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DRAFT STATUTORY INSTRUMENTS

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**2009 No.**

**The Offshore Funds (Tax) Regulations 2009**

**PART 2**

**THE TREATMENT OF PARTICIPANTS IN NON-REPORTING FUNDS**

**CHAPTER 1**

**PRELIMINARY PROVISIONS**

**Structure of this Part**

- 14.** The structure of this Part is as follows—
- (a) this Chapter contains preliminary provisions;
  - (b) Chapter 2 deals with charges to tax on participants in non-reporting funds;
  - (c) Chapter 3 deals with exceptions from the charge to tax;
  - (d) Chapter 4 deals with disposals of interests in non-reporting funds;
  - (e) Chapter 5 deals with offshore income gains and the computation of offshore income gains;
  - (f) Chapter 6 deals with the deduction of offshore income gains in computing chargeable gains;
  - (g) Chapter 7 deals with the conversion of a non-reporting fund into a reporting fund.

**Meaning of “material disposal”**

- 15.** In these Regulations a “material disposal” means a disposal to which this Part applies.

**CHAPTER 2**

**CHARGES TO TAX ON PARTICIPANTS IN NON-REPORTING FUNDS**

*Charge to tax on certain amounts treated as distributions*

**Treatment of certain amounts as distributions**

**16.—(1)** This regulation applies if a non-reporting fund which is a transparent fund has an interest in a reporting fund.

(2) In the case of any excess specified in regulation 94(2) which is treated, under that regulation, as made to the non-reporting fund, the Tax Acts have effect as if the excess were additional income of the participants in the non-reporting fund in proportion to their rights.

(3) The additional income is treated as arising on the same date as the excess is treated as made to the non-reporting fund.

(4) If a participant in the non-reporting fund is chargeable to income tax, the additional income is charged as relevant foreign income within the meaning given by section 830 of ITTOIA 2005(1).

(5) If a participant in the non-reporting fund is chargeable to corporation tax, the additional income is charged under Chapter 8 of Part 10 of CTA 2009 (miscellaneous income: income not otherwise charged).

### *Charge to tax on disposal of asset*

#### **The charge to tax**

17.—(1) There is a charge to tax if—

- (a) a person disposes of an asset,
  - (b) either condition A or condition B is met, and
  - (c) as a result of the disposal, an offshore income gain arises to the person making the disposal.
- (2) Condition A is that the asset is an interest in a non-reporting fund at the time of the disposal.
- (3) Condition B is that—
- (a) the asset is an interest in a reporting fund at the time of the disposal,
  - (b) the reporting fund was previously a non-reporting fund (becoming a reporting fund as the result of an application under regulation 52),
  - (c) the interest was an interest in a non-reporting fund during some or all of the material period,
  - (d) an election under regulation 48 was not prevented by paragraph (5) of that regulation, and
  - (e) no election has been made under regulation 48(2).

(4) For the purposes of paragraph (3)(c) the “material period” means a period beginning with the day on which consideration was given for the acquisition of the asset or on 1st January 1984 (whichever is the later) and ending with the day on which the fund became a reporting fund.

(5) Chapter 5 of this Part deals with offshore income gains and the computation of offshore income gains.

#### **The charge to tax: further provisions**

18.—(1) The offshore income gain arising is treated for all the purposes of the Tax Acts as income which arises at the time of the disposal to the person making the disposal (or treated as making the disposal).

(2) The tax is charged on the person making the disposal (or treated as making the disposal).

(3) In the case of a person chargeable to income tax, tax is charged under Chapter 8 of Part 5 of ITTOIA 2005 (miscellaneous income: income not otherwise charged) for the year of assessment in which the disposal is made, but sections 688(1) and 689 of ITTOIA 2005(2) (income charged and person liable) do not apply.

(4) In the case of a person chargeable to corporation tax, tax is charged under Chapter 8 of Part 10 of CTA 2009 (miscellaneous income: income not otherwise charged) for the accounting period in which the disposal is made.

(5) Paragraph (1) is subject to—

- (a) regulation 19 (income treated as arising under regulation 17: remittance basis);

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(1) Section 830 was amended by paragraphs 51, 96, 156 and 162 of Schedule 7 to the Finance Act 2008.

(2) Section 688(1) was amended by paragraph 22 of Schedule 12 to the Finance Act 2008.

- (b) regulation 20(1) (offshore income gain arising to non-resident trustees not treated as income of settlor);
- (c) regulation 20(5) (application to gains of non-resident settlements);
- (d) regulation 24(6) (application of section 13 of TCGA 1992).

