DRAFT STATUTORY INSTRUMENTS

2009 No.

The Offshore Funds (Tax) Regulations 2009

PART 2

THE TREATMENT OF PARTICIPANTS IN NON-REPORTING FUNDS

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(**1**) (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.

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(**2**) (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(**3**) (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(**4**), 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—

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

(**2**) 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).

(**3**) 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.

(**4**) 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).

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

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

(**5**) 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.