

2004 No. 1863

TAXES

The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004

<i>Made</i> - - - -	<i>22nd July 2004</i>
<i>Laid before the House of Commons</i>	<i>22nd July 2004</i>
<i>Coming into force</i> - -	<i>1st August 2004</i>

The Treasury, in exercise of the powers conferred upon them by section 306(1)(a) and (b) of the Finance Act 2004(a), after Royal Assent to that Act, make the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004 and shall come into force on 1st August 2004.

(2) In these Regulations—

“the Act” means the Finance Act 2004 and except where the context otherwise requires “Part 7” means Part 7 of the Act (disclosure of tax avoidance schemes);

“ICTA 1988” means the Income and Corporation Taxes Act 1988(b);

“ITEPA 2003” means the Income Tax (Earnings and Pensions) Act 2003(c);

“the Board” means the Commissioners of Inland Revenue;

“corporation tax” shall be construed in accordance with section 318(1) of the Act;

“employment” has the same meaning as it has for the purposes of the employment income Parts of ITEPA 2003 (see section 4 of that Act) and includes—

(a) former and prospective employments; and

(b) offices (including former and prospective offices) to which the provisions of those Parts that are expressed to apply to employments apply equally (see section 5 of that Act);

and “employee” and “employer” have corresponding meanings;

“promoter” has the meaning given by section 307 of the Act.

(3) For the purposes of these Regulations, section 839 of ICTA 1988(d) applies to determine whether persons are connected.

(a) 2004 c. 12.

(b) 1988 c. 1.

(c) 2003 c. 1.

(d) Section 839 was amended by paragraph 20 of Schedule 17 to the Finance Act 1995 (c. 4).

Prescribed descriptions of arrangements in relation to income tax, corporation tax and capital gains tax

2.—(1) For the purposes of Part 7, the arrangements specified in the Schedule to these Regulations are prescribed in relation to income tax, corporation tax and capital gains tax.

(2) Part 1 of the Schedule specifies arrangements connected with employment.

(3) Part 2 of the Schedule specifies arrangements in relation to financial products.

(4) If an arrangement—

(a) would, but for some exemption contained in Part 1 of the Schedule, be notifiable by virtue of a provision in that Part, and

(b) would be notifiable by virtue of a provision in Part 2 of the Schedule,

it shall not be notifiable under any provision of that Schedule.

John Heppell

Jim Murphy

22nd July 2004

Two of the Lords Commissioners of Her Majesty's Treasury

SCHEDULE

Regulation 2(1)

Arrangements prescribed by these Regulations

PART 1

Arrangements connected with employment

Introduction

1.—(1) The arrangements specified in this Part are those which satisfy the condition in subparagraph (2) and involve—

(a) securities or associated rights (see paragraph 3);

(b) payments to trustees and intermediaries (see paragraph 4); or

(c) loans (see paragraph 5).

(2) The condition is that a tax advantage by way of a reduction in, or deferment of, liability might be expected to be obtained, by virtue of the arrangements, by the employer or the employee, or by any other person by reason of the employee's employment—

(a) where the advantage relates to employment income, in any year of assessment; or

(b) in any other case, in any period of account.

Interpretation for the purposes of this Part

2.—(1) In this Part the persons who are associated with each other in relation to arrangements are—

(a) the person who is expected to receive any payment under the arrangements,

(b) the employee, and

(c) any relevant linked person.

(2) A person is a relevant linked person if—

(a) that person (on the one hand), and

(b) either the person who is expected to receive the payment or the employee (on the other), are or have been connected or (without being or having been connected) are or have been members of the same household.

(3) In this Part “payment” includes a transfer of assets and any other transfer of money’s worth, including, without prejudice to the foregoing, the doing of anything by means of which the value of an asset is increased, or a liability is reduced.

Arrangements involving securities or associated rights

3.—(1) This paragraph applies to any arrangements under which—

- (a) securities,
- (b) interests in securities,
- (c) securities options,
- (d) anything the right to which is derived from securities, or
- (e) anything the value or amount of which is calculated by reference to securities, interests in securities or securities options, or something the right to which is derived from securities,

are obtained by an employee or any other person, by reason of the employee’s employment, but this is subject to sub-paragraphs (3), (5) and (6).