### **Income treated as arising under regulation 17: remittance basis**

**19.**—(1) This regulation applies to income treated as arising under regulation 17 to an individual in a tax year if—

- (a) section 809B, 809D or 809E of ITA 2007(3) (remittance basis) applies to the individual for that year, and
  - (b) the individual is not domiciled in the United Kingdom in that year.
- (2) The income is treated as relevant foreign income of the individual.
- (3) For the purposes of Chapter A1 of Part 14 of ITA 2007(4) (remittance basis)—
- (a) any consideration obtained on the disposal of the asset is treated as deriving from the income, and
  - (b) unless the consideration so obtained is of an amount equal to or exceeding the market value of the asset, the asset is treated as deriving from the income.
- (4) In paragraph (3)—
- (a) “the asset” means the asset the disposal of which causes the income to be treated as arising, and
  - (b) “the disposal” means the disposal mentioned in sub-paragraph (a) of that paragraph.
- (5) This regulation does not apply for the purposes of regulation 20.

### *Offshore funds and gains of non-resident settlements*

### **Application to gains of non-resident settlements**

**20.**—(1) If an offshore income gain arises to a settlement in a tax year and the trustees of the settlement are neither resident nor ordinarily resident in the United Kingdom in the tax year, the gain is not regarded as income for the purposes of Chapter 5 of Part 5 of ITTOIA 2005 (settlements: amounts treated as income of settlor).

- (2) If—
- (a) offshore income gains arise to the trustees of a settlement in a tax year, and
  - (b) section 87 of TCGA 1992(5) (gains of non-resident settlements) applies to the settlement for that year,

the OIG amount for the settlement for that year is the amount of the offshore income gains.

(3) Sections 12, 87 to 90A and 96 to 98 of, and Schedule 4C to, TCGA 1992(6) apply in relation to OIG amounts as if—

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(3) Sections 809B to 809E were inserted by paragraph 1 of Schedule 7 to the Finance Act 2008 (c. 9).

(4) Chapter A1 of Part 14 of the Income Tax Act 2007 (c. 3), consisting of sections 809A to 809Z7 of that Act, was inserted by paragraph 1 of Schedule 7 to the Finance Act 2008 (c. 9).

(5) Section 87 was substituted by paragraph 108 of Schedule 7 to the Finance Act 2008.

(6) Section 12 was substituted by paragraph 60 of Schedule 7 to the Finance Act 2008; sections 87 to 87C were substituted for section 87 by paragraph 108 of Schedule 7 to the Finance Act 2008; section 88 was amended by section 130(2) of the Finance Act 1998 (c. 36), paragraph 35 of Schedule 12 to the Finance Act 2006 (c. 25), and by paragraph 6 of Schedule 2 and paragraph 109 of Schedule 7 to the Finance Act 2008; section 89 was amended by paragraph 110 of Schedule 7 to the Finance Act 2008; sections 90 and 90A were substituted for section 90 by paragraph 111 of Schedule 7 to the Finance Act 2008; section 96 was

- (a) references to section 2(2) amounts (except those in paragraph 7B(2)(b) and (4) of Schedule 4C) were to OIG amounts,
  - (b) references to chargeable gains (except the one in paragraph 1(5) of Schedule 4C) were to offshore income gains,
  - (c) references to anything accruing were to it arising (and similar references, except the one in paragraph 1(5) of Schedule 4C, were read accordingly),
  - (d) sections 87(4), 88(2) to (5) and 97(6) and paragraphs 1(3A), 3 to 7 and 12 of Schedule 4C were omitted, and
  - (e) regulation 21 did not apply.
- (4) Section 87A of TCGA 1992(7) applies for a tax year by virtue of paragraph (3) before it applies for that year otherwise than by virtue of that paragraph.
- (5) If this regulation applies, the person to whom the offshore income gain arises is treated as the person making the disposal.

### *Offshore funds and the transfer of assets abroad*

#### **Application of transfer of assets abroad provisions**

**21.**—(1) Chapter 2 of Part 13 of ITA 2007 (transfer of assets abroad) applies in relation to an offshore income gain arising to a person resident or domiciled outside the United Kingdom as if the offshore income gain were income becoming payable to the person.

(2) Income treated as arising under that Chapter by virtue of paragraph (1) is regarded as “foreign” for the purposes of section 726, 730 or 735(8) of that Act.

(3) Paragraph (1) does not apply in relation to an offshore income gain if (and to the extent that) it is treated, by virtue of regulation 24, as arising to a person resident or ordinarily resident in the United Kingdom.

(4) The following provisions apply if regulation 20 applies in relation to an offshore income gain (the “relevant offshore income gain”).

