7) For the purposes of this section, where one of the purposes for which a company is party to a qualifying contract at any time is a tax avoidance purpose, that purpose shall be taken to be a business or other commercial purpose of the company only where it is not the main purpose, or one of the main purposes, for which the company is party to the contract at that time.

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- (8) The reference in subsection (7) above to a tax avoidance purpose is a reference to any purpose that consists in securing a tax advantage (whether for the company or any other person).
- (9) In this section “tax advantage” has the same meaning as in Chapter 1 of Part 17 of the Taxes Act 1988 (tax avoidance).]

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**Textual Amendments**

- F4** S.168A inserted (with effect as mentioned in s. 69(2)4) of the amending Act) by [Finance Act 2002 \(c. 23\), s. 69\(1\)](#)

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