



Taxation (International and Other Provisions) Act 2010

2010 CHAPTER 8

[^{F1}PART 6A

HYBRID AND OTHER MISMATCHES

CHAPTER 3

HYBRID AND OTHER MISMATCHES FROM FINANCIAL INSTRUMENTS

[^{F1}Application of Chapter

Textual Amendments

- F1** Pt. 6A inserted (with effect in accordance with Sch. 10 paras. 18-21 of the amending Act) by [Finance Act 2016 \(c. 24\), Sch. 10 para. 1](#)

259CA Circumstances in which the Chapter applies

- (1) This Chapter applies if conditions A to D are met.
- (2) Condition A is that a payment or quasi-payment is made under, or in connection with, a financial instrument.
- (3) Condition B is that—
 - (a) the payer is within the charge to corporation tax for the payment period, or
 - (b) a payee is within the charge to corporation tax for an accounting period some or all of which falls within the payment period.
- (4) Condition C is that it is reasonable to suppose that, disregarding the provisions mentioned in subsection (5), there would be a hybrid or otherwise impermissible

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deduction/non-inclusion mismatch in relation to the payment or quasi-payment (see section 259CB).

- (5) The provisions are—
- (a) this Chapter and Chapters 5 to 10, and
 - (b) any equivalent provision under the law of a territory outside the United Kingdom.
- (6) Condition D is that—
- (a) it is a quasi-payment that is made as mentioned in subsection (2) and the payer is also a payee (see section 259BB(7)),
 - (b) the payer and a payee are related (see section 259NC) at any time in the period—
 - (i) beginning with the day on which any arrangement is made by the payer or a payee in connection with the financial instrument, and
 - (ii) ending with the last day of the payment period, or
 - (c) the financial instrument, or any arrangement connected with it, is a structured arrangement.
- (7) The financial instrument, or an arrangement connected with it, is a “structured arrangement” if it is reasonable to suppose that—
- (a) the financial instrument, or arrangement, is designed to secure a hybrid or otherwise impermissible deduction/non-inclusion mismatch, or
 - (b) the terms of the financial instrument or arrangement share the economic benefit of the mismatch between the parties to the instrument or arrangement or otherwise reflect the fact that the mismatch is expected to arise.
- (8) The financial instrument or arrangement may be designed to secure a hybrid or otherwise impermissible deduction/non-inclusion mismatch despite also being designed to secure any commercial or other objective.
- (9) Sections 259CD (cases where the payer is within the charge to corporation tax for the payment period) and 259CE (cases where a payee is within the charge to corporation tax) contain provision for the counteraction of the hybrid or otherwise impermissible deduction/non-inclusion mismatch.

259CB Hybrid or otherwise impermissible deduction/non-inclusion mismatches and their extent

- (1) There is a “hybrid or otherwise impermissible deduction/non-inclusion mismatch”, in relation to a payment or quasi-payment, if either or both of case 1 or 2 applies.
- (2) Case 1 applies where—
 - (a) the relevant deduction exceeds the sum of the amounts of ordinary income that, by reason of the payment or quasi-payment, arise to each payee for a permitted taxable period, and
 - (b) all or part of that excess arises by reason of the terms, or any other feature, of the financial instrument.
- ^{F2}(3) So far as the excess arises—
 - (a) by reason of a relevant debt relief provision, or
 - (b) in relevant debt relief circumstances,

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it is to be taken not to arise by reason of the terms, or any other feature, of the financial instrument (whether or not it would have arisen by reason of the terms, or any other feature, of the financial instrument regardless).]

[So far as the excess arises by reason of an interest distribution designation, it is to
^{F3}(3A) be taken not to arise by reason of the terms, or any other feature, of the financial instrument (whether or not it would have arisen by reason of the terms, or any other feature, of the financial instrument regardless of that designation).]