(5) If—

(a) by virtue of regulation 20 an offshore income gain is treated as arising in a tax year to a person resident or ordinarily resident in the United Kingdom, and

(b) it is so treated by reason of the relevant offshore income gain (or part of it),

for that and subsequent tax years paragraph (1) does not apply in relation to the relevant offshore income gain (or that part).

(6) If, by virtue of paragraph (1) as it applies in relation to the relevant offshore income gain, income is treated under Chapter 2 of Part 13 of ITA 2007 as arising in a tax year, the OIG amount in question must be reduced (with effect from the following tax year) by the amount of the income.

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amended by section 127(3) of the Finance Act 1998, section 96 of, and paragraph 3 of Schedule 26 to, the Finance Act 2000 (c. 17); section 97 was amended by section 129(2) of the Finance Act 1998, paragraph 4 of Schedule 26 to the Finance Act 2000, paragraph 15 of Schedule 12 to the Finance Act 2006 and paragraph 302 of Schedule 1 to the Income Tax Act 2007 (c. 3); and section 98 was amended by paragraph 5 of Schedule 26 to the Finance Act 2000, paragraph 16 of Schedule 12 to the Finance Act 2006 and paragraph 303 of Schedule 1 to the Income Tax Act 2007. Schedule 4C was inserted by paragraph 1 of Schedule 26 to the Finance Act 2000. Paragraph 1 of Schedule 4C was substituted by paragraph 2 of Schedule 29 to the Finance Act 2003 (c. 14) and paragraph 7B of Schedule 4C, in its present form, was substituted by paragraph 137 of Schedule 7 to the Finance Act 2008.

(7) Sections 87 to 87C were substituted for section 87 by paragraph 108 of Schedule 7 to the Finance Act 2008 (c. 9).

(8) Section 726 was substituted by paragraph 165 of Schedule 7 to the Finance Act 2008; section 730 was substituted by paragraph 167 of Schedule 7 to the Finance Act 2008; and section 735 was substituted by paragraph 169 of Schedule 7 to the Finance Act 2008.

### *Application of TCGA 1992*

#### **Application of certain provisions of TCGA 1992**

**22.**—(1) The following enactments have effect in relation to income tax or corporation tax in respect of offshore income gains as they have effect in relation to capital gains tax or corporation tax in respect of chargeable gains—

- (a) section 2(1) of TCGA 1992 (persons chargeable to capital gains tax);
- (b) section 10 of TCGA 1992<sup>(9)</sup> (non-resident with a United Kingdom branch or agency);
- (c) section 10B of TCGA 1992<sup>(10)</sup> (non-resident company with United Kingdom permanent establishment).

(2) Paragraph (1) is subject to paragraphs (3) and (4).

(3) In the application of section 10 of TCGA 1992 in accordance with paragraph (1), paragraphs (a) and (b) of subsection (1) (assets on the disposal of which chargeable gains are taxable) have effect with the omission of the words “situated in the United Kingdom and”.

(4) In the application of section 10B of TCGA 1992 in accordance with paragraph (1), paragraphs (a) and (b) of subsection (1) (assets on the disposal of which chargeable profits arise for the purposes of corporation tax) have effect with the omission of the words “situated in the United Kingdom and”.

#### **Application of section 10A of TCGA 1992**

**23.**—(1) Section 10A of TCGA 1992<sup>(11)</sup> (temporary non-residents) applies for the purposes of this Part with the following modifications.

(2) The section applies as if, in subsection (2)—

- (a) the reference to section 86A were omitted;
- (b) for the reference to capital gains tax there were substituted a reference to income tax;
- (c) in paragraph (a), for the reference to chargeable gains and losses there were substituted a reference to offshore income gains;
- (d) in paragraph (b)—
  - (i) for the reference to chargeable gains there were substituted a reference to offshore income gains;
  - (ii) for the reference to section 13 or 86 there were substituted a reference to regulation 24;
- (e) paragraph (c) were omitted; and
- (f) for the reference to gains or, as the case may be, losses there were substituted a reference to offshore income gains.

(3) The section applies as if, in subsection (3)—

- (a) for the reference to gains and losses there were substituted a reference to offshore income gains; and
- (b) for the reference to any gain or loss there were substituted a reference to any offshore income gains.

(4) The section applies as if subsection (4) were omitted.

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<sup>(9)</sup> Section 10 was amended by paragraph 2(2) of Schedule 27 to the Finance Act 2003 (c. 14).

<sup>(10)</sup> Section 10B was inserted by section 149(4) of the Finance Act 2003 and amended by paragraph 360 of Schedule 1 to the Corporation Tax Act 2009 (c. 4).