In this sub-paragraph—

“securities” has the meaning which it would have by virtue of section 420 of ITEPA 2003(a) were subsection (5) disregarded; and

“securities option” has the meaning given by subsection (8) of that section.

(2) For the purposes of this paragraph, anything obtained under arrangements by an employee or a person associated with him—

- (a) which confer a right or opportunity to obtain anything mentioned in sub-paragraph (1), and
- (b) the costs of which are borne wholly or partly and whether directly or indirectly by the employer or a person connected with the employer,

is to be treated as obtained by reason of the employee’s employment.

(3) This paragraph does not apply if the arrangements in their entirety constitute—

- (a) an approved share incentive plan under Schedule 2 to ITEPA 2003(b), including any trust established for the purposes of the plan under paragraph 71(3) of that Schedule; or
- (b) an approved SAYE option scheme under Schedule 3 to that Act(c) or an approved CSOP scheme under Schedule 4 to that Act(d), together with any trust established solely for the purposes of that scheme or those schemes.

(4) For the purposes of sub-paragraph (3), a plan or scheme (as the case may be) for which approval has been sought from the Board is to be treated as approved during the period while the application for approval is before them.

(5) This paragraph does not apply to arrangements to the extent that they would involve the issue of shares to persons to whom it is reasonably expected that certificates in relation to those

(a) Section 420 was substituted by paragraph 2 of Schedule 22 to the Finance Act 2003 (c. 14).

(b) Schedule 2 was amended by section 142(3) of, and Part 1 of Schedule 21, paragraph 43 of Schedule 22 and Part 3(3) of Schedule 43 to, the Finance Act 2003.

(c) Schedule 3 was amended by Part 2 of Schedule 21, paragraph 44 of Schedule 22 and Part 3(3) of Schedule 43 to the Finance Act 2003.

(d) Schedule 4 was amended by paragraphs 15 to 17 of Schedule 21 to the Finance Act 2003.

shares would be issued under section 306(2) of ICTA 1988(a) (including that subsection as it is applied by paragraph 6 of Schedule 5B to the Taxation of Chargeable Gains Act 1992(b)).

- (6) This paragraph does not apply if the arrangements in their entirety comprise—
- (a) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 and fall to be notified to the Board in accordance with Part 7 of that Schedule; or
 - (b) such a grant as is mentioned in paragraph (a) together only with such other steps as are reasonably necessary in all the circumstances for the purpose of facilitating it.

Arrangements involving payments to trustees and intermediaries

4.—(1) This paragraph applies to any arrangements under which a payment is to be made by the employer or a person connected with him to—

- (a) a trust for the benefit of an employee or a person associated with an employee;
- (b) a trust for a class of persons which includes an employee or a person so associated; or
- (c) a third party who is entitled or required, under the terms of an employee benefit scheme, within the meaning of Schedule 24 to the Finance Act 2003, to hold or use the payment for or in connection with the provision of benefits to employees of the employer or persons associated with any of those employees.

This is subject to the qualification in sub-paragraph (2).

For the purposes of paragraphs (a) and (b), it is immaterial whether the trust is established under the law of any part of the United Kingdom or of a country or territory overseas.

- (2) This paragraph does not apply to payments to the extent that they are made to—
- (a) a pension fund listed in sub-paragraph (4);
 - (b) a fund to which section 329AA of ICTA 1988 (personal injury damages in the form of periodical payments)(c) applies;
 - (c) the trustees of a trust established for the purposes of—
 - (i) an approved share incentive plan under Schedule 2 to ITEPA 2003; or
 - (ii) an approved SAYE option scheme under Schedule 3, or an approved CSOP scheme under Schedule 4, to that Act or both.

(3) Paragraph 3(4) applies to the construction of references in sub-paragraph (2)(c) to approved share plans and schemes as it applies to such references in paragraph 3(3).

- (4) The pensions funds are—
- (a) those approved under Chapter 1 of Part 14 of ICTA 1988 (retirement benefit schemes);
 - (b) relevant statutory schemes within section 611A of ICTA 1988 (definition of relevant statutory scheme)(d);
 - (c) those approved under Chapter 4 of Part 14 of ICTA 1988 (personal pension schemes); and
 - (d) overseas pension schemes in respect of which tax relief is granted in the United Kingdom under—

(a) Chapter 3 of Part 7 of ICTA 1988 was substituted in respect of shares issued on or after 1st January 1994 by section 137 of, and Schedule 15 to, the Finance Act 1994 (c. 9). Section 306(2) was amended by paragraph 22 of Schedule 20 to the Finance Act 1996 (c. 8) and paragraph 19 of Schedule 13 to the Finance Act 1998 (c. 36).