- (4) Subject to [^{F4}subsections (3), (3A) and] (9), for the purposes of subsection (2)(b)—
- (a) it does not matter whether the excess or part arises for another reason as well as the terms, or any other feature, of the financial instrument (even if it would have arisen for that other reason regardless of the terms, or any other feature, of the financial instrument), and
 - (b) an excess or part of an excess is to be taken to arise by reason of the terms, or any other feature, of the financial instrument (so far as would not otherwise be the case) if, on making such of the relevant assumptions in relation to each payee as apply in relation to that payee (see subsections (5) and (6)), it could arise by reason of the terms, or any other feature, of the financial instrument.
- (5) These are the “relevant assumptions”—
- (a) where a payee is not within the charge to a tax under the law of a payee jurisdiction because the payee benefits from an exclusion, immunity, exemption or relief (however described) under that law, assume that the exclusion, immunity, exemption or relief does not apply;
 - (b) where an amount of income is not included in the ordinary income of a payee for the purposes of a tax charged under the law of a payee jurisdiction because the payment or quasi-payment is not made in connection with a business carried on by the payee in that jurisdiction, assume that the payment or quasi-payment is made in connection with such a business;
 - (c) where a payee is not within the charge to a tax under the law of any territory because there is no territory where the payee is—
 - (i) resident for the purposes of a tax charged under the law of that territory, or
 - (ii) within the charge to a tax under the law of that territory as a result of having a permanent establishment in that territory,assume that the payee is a company that is resident for tax purposes, and carries on a business in connection with which the payment or quasi-payment is made, in the United Kingdom.
- (6) Where the relevant assumption in subsection (5)(c) applies in relation to a payee the following provisions are to be disregarded in relation to that payee for the purposes of subsection (4)(b)—
- (a) section 441 of CTA 2009 (loan relationships for unallowable purposes);
 - (b) section 690 of that Act (derivative contracts for unallowable purposes);
 - (c) Part 4 (transfer pricing);
 - (d) this Part;
 - ^{F5}(e) Part 10 (corporate interest restriction).]
- (7) Case 2 applies where there are one or more amounts of ordinary income (“under-taxed amounts”) that—

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- (a) arise, by reason of the payment or quasi-payment, to a payee for a permitted taxable period, and
- (b) are under taxed by reason of the terms, or any other feature, of the financial instrument.
- (8) Subject to subsection (9), for the purposes of subsection (7)(b) it does not matter whether an amount of ordinary income is under taxed for another reason as well as the terms, or any other feature, of the financial instrument (even if it would have been under taxed for that other reason regardless of the terms, or any other feature, of the financial instrument).
- (9) For the purposes of this section disregard—
- (a) any excess or part of an excess mentioned in subsection (2), and
- (b) any under-taxed amount,
- that arises as a result of a payee being a relevant investment fund (see section 259NA).
- (10) Where case 1 applies, the amount of the hybrid or otherwise impermissible deduction/non-inclusion mismatch is equal to the excess that arises as mentioned in subsection (2)(b).
- (11) Where case 2 applies, the amount of the hybrid or otherwise impermissible deduction/non-inclusion mismatch is equal to the sum of the amounts given in respect of each under-taxed amount by—
- $$(UTA \times (FMR - R)) FMR$$
- where—
- “UTA” is the under-taxed amount;
- “FMR” is the payee's full marginal rate (expressed as a percentage) for the permitted taxable period for which the under-taxed amount arises;
- “R” is the highest rate (expressed as a percentage) at which tax is charged on the taxable profits in which the under-taxed amount is included, taking into account on a just and reasonable basis the effect of any credit for underlying tax.
- (12) Where cases 1 and 2 both apply, the amount of the hybrid or otherwise impermissible deduction/non-inclusion mismatch is the sum of the amounts given by subsections (10) and (11).
- (13) See section 259CC for the meaning of “permitted taxable period”, “relevant debt relief provision” and “under taxed”.

Textual Amendments

- F2** S. 259CB(3) substituted (retrospectively) by [Finance Act 2021 \(c. 26\)](#), [Sch. 7 paras. 3, 36](#)
- F3** S. 259CB(3A) inserted (retrospectively) by [Finance Act 2021 \(c. 26\)](#), [Sch. 7 paras. 7\(a\), 36](#)
- F4** Words in s. 259CB(4) substituted (retrospectively) by [Finance Act 2021 \(c. 26\)](#), [Sch. 7 paras. 7\(b\), 36](#)
- F5** S. 259CB(6)(e) substituted (with effect in accordance with Sch. 5 para. 25(1)(2) of the amending Act) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), [Sch. 5 para. 18](#)

259CC Interpretation of section 259CB

- (1) This section has effect for the purposes of section 259CB.