<sup>(11)</sup> Section 10A was inserted by section 127(1) of the Finance Act 1998 (c. 36) and amended by section 32 of the Finance (No. 2) Act 2005 (c. 22), section 74(4)(a) of the Finance Act 2006 (c. 25) and paragraph 59 of Schedule 7 to the Finance Act 2008.

- (5) The section applies as if, in subsection (5)—
- (a) for the reference to gains and losses there were substituted a reference to offshore income gains;
  - (b) for the reference to any chargeable gain or allowable loss there were substituted a reference to an offshore income gain; and
  - (c) for the reference to section 10 or 16(3) there were substituted a reference to regulation 22(1)(b).
- (6) The section applies as if subsection (6) were omitted.
- (7) The section applies as if, in subsection (7), for the reference to capital gains tax there were substituted a reference to income tax.
- (8) The section applies as if, in subsection (9ZA)—
- (a) for the reference to foreign chargeable gains there were substituted a reference to offshore income gains to which regulation 19 applied; and
  - (b) the second sentence of that subsection were omitted.
- (9) The section applies as if, in subsection (9B)—
- (a) in paragraph (a)—
    - (i) for the reference to section 87 or 89(2) there were substituted a reference to regulation 20;
    - (ii) for the reference to chargeable gains there were substituted a reference to offshore income gains; and
  - (b) in paragraph (b) the references to subsections (2)(c) and (6) were omitted.
- (10) The section applies as if, in subsection (9C)—
- (a) for the reference to capital gains tax there were substituted a reference to income tax; and
  - (b) for the reference to chargeable gains there were substituted a reference to offshore income gains.

### **Application of section 13 of TCGA 1992**

**24.**—(1) Section 13 of TCGA 1992<sup>(12)</sup> (chargeable gains accruing to certain non-resident companies) applies for the purposes of this Part with the following modifications.

- (2) The section applies as if—
- (a) for any reference to a chargeable gain there were substituted a reference to an offshore income gain; and
  - (b) for any reference to anything accruing there were substituted a reference to it arising (with similar references being read accordingly).
- (3) The section applies as if, in subsection (5), paragraphs (b) and (c) were omitted.
- (4) The section applies as if, in subsection (7), for the reference to capital gains tax there were substituted a reference to income tax or corporation tax.
- (5) The section applies as if subsection (8) were omitted.

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<sup>(12)</sup> Section 13 was amended by section 174(1) to (9) of, and Part 5(30) of Schedule 41 to, the Finance Act 1996 (c. 8), section 122(4) of the Finance Act 1998, section 80 of the Finance Act 2001 (c. 9), Part 3(16) of Schedule 40 to the Finance Act 2002 (c. 23), paragraph 2(3) of Schedule 27 to the Finance Act 2003 (c. 14), paragraph 39 of Schedule 35 to the Finance Act 2004 (c. 12), paragraph 8 of Schedule 12 to the Finance Act 2006 and paragraphs 4 and 28 of Schedule 2 and paragraph 103 of Schedule 7 to the Finance Act 2008 (c. 9) and by S.I. 2009/56.

(6) If this regulation applies, the person to whom the offshore income gain arises is treated as the person making the disposal.

(7) To the extent that an offshore income gain is treated, by virtue of this regulation, as having accrued to any person resident or ordinarily resident in the United Kingdom, that gain shall not be deemed to be the income of any individual for the purposes of Chapter 2 of Part 13 of ITA 2007 (transfer of assets abroad).

## CHAPTER 3

### EXCEPTIONS ETC. FROM THE CHARGE TO TAX

#### **Exceptions from the charge**

**25.**—(1) No liability to tax arises under regulation 17 if any of conditions A to E is met.

(2) Condition A is that the participant is required to treat the interest in the fund as a loan relationship under Chapter 3 of Part 6 of CTA 2009.

(3) Condition B is that the participant is required to treat the interest in the fund as a derivative contract to which the provisions of Part 7 of CTA 2009 apply.

(4) Condition C is that the asset is an intangible fixed asset to which the provisions of Part 8 of CTA 2009 apply.

(5) Condition D is that the asset consists of excluded indexed securities as defined in section 433 of ITTOIA 2005.

(6) Condition E is that the asset is a right arising under a policy of insurance.

#### **Trading stock etc.**

**26.**—(1) No liability to tax arises under regulation 17 if condition A or B is met.

(2) Condition A is that the interest in the fund is held as trading stock.

(3) Condition B is that the disposal of the interest is taken into account in computing the profits of a trade.

#### **Long-term insurance funds of insurance companies**

**27.**—(1) No liability to tax arises under regulation 17 in respect of disposals of assets of an insurance company's long-term insurance fund.

(2) In paragraph (1) "insurance company" and "long-term insurance fund" have the same meaning as in section 431(2) of ICTA(13).