(b) 1992 c. 12. Schedule 5B was inserted by paragraph 4 of Schedule 13 to the Finance Act 1995. Paragraph 6 was substituted by paragraph 33 of Schedule 13 to the Finance Act 1998 and was amended by paragraph 4 of Schedule 8 to the Finance Act 1999 (c. 16).

(c) Section 329AA was inserted by section 150 of, and Schedule 26 to, the Finance Act 1996 and was amended by section 100(2) of the Courts Act 2003 (c. 39).

(d) Section 611A was inserted by paragraph 18(1) of Schedule 6 to the Finance Act 1989 (c. 26) and was amended by paragraph 5 of Schedule 5 to the Finance Act 1999.

- (i) section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom)(a);
- (ii) arrangements specified in an Order in Council under section 788 of that Act (double taxation agreements)(b); or
- (iii) section 390 of ITEPA 2003 (exception from the charge on payments to non-approved schemes for non-domiciled employees with foreign employers).

(5) For the purposes of paragraphs (a) and (c) of sub-paragraph (4), a pension fund for which approval has been sought from the Board is to be treated as if it were approved during the period while the application for approval is before them.

Arrangements involving loans

5.—(1) This paragraph applies to any arrangements which include the making, release or writing off of any loan by an employer, or a person connected with an employer, to or for the benefit of an employee or any other person by reason of the employee's employment.

This is subject to the following qualification.

- (2) This paragraph does not apply if the arrangements are in their entirety ones—
 - (a) to which Chapter 7 of Part 3 of ITEPA 2003 (employment income: taxable benefits: loans) applies unless it is the intention of the parties to the loan that the loan should not be repaid either in whole or in part; or
 - (b) in respect of which no liability under that Chapter arises by virtue of section 288 or 289 of that Act (limited exemption for bridging loans connected with employment).

(3) The reference in sub-paragraph (1) to making a loan includes arranging, guaranteeing or in any way facilitating a loan.

PART 2

Arrangements in relation to financial products

Introduction

6.—(1) The arrangements specified in this Part are those which—

- (a) satisfy the condition in sub-paragraph (2); and
- (b) include one or more of the financial products to which paragraph 7 applies,

unless they are arrangements that are excluded by paragraph 8.

(2) The condition is that the tax advantage expected to be obtained under the arrangements arises, to a significant degree, from the inclusion in those arrangements of the financial product or any of the financial products to which paragraph 7 applies.

Specified financial products

7.—(1) The financial products to which this paragraph applies are—

- (a) a loan;
- (b) a contract which—
 - (i) is a derivative contract for the purposes of Schedule 26 to the Finance Act 2002;

(a) Section 615 was amended by section 2 of the Overseas Superannuation Act 1991 (c. 16), paragraph 11 of Schedule 10 to the Finance Act 1999, paragraph 9 of Schedule 3 to the International Development Act 2002 (c. 1) and paragraph 85 of Schedule 6, and the relevant entry in Part 1 of Schedule 8, to ITEPA 2003.

(b) Section 788 was amended by paragraphs 1 and 2 of Schedule 30, and Part 2(13) of Schedule 40, to the Finance Act 2000 (c. 17), section 88 of the Finance Act 2002 (c. 23) and section 198 of the Finance Act 2003.

- (ii) would be such a derivative contract if paragraph 4 of that Schedule (contracts excluded by virtue of their underlying subject matter) were omitted; or
- (iii) would be a derivative contract falling within sub-paragraph (i) or (ii) if it were a contract of a company;
- (c) an agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of ICTA 1988(a);
- (d) a stock lending arrangement within the meaning given by section 263B(1) of the Taxation of Chargeable Gains Act 1992(b);
- (e) a share; and
- (f) a contract, not being one of the above, which, whether alone or in combination with one or more other contracts (including any of the above), in substance represents the making of a loan, or the advancing or depositing of money, whatever its form and falls to be accounted for on that basis.

This sub-paragraph is subject to the following qualifications.

