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SCHEDULES

SCHEDULE 26 **U.K.**

Section 152

NON-RESIDENT COMPANIES: TRANSACTIONS THROUGH BROKER, INVESTMENT MANAGER OR LLOYD'S AGENT

Introduction

- 1 (1) This Schedule makes provision about transactions carried out on behalf of a company that is not resident in the United Kingdom (a “non-resident company”), in the course of that company’s trade, by a person in the United Kingdom acting as—
- (a) a broker (paragraph 2),
 - (b) an investment manager (paragraphs 3 to 5), or
 - (c) a members' or managing agent at Lloyd's (paragraph 6).
- (2) The provisions of this Schedule supplement—
- (a) section 148(3) (meaning of “permanent establishment”: not to include independent agent), and
 - (b) section 151(2)(c) (limit on income tax chargeable on non-resident company: income arising from transactions carried out through independent agent).

Brokers

- 2 (1) In relation to a transaction carried out on behalf of a non-resident company, a broker is regarded as an agent of independent status acting in the ordinary course of his business if, and only if, the following conditions are met.
- (2) The conditions are—
- (a) that at the time of the transaction he is carrying on the business of a broker;
 - (b) that the transaction is carried out by him in the ordinary course of that business;
 - (c) that the remuneration he receives in respect of the transaction for the provision of the services of a broker to the non-resident company is not less than is customary for that class of business; and
 - (d) that he does not fall to be treated as a permanent establishment of the non-resident company in relation to any other transaction carried out in the same accounting period.

Investment managers

- 3 (1) In relation to an investment transaction carried out on behalf of a non-resident company by a person providing investment management services (an “investment manager”), the investment manager is regarded as an agent of independent status acting in the ordinary course of his business if, and only if, the following conditions are met.

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- (2) The conditions are—
- (a) that at the time of the transaction he is carrying on a business of providing investment management services;
 - (b) that the transaction is carried out in the ordinary course of that business;
 - (c) that he acts on behalf of the non-resident company in relation to the transaction in an independent capacity;
 - (d) that the requirements of the 20% rule are met (see paragraph 4);
 - (e) that the remuneration he receives in respect of the transaction for the provision to the non-resident company of investment management services is not less than is customary for that class of business; and
 - (f) that he does not fall to be treated as a permanent establishment of the company in relation to any other transaction carried out in the same accounting period.
- (3) In sub-paragraph (1) “investment transaction” means—
- (a) transactions in shares, stock, futures contracts, options contracts or securities of any description not mentioned in this paragraph, but excluding futures contracts or options contracts relating to land,
 - (b) transactions consisting in the buying or selling of any foreign currency or in the placing of money at interest, and
 - (c) such other transactions as the Treasury may by regulations designate for the purposes of this Schedule.
- Regulations for the purposes of paragraph (c) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the House of Commons.
- (4) For the purposes of sub-paragraph (3) a contract is not prevented from being a futures contract or an options contract by the fact that any party is or may be entitled to receive or liable to make, or entitled to receive and liable to make, only a payment of a sum (as opposed to a transfer of assets other than money) in full settlement of all obligations.

Investment managers: the 20% rule

- 4 (1) The requirements of the 20% rule are—
- (a) that in relation to a qualifying period (see sub-paragraph (2)) it has been or is the intention of the investment manager and the persons connected with him that the company's relevant excluded income (see sub-paragraph (3)) should, as to at least 80%, consist of amounts to which neither he nor any such person has a beneficial entitlement (see sub-paragraph (4)), and
 - (b) to the extent that there is a failure to fulfil that intention, that failure—
 - (i) is attributable (directly or indirectly) to matters outside the control of the investment manager and persons connected with him, and
 - (ii) does not result from a failure by him or any of those persons to take such steps as may be reasonable for mitigating the effect of those matters in relation to the fulfilment of that intention.
- (2) A “qualifying period” means—
- (a) the accounting period in which the transaction in question is carried out, or