#### **Loans other than participating loans**

**28.**—(1) No liability to tax arises under regulation 17 if the asset is a loan which is not a participating loan.

(2) For the purposes of paragraph (1) a "participating loan" means a loan where the amount payable on redemption exceeds the issue price by an amount which is determined in whole or in part by reference to the income of the non-reporting fund.

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(13) In section 431(2), the definition of "insurance company" was substituted by S.I. 2001/3629 and amended by S.I. 2006/3270. As regards the expression "long-term insurance fund", a definition of "long term business fund" was inserted by paragraph 1(2) of the Finance Act 1990 (c. 29) and amended by Part 5(26) of Schedule 41 to the Finance Act 1996. The definition was re-labelled as a definition of "long-term insurance fund" and further amended by S.I. 2001/3629.

### Interests in transparent funds

**29.**—(1) No liability to tax arises under regulation 17 if—

- (a) the disposal is the disposal of an interest in an offshore fund falling within paragraph (b) or (c) of section 40A(2) of FA 2008<sup>(14)</sup>, and
- (b) the fund is a transparent fund.

This is subject to paragraphs (2) and (3).

(2) But there is a charge to tax under regulation 17 if—

- (a) there is a disposal of an interest in a transparent fund, and
- (b) during a period beginning with the date the interest (or any part of it) was acquired and ending with the date of the disposal, the offshore fund has at any time held interests in other non-reporting funds which amounted in total to more than 5% by value of the offshore fund's assets.

(3) And there is a charge to tax under regulation 17 if—

- (a) there is a disposal of an interest in a transparent fund,
- (b) the fund is a non-reporting fund, and
- (c) the fund fails to make sufficient information available to participants in the fund to enable those participants to meet their tax obligations in the United Kingdom with respect to their shares of the income of the fund.

(4) If, on the disposal by an offshore fund of an interest in another non-reporting fund, no liability would arise under regulation 17 by virtue of this regulation, that interest is not taken into account for the purposes of paragraph (2)(b).

### Rights in certain existing holdings

**30.**—(1) No liability to tax arises under regulation 17 in respect of any rights in an offshore fund to which this regulation applies if the rights are acquired by a person—

- (a) before 1st December 2009, or
- (b) in accordance with paragraph (2).

(2) Rights are acquired in accordance with this paragraph if—

- (a) the rights are acquired by the participant in accordance with a legally enforceable agreement in writing that was entered into by the participant before 30th April 2009,
- (b) in the case of an agreement which was conditional, the conditions are met before that date, and
- (c) the agreement is not varied on or after that date.

(3) Rights of a person in a fund are rights in an offshore fund to which this regulation applies if, on the date on which the person acquired the rights, those rights did not constitute a material interest in an offshore fund within the meaning of that expression given by section 759 of ICTA<sup>(15)</sup>.

### Charitable companies and charitable trusts

**31.**—(1) A charitable company shall be exempt from corporation tax in respect of an offshore income gain if the gain is applicable and applied for charitable purposes.

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<sup>(14)</sup> Section 40A was inserted by paragraph 2 of Schedule 22 to the Finance Act 2009 (c. 10).

<sup>(15)</sup> Section 759 is repealed by these Regulations (see regulation 13(2) and Schedule 2) subject to the saving contained in paragraph 3(4) of Schedule 1 (see regulation 13(3) of these Regulations).



(2) See section 535 of ITA 2007 for an exemption for income tax purposes for offshore income gains accruing to a charitable trust.

(3) Paragraphs (4) and (5) apply if—

- (a) property held on charitable trusts ceases to be subject to charitable trusts, and
- (b) that property represents directly or indirectly an offshore income gain.

(4) The trustees are treated as if they had disposed of and immediately reacquired that property for a consideration equal to its market value.

(5) An offshore income gain accruing on the disposal arising under paragraph (4) is treated as an offshore income gain not accruing to a charity.

(6) In this regulation “charity” and “charitable company” have the same meaning as in section 506 of ICTA(16).

## CHAPTER 4

### DISPOSALS OF INTERESTS IN NON-REPORTING FUNDS

#### *Basic provisions*

#### **Application of this Chapter**

**32.** This Chapter applies if a participant disposes of an asset and at the time of the disposal—

- (a) the asset is an interest in a non-reporting fund, or
- (b) the asset is an interest in a reporting fund and the requirements specified in paragraph (3) of regulation 17 (read, as appropriate, with paragraphs (4) and (5) of that regulation) are met.

#### **Disposal of an asset: the basic rule**

**33.—**(1) There is a disposal of an asset for the purposes of these Regulations if there would be a disposal of an asset for the purposes of TCGA 1992.