(2) This paragraph does not apply if the only financial products involved in the arrangements are one or both of the following—

- (a) assets which are held within an account which satisfies the conditions in the Individual Savings Accounts Regulations 1998(c); and
- (b) assets which are held as plan investments in a personal equity plan within the meaning of the Personal Equity Plan Regulations 1989(d).

(3) For the purposes of this paragraph, a contract, or a combination of contracts, falls to be accounted for as a loan, or as the advancing or depositing of money, if the person entering into the arrangements is, in accordance with generally accepted accounting practice, required to treat the contract, or the combination of contracts, as a loan, deposit or other financial asset or obligation (as to which, see section 43A(1) of ICTA 1988(e)), or would be so required if the person were a company to which the Companies Act 1985(f) applied.

This is subject to the following qualification.

(4) Anything which is a finance lease for the purposes of generally accepted accounting practice does not fall to be accounted for as a loan for the purposes of this paragraph.

(5) In this paragraph “generally accepted accounting practice” has the meaning given by section 836A of ICTA 1988(g).

Excluded arrangements

8.—(1) Arrangements are excluded by this paragraph if—

- (a) sub-paragraphs (2) and (3) apply; and
- (b) where, as part of the arrangements, a promoter, or any person connected with a promoter, becomes a party to one or more financial products, sub-paragraph (4) applies.

(2) This sub-paragraph applies where the arrangements are such that it might reasonably be expected that no promoter, and no person connected with a promoter, of arrangements that are the

(a) Section 730A was inserted by section 80(1) of the Finance Act 1995 and was relevantly amended by paragraph 5 of Schedule 38 to the Finance Act 2003.

(b) Section 263B was inserted by paragraph 5(1) of Schedule 10 to the Finance Act 1997 (c. 16).

(c) S.I. 1998/1870; amended by S.I. 1998/3174, 2000/809, 2079 and 3112, 2001/908, 3629 and 3778, 2002/453, 1409, 1974 and 3158 and 2003/2747.

(d) S.I. 1989/469; amended by S.I. 1990/678, 1991/733 and 2774, 1992/623, 1993/756, 1995/1539 and 3287, 1996/846 and 1355, 1997/511 and 1716, 1998/1869, 2000/3109, 2001/923, 3629 and 3777 and 2003/2748.

(e) Section 43A was inserted by section 110 of the Finance Act 2000 (c. 17) and was amended by section 103(4) of, and the relevant entry in Part 3(16) of Schedule 40 to, the Finance Act 2002 (c. 23).

(f) 1985 c. 6.

(g) Section 836A was inserted by section 103(2) of the Finance Act 2002.

same as, or substantially similar to, the arrangements in question would be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

(3) This sub-paragraph applies where the tax advantage expected to be obtained under the arrangements does not arise from any element of the arrangements (including the way in which they are structured) which, disregarding any duty of confidentiality owed to any person, a promoter might reasonably be expected to wish to keep confidential from other promoters.

(4) This sub-paragraph applies where none of the terms of the financial product or products mentioned in sub-paragraph (1)(b) differs significantly from the terms which might reasonably be expected to be offered in the open market to the other party to a product that is, or products that are, the same as, or substantially similar to, the product or products in question.

(5) For the purposes of this paragraph, a premium fee, in relation to any arrangements, is a fee which is chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises and is—

- (a) a fee to a significant extent attributable to that tax advantage; or
- (b) a fee to any extent contingent upon the obtaining of that tax advantage.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations prescribe arrangements, which are such that their main benefit or one of the main benefits which might be expected to arise from them is the obtaining of a tax advantage, and which a promoter is required to notify to the Inland Revenue.

Regulation 1 provides for the citation and commencement of these Regulations, and the definition of certain terms used in them.

Regulation 2 introduces the Schedule to the Regulations. The Schedule prescribes certain arrangements which must be notified to the Inland Revenue under Part 7 of the Finance Act 2004. Part 1 of the Schedule prescribes arrangements connected with employment and Part 2 prescribes arrangements connected with financial products.

These Regulations impose new costs on business. A regulatory impact assessment in respect of the effects of the Finance Act 2004 prepared by the Inland Revenue was published on 8th April 2004 and is available on the Inland Revenue website (www.inlandrevenue.gov.uk).

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