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- (b) a period of not more than five years comprising two or more complete accounting periods including that one.
- (3) The “relevant excluded income” of a non-resident company for a qualifying period is the aggregate of such of the chargeable profits of the company for the accounting periods comprised in the qualifying period as derive from transactions carried out by the investment manager on the company’s behalf in relation to which the manager does not (apart from the requirements of the 20% rule) fall to be treated as a permanent establishment of the company.
- (4) A person has a “beneficial entitlement” to relevant excluded income if he has or may acquire a beneficial entitlement by virtue of—
 - (a) an interest of his (whether or not an interest giving a right to an immediate payment of a share in the profits or gains) in property in which the whole or any part of that income is represented, or
 - (b) an interest of his in or other rights in relation to the non-resident company, that is or would be attributable to that income.
- (5) In the case of a transaction in relation to which the conditions in paragraph 3 are met except for the requirements of the 20% rule, this Schedule has effect as if the requirements of that rule were met in relation to so much of the chargeable profits of the non-resident company deriving from the transaction as do not represent relevant excluded income of the company to which the investment manager or a person connected with him has or has had any beneficial entitlement.

Investment managers: application of 20% rule to collective investment schemes

- 5 (1) This paragraph applies where amounts arise or accrue to the non-resident company as a participant in a collective investment scheme.
- (2) The requirements of the 20% rule need not be met in relation to a transaction carried out for the purposes of the scheme if the scheme is such that, if the following assumptions applied—
 - (a) that all transactions carried out for the purposes of the scheme were carried out on behalf of a company constituted for the purposes of the scheme and resident outside the United Kingdom, and
 - (b) that the participants did not have any rights in respect of the amounts arising or accruing in respect of those transactions other than the rights that, if they held shares in the company on whose behalf the transactions are assumed to be carried out, would be their rights as shareholders,
 the assumed company would not, in relation to the accounting period in which the transaction was carried out, be regarded for tax purposes as carrying on a trade in the United Kingdom.
- (3) Where on those assumptions the assumed company would be regarded for tax purposes as carrying on a trade in the United Kingdom, paragraph 4 has effect with the following modifications in relation to a transaction carried out for the purposes of the scheme—
 - (a) for references to the non-resident company substitute references to the assumed company;
 - (b) for references to the non-resident company’s relevant excluded income substitute references to the aggregate of the amounts that would, for accounting periods comprised in the qualifying period, be chargeable to tax

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on the assumed company as profits deriving from the transactions carried out by the investment manager and assumed to be carried out on behalf of the company.

- (4) In this paragraph “collective investment scheme” has the meaning given by section 235 of the Financial Services and Markets Act 2000 (c. 8), and “participant”, in relation to such a scheme, shall be construed in accordance with that section.

Lloyd's agents

- 6 (1) Where a non-resident company is a member of Lloyd's and the transaction is carried out in the course of the company's underwriting business, a person who acts on behalf of the company in relation to the transaction is regarded as an independent agent acting in the ordinary course of his business if he acts as members' agent or as managing agent of the syndicate in question.
- (2) In sub-paragraph (1)—
- (a) the reference to the non-resident company being a member of Lloyd's is to its being a corporate member within the meaning of Chapter 5 of Part 4 of the Finance Act 1994 (c. 9); and
 - (b) the references to a members' agent and to a managing agent shall be construed in accordance with section 230 of that Act.

General supplementary provisions

- 7 (1) For the purposes of this Schedule a person is regarded as carrying out a transaction on behalf of another where he undertakes the transaction himself, whether on behalf of or to the account of that other, and also where he gives instructions for it to be so carried out by another.
- (2) For the purposes of this Schedule a person is regarded as acting in an independent capacity on behalf of a company only if the relationship between them, having regard to its legal, financial and commercial characteristics, is a relationship between persons carrying on independent businesses that deal with each other at arm's length.
- (3) Section 839 of the Taxes Act 1988 (connected persons) applies for the purposes of this Schedule.
- (4) This Schedule has effect in the case of a person who acts as a broker or provides investment services as part only of a business as if that part were a separate business.

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