(2) Paragraph (1) is subject to the following provisions of this Chapter.

#### *Further provisions*

#### **Provisions applicable on death**

**34.—**(1) Notwithstanding anything in paragraph (b) of subsection (1) of section 62 of TCGA 1992 (general provisions applicable on death: no deemed disposal by the deceased), where a person dies and the assets of which the deceased was competent to dispose at the time of death include an interest in a non-reporting fund, then, for the purposes of these Regulations—

- (a) immediately before the acquisition referred to in paragraph (a) of that subsection, that interest shall be deemed to be disposed of by the deceased for such a consideration as is mentioned in that subsection; but
- (b) nothing in this regulation affects the determination, in accordance with regulation 32, of the question whether that deemed disposal is one to which this Chapter applies.

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(16) Section 506 was amended by section 55(2) of the Finance Act 2006 (c. 25) and paragraph 95 of Schedule 1 to the Income Tax Act 2007 (c. 3).

(2) Subject to paragraph (1), section 62 of TCGA 1992<sup>(17)</sup> applies for the purposes of these Regulations as it applies for the purposes of that Act, and the reference in that paragraph to the assets of which a deceased person was competent to dispose are to be construed in accordance with subsection (10) of that section.

#### **Application of section 135 of TCGA 1992**

**35.**—(1) Section 135 of TCGA 1992<sup>(18)</sup> (exchange of securities for those in another company treated as not involving a disposal) does not apply for the purposes of this Part to the extent that—

- (a) the interest in the entity that is company A for the purposes of that section that is exchanged is an interest in a non-reporting fund, and
- (b) the interest in the entity that is company B for those purposes that is exchanged is not an interest in such a fund.

(2) In a case where section 135 of TCGA 1992 would apply apart from paragraph (1), the exchange in question shall for the purposes of this Part constitute a disposal of interests in the non-reporting fund for a consideration equal to their market value at the time of the exchange.

#### **Application of section 136 of TCGA 1992**

**36.**—(1) Section 136 of TCGA 1992<sup>(19)</sup> (scheme of reconstruction involving issue of securities treated as exchange not involving disposal) does not apply for the purposes of this Part to the extent that—

- (a) the interest in the entity that is company A for the purposes of that section that is exchanged is an interest in a non-reporting fund, and
- (b) the interest in the entity that is company B for those purposes that is exchanged is not an interest in such a fund.

(2) In a case where section 136 of TCGA 1992 would apply apart from paragraph (1), the deemed exchange in question shall for the purposes of this Part constitute a disposal of interests in the non-reporting fund for a consideration equal to their market value at the time of the deemed exchange.

#### **Exchange of interests of different classes**

**37.**—(1) If conditions A to D are met, section 127 of TCGA 1992 (equation of original shares and new holding) does not prevent an exchange from constituting a disposal for the purposes of these Regulations.

(2) Condition A is that an offshore fund is constituted by a class of interest (“class A”) in main arrangements.

(3) Condition B is that a participant exchanges an interest of class A for an interest in another offshore fund constituted by a different class of interest (“class B”) in those main arrangements.

(4) Condition C is that the interest of class A is at the time of the exchange an interest in a non-reporting fund.

(5) Condition D is that the interest of class B is at the time of the exchange an interest which is not an interest in a non-reporting fund.

(6) Any disposal to which this regulation applies is to be treated as a disposal for a consideration equal to the market value of the rights at the time of the exchange.

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<sup>(17)</sup> Section 62 was amended by paragraph 5 of Schedule 21 to the Finance Act 1998 (c. 36), section 52 of the Finance Act 2002 (c. 23) and paragraph 29 of Schedule 2 to the Finance Act 2008 (c. 9).

<sup>(18)</sup> Section 135 was substituted by paragraph 1 of Schedule 9 to the Finance Act 2002.

<sup>(19)</sup> Section 136 was substituted by paragraph 2 of Schedule 9 to the Finance Act 2002.

## CHAPTER 5

### OFFSHORE INCOME GAINS AND THE COMPUTATION OF OFFSHORE INCOME GAINS

#### General provisions

**38.**—(1) An offshore income gain arises to a person on the disposal of an asset if a basic gain arises on the disposal.

(2) The disposal gives rise to an offshore income gain of an amount equal to the basic gain on the disposal.

(3) The following provisions of this Chapter explain how the basic gain is computed.

#### The basic gain and its computation

**39.**—(1) In the case of a participant chargeable to income tax, the basic gain is a gain of the amount which would be the gain on that disposal for the purposes of TCGA 1992 if the gain were computed without regard to any charge to income tax arising under this Part.