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- (2) A taxable period of a payee is “permitted” in relation to an amount of ordinary income that arises as a result of the payment or quasi-payment if—
- (a) the period begins before the end of 12 months after the end of the payment period, or
 - ^{F6}(b) the period begins at a later time and it is just and reasonable for the amount of ordinary income to arise for the period (rather than an earlier one).]
- (3) Each of these is a “relevant debt relief provision”—
- (a) section 322 of CTA 2009 (release of debts: cases where credits not required to be brought into account),
 - (b) section 357 of that Act (insolvent creditors),
 - (c) section 358 of that Act (exclusion of credits on release of connected companies' debts: general),
 - (d) section 359 of that Act (exclusion of credits on release of connected companies' debts during creditor's insolvency),
 - (e) section 361C of that Act (the equity-for-debt exception),
 - (f) section 361D of that Act (corporate rescue: debt released shortly after acquisition), and
 - (g) section 362A of that Act (corporate rescue: debt released shortly after connection arises).
- ^{F7}[To determine whether excess arises in “relevant debt relief circumstances” see sections 259NEB to 259NEF.]
- ^{F8}[An “interest distribution designation” means a designation made under regulation 5(2) of the Investment Trusts (Dividends) (Optional Treatment as Interest Distributions) Regulations 2009 (S.I. 2009/2034).]
- (4) An amount of ordinary income of a payee, for a permitted taxable period, is “under taxed” if the highest rate at which tax is charged on the taxable profits of the payee in which the amount is included, taking into account on a just and reasonable basis the effect of any credit for underlying tax, is less than the payee's full marginal rate for that period.
- (5) The payee's “full marginal rate” means the highest rate at which the tax that is chargeable on the taxable profits mentioned in subsection (4) could be charged on taxable profits, of the payee for the permitted taxable period, which include ordinary income that arises from, or in connection with, a financial instrument.
- (6) A “credit for underlying tax” means a credit or relief given to reflect tax charged on profits that are wholly or partly used to fund (directly or indirectly) the payment or quasi-payment.]
- ^{F9}(7) A qualifying capital amount arising to a payee is treated as an amount of ordinary income of a payee and references to tax include any qualifying capital tax.
- (8) For the purposes of case 2—
- (a) a qualifying capital amount arising to a payee, for a permitted taxable period, is “under taxed” if the highest rate at which tax is charged on the amount, taking into account on a just and reasonable basis the effect of any credit for underlying tax, is less than the payee’s full marginal rate for that period,

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- (b) in determining the payee’s “full marginal rate”, the reference to the taxable profits mentioned in subsection (4) includes any qualifying capital amount, and
 - (c) in determining a “credit for underlying tax”, the reference to profits includes any qualifying capital amount.
- (9) If the rate at which a qualifying capital tax is charged on a qualifying capital amount of a payee exceeds the rate at which tax would be charged on an amount of income of the payee, the excess is to be ignored.
- (10) For the purposes of subsections (7) to (9) a “qualifying capital amount” means an amount of a capital nature on which a qualifying capital tax is charged.
- (11) A qualifying capital tax is not regarded for this purpose as charged on an amount so far as—
- (a) the amount is excluded, reduced or offset for the purposes of the tax by any exemption, exclusion, relief or credit that—
 - (i) applies specifically to all or part of the amount (as opposed to amounts of a capital nature generally), or
 - (ii) arises as a result of, or otherwise in connection with, a payment or quasi-payment that gives rise to the amount, or
 - (b) the tax is, or falls to be, refunded (and section 259BC(6) and (7) apply for the purposes of this paragraph with the necessary modifications).
- (12) For the purposes of subsections (7) to (11) a “qualifying capital tax” means—
- (a) capital gains tax or the charge to corporation tax in respect of chargeable gains, or
 - (b) any tax chargeable under the law of a territory outside the United Kingdom that corresponds to a United Kingdom tax mentioned in paragraph (a),
- but does not include any tax chargeable at a nil rate.]

Textual Amendments

- F6** S. 259CC(2)(b) substituted (retrospectively) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), s. **24(3)(13)**
- F7** S. 259CC(3A) inserted (retrospectively) by [Finance Act 2021 \(c. 26\)](#), **Sch. 7 paras. 4, 36**
- F8** S. 259CC(3B) inserted (retrospectively) by [Finance Act 2021 \(c. 26\)](#), **Sch. 7 paras. 8, 36**
- F9** S. 259CC(7)-(12) inserted (retrospectively) by [Finance Act 2018 \(c. 3\)](#), **Sch. 7 paras. 8, 19(4)**

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