(2) In the case of a participant chargeable to corporation tax, the basic gain is a gain of the amount which would be the gain on that disposal for the purposes of TCGA 1992 if the gain were computed—

- (a) without regard to any charge to corporation tax arising under this Part, and
- (b) without regard to any indexation allowance on the disposal under TCGA 1992.

(3) The computation of the basic gain is subject to—

- (a) regulation 34 (provisions applicable on death);
- (b) regulation 35 (application of section 135 of TCGA 1992);
- (c) regulation 36 (application of section 136 of TCGA 1992);
- (d) regulation 37 (exchange of interests of different classes);
- (e) regulation 40 (earlier disposal to which the no gain/no loss basis applies);
- (f) regulation 41 (modifications of TCGA 1992);
- (g) regulation 42 (losses);
- (h) regulation 43 (special rules for certain existing holdings).

#### Earlier disposal to which the no gain/no loss basis applies

**40.**—(1) This regulation applies if—

- (a) a participant is chargeable to corporation tax, and
- (b) the amount of any chargeable gain or allowable loss which would arise on the disposal would fall to be computed in a way which, in whole or in part, would take account of the indexation allowance on an earlier disposal to which section 56(2) of TCGA 1992(20) (disposals on a no gain/no loss basis) applies.

(2) The basic gain on the disposal is computed as if—

- (a) no indexation allowance had been available on any such earlier disposal, and
- (b) subject to that, neither a gain nor a loss had arisen to the person making such an earlier disposal.

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(20) Section 56(2) was amended by section 93(5) of the Finance Act 1994 (c. 9).

## Modifications of TCGA 1992

**41.**—(1) If the disposal forms part of a transfer to which section 162 of TCGA 1992 (roll-over relief on transfer of business) applies, the basic gain arising on the disposal is computed without regard to any deduction which falls to be made under that section in computing a chargeable gain.

(2) If the disposal is made otherwise than under a bargain at arm's length and a claim for relief is made in respect of that disposal under section 165 or 260 of TCGA 1992(**21**) (relief for gifts), the claim does not affect the computation of the basic gain arising on the disposal.

## Losses

**42.**—(1) If the effect of any computation under regulations 39 to 41 would be to produce a loss, the basic gain on the disposal is nil.

(2) Paragraph (1) applies notwithstanding section 16 of TCGA 1992(**22**) (losses determined in like manner as gains).

(3) Accordingly, for the purposes of these Regulations, no loss is to be treated as arising on the disposal.

## Special rules for certain existing holdings

**43.**—(1) This regulation applies if—

- (a) a person acquired rights (the “protected rights”) in an offshore fund—
  - (i) before 1st December 2009, or
  - (ii) in accordance with paragraph (2),
- (b) immediately before 1st December 2009 those rights did not constitute a material interest in an offshore fund within the meaning of that expression given by section 759 of ICTA(**23**), and
- (c) on or after 1st December 2009 the person acquires additional rights in the offshore fund (the “non-protected rights”).

(2) Rights are acquired in accordance with this paragraph if—

- (a) the rights are acquired by the participant in accordance with a legally enforceable agreement in writing that was entered into by the participant before 30th April 2009,
- (b) in the case of an agreement which was conditional, the conditions are met before that date, and
- (c) the agreement is not varied on or after that date.

(3) For the purposes of tax in respect of chargeable gains—

- (a) section 104 of TCGA 1992(**24**) (share pooling: general interpretative provisions) applies as if the protected rights were assets of a different class from the non-protected rights, and

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(21) Section 165 was amended by paragraph 1(1) of Schedule 7 to the Finance Act 1993 (c. 34), section 140(4) of, and Part 3(31) of Schedule 27 to, the Finance Act 1998 (c. 36), section 90(1), (3) and (4) of the Finance Act 2000 (c. 17), paragraph 3 of Schedule 21 to the Finance Act 2004 (c. 12) and paragraph 33 of Schedule 2 to the Finance Act 2008 (c. 9). Section 260 was amended by section 72(6) of, and paragraph 4(2) of Schedule 13 to, the Finance Act 1995 (c. 4), Parts 3(31) and 4 of Schedule 27 to the Finance Act 1998, section 90(2) of the Finance Act 2000, paragraph 5 of Schedule 21 to the Finance Act 2004 and paragraph 32 of Schedule 20 to the Finance Act 2006 (c. 25).

(22) Section 16 was amended by section 113(1) of the Finance Act 1995, paragraph 7 of Schedule 4 to the Finance (No. 2) Act 2005 (c. 22), paragraph 298 of Schedule 1 to the Income Tax Act 2007 (c. 3) and paragraph 61 of Schedule 7 to the Finance Act 2008.

(23) Section 759 is repealed by these Regulations (see regulation 13(2) and Schedule 2) subject to the saving contained in paragraph 3(4) of Schedule 1 (see regulation 13(3) of these Regulations).

(24) Section 104 was amended by sections 123(1) to (4) and 125(3) of the Finance Act 1998, paragraph 17 of Schedule 12 to the Finance Act 2006 (c. 25) and paragraph 85 of Schedule 2 to the Finance Act 2008.

- (b) all the protected rights must be treated as disposed of before any of the non-protected rights may be so treated.

## CHAPTER 6

### DEDUCTION OF OFFSHORE INCOME GAINS IN COMPUTING CHARGEABLE GAINS

#### **Ambit of this Chapter**

**44.**—(1) This Chapter applies if—

- (a) a material disposal gives rise to an offshore income gain, and
- (b) that disposal also constitutes the disposal of the interest concerned for the purposes of TCGA 1992.

(2) In this Chapter the disposal specified in paragraph (1)(b) is called the “TCGA disposal”.

#### **Treatment of the TCGA disposal: general rules**

**45.**—(1) This regulation applies for the purposes of the computation of the chargeable gain arising on the TCGA disposal.

(2) The provisions of this regulation have effect in relation to the TCGA disposal in substitution for section 37(1) of TCGA 1992 (deduction of consideration chargeable to tax on income).

(3) In the computation of the gain arising on the TCGA disposal, a sum equal to the offshore income gain shall be deducted from the sum which would otherwise constitute the amount or value of the consideration for the disposal.

(4) Paragraph (3) is subject to the following provisions of this Chapter.

(5) Paragraph (6) applies if the TCGA disposal is of such a nature that, by virtue of section 42 of TCGA 1992 (part disposals), an apportionment falls to be made of certain expenditure.

(6) No deduction is to be made by virtue of paragraph (3) in determining the amount or value of the consideration for the purposes of the fraction in section 42(2) of TCGA 1992.

#### **Modification of section 162 of TCGA 1992**

**46.**—(1) This regulation applies if the TCGA disposal forms part of a transfer to which section 162 of TCGA 1992 applies (roll-over relief on transfer of business in exchange wholly or partly for shares).

(2) For the purposes of subsection (4) of section 162 of TCGA 1992 (determination of the amount of the deduction from the gain on the old assets) “B” in the fraction in that subsection (the value of the whole of the consideration received by the transferor in exchange for the business) is to be taken to be what it would be if the value of the consideration other than shares so received by the transferor were reduced by an amount equal to the offshore income gain.

#### **Application of section 128 of TCGA 1992**

**47.**—(1) This regulation applies if there is a disposal to which this Part applies by virtue of—

- (a) regulation 35 (application of section 135 of TCGA 1992),
- (b) regulation 36 (application of section 136 of TCGA 1992), or
- (c) regulation 37 (exchange of interests of different classes).

(2) TCGA 1992 has effect as if an amount equal to the offshore income gain to which that disposal gives rise were given (by the person making the exchange) as consideration for the new holding

(within the meaning of section 128 of that Act (consideration given or received for new holding on a reorganisation)).

## CHAPTER 7

### THE CONVERSION OF A NON-REPORTING FUND INTO A REPORTING FUND

#### Consequences of conversion for participants

**48.**—(1) This regulation applies if an offshore fund ceases to be a non-reporting fund and becomes a reporting fund.

(2) A participant in the fund may make an election to be treated—

- (a) as disposing of the interest owned by the participant in the non-reporting fund at its market value on the disposal date, and
- (b) as acquiring a holding in the reporting fund at the beginning of the reporting fund's first period of account.

This is subject to paragraph (5).

(3) Chapter 5 of this Part applies to determine the offshore income gain arising on the deemed disposal referred to in paragraph (2)(a).

(4) The deemed acquisition referred to in paragraph (2)(b) is treated as made for the same amount as the deemed disposal referred to in paragraph (2)(a).

(5) An election may not be made under paragraph (2) unless the offshore income gain arising on the deemed disposal referred to in paragraph (2)(a) (determined in accordance with paragraph (3)) is greater than zero.

(6) If the participant is chargeable to income tax, the election mentioned in paragraph (2) must be made by being included in a return made for the tax year which includes the disposal date.

(7) If the participant is chargeable to corporation tax, the election mentioned in paragraph (2) must be made by being included in the participant's company tax return for the accounting period which includes the disposal date.

(8) In this regulation—

“company tax return” has the same meaning as in Schedule 18 to the Finance Act 1998<sup>(25)</sup>;  
the “disposal date” means the final day of the last period of account before the fund becomes a reporting fund.

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(25) 1998 c. 36.