These notes refer to the Taxation (International and Other Provisions) Act 2010 (c.8) which received Royal Assent on 18 March 2010

TAXATION (INTERNATIONAL AND OTHER PROVISIONS) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transfer pricing

Overview

301. This Part provides the rules on transfer pricing. The transfer pricing provisions apply where "provision" is made between two persons by means of a transaction and, broadly, one of the persons controls the other or both are controlled by the same person or persons. The actual provision is compared to the arm's length provision (that is to say the provision that would have been made between independent enterprises) and, if the actual provision confers a potential United Kingdom tax advantage, the taxable profits of the person receiving that tax advantage are adjusted to what they would have been if the persons had been at arm's length.

302. This basic rule is also applied where "provision" is made between the ring-fence trade of an oil company and other activities carried on by the same company.

303. The Part also provides for claims and adjustments to be made between a person whose profits are increased as a result of a non-arm's length transaction and a person whose profits have been reduced. These either eliminate double counting of profits or restore the cash position of the companies involved to its original state.

304. The Part rewrites Schedule 28AA to ICTA (provision not at arm's length) and sections 110 and 111 of FA 1998 (notice to potential claimants, and determinations requiring the sanction of the Commissioners for HMRC).

305. Schedule 28AA was inserted into ICTA by section 108 of and Schedule 16 to FA 1998, replacing the transfer pricing legislation in sections 770 to 773 of ICTA. Schedule 28AA was then substantially amended by FA 2004 and F(No 2)A 2005.

306. Chapter 1 gives the basic transfer-pricing rule and Chapter 2 gives the meaning of important terms used in that Chapter.

307. Chapter 3 gives the exemptions from the basic rule.

308. Chapters 4 and 5 deal with claims to prevent double taxation following an uplift in profits and Chapter 6 with balancing payments made by the disadvantaged to the advantaged person.

309. Chapter 7 deals with oil-related matters and finally Chapter 8 contains supplementary provisions and definitions.

Chapter 1: Basic transfer-pricing rule

Overview

310. This Chapter gives the basic transfer-pricing rule and explains the meaning of "participation condition".

Section 146: Application of this Part

311. This section provides that the Part applies for both corporation tax and income tax purposes. It is based on section 832(3) of ICTA.

Section 147: Tax calculations to be based on arm's length, not actual, provision

312. This section gives the conditions necessary for the Part to apply (broadly where a transaction take place between two persons who meet the "participation condition" and that transaction differs from one at arm's length) and the basic transfer pricing rule that the profits and losses should be computed as if the transaction had been at arm's length. It is based on paragraphs 1(1) and (2), 9(1), 10 and 11(3) of Schedule 28AA to ICTA.

313. Paragraph 1(2) of Schedule 28AA makes the basic rule subject to paragraph 8 of the Schedule. *Subsection (6)(e)* and *(f)* recognise that paragraph 8 is rewritten in Parts 5 (loan relationships) and 7 (derivative contracts) of CTA 2009.

Section 148: The "participation condition"

314. This section explains when the participation condition is met for the purposes of section 147. It is based on paragraphs 1(1), 4A(6) and 4B(1) and (2) of Schedule 28AA to ICTA.

Chapter 2: Key interpretative provisions

Overview

315. This Chapter explains terms used in Chapter 1, in particular what is meant by participation by a person in the management, control or capital of another person. The term is used in section 148 which defines the "participation condition" for section 147.

Section 149: "Actual provision" and "affected persons"

316. This section gives the meaning for this Part of two terms used in section 147. It is based on paragraphs 4A(7), 11(3) and 14(1) of Schedule 28AA to ICTA.

Section 150: "Transaction" and "series of transactions"

317. This section gives the meaning of "transaction" and "series of transactions" for this Part. It is based on paragraph 3 of Schedule 28AA to ICTA.

Section 151: "Arm's length provision"

318. This section gives the meaning of "arm's length provision" by reference to section 147 and also applies the basic rule where a transaction that has occurred would not in fact have occurred between independent enterprises. It is based on paragraphs 1(3) and 14(1) of Schedule 28AA to ICTA.

Section 152: Arm's length provision where actual provision relates to securities

319. This section deals with what is generally known as "thin capitalisation". It provides that, where a security is issued between connected companies, in applying the basic rule in section 147, account must be taken as to whether the loan concerned would have

been made, and would have been made on the same terms, if the parties had been at arm's length. It is based on paragraph 1A(1) to (5) of Schedule 28AA to ICTA.

Section 153: Arm's length provision where security issued and guarantee given

320. This section provides that, where a security is issued by one of the affected persons and a guarantee given by the other, in applying the basic rule in section 147, account must be taken of whether that guarantee would have been given, and would have been given on the same terms, if the parties had been at arm's length. It is based on paragraph 1B(1) to (5) of Schedule 28AA to ICTA.

Section 154: Interpretation of sections 152 and 153

321. This section explains terms used in the two preceding sections. It is based on paragraphs 1A(6) to (10) and 1B(6) of Schedule 28AA to ICTA.

Section 155: "Potential advantage" in relation to United Kingdom taxation

322. This section explains what is meant by conferring a potential advantage in relation to United Kingdom taxation in this Part. It is based on paragraph 5(1), (7), (8) and (9) of Schedule 28AA to ICTA.

Section 156: "Losses" and "profits"

323. This section explains the meaning of "losses" and "profits" for this Part. It is based on paragraph 14(1) of Schedule 28AA to ICTA, paragraph 5(1) of Schedule 2 to ITTOIA, paragraph 5(1) of Schedule 2 to ITA and paragraph 5(1) of Schedule 2 to CTA 2009.

324. Paragraph 14(1) of Schedule 28AA to ICTA brings relief in accordance with section 468L(5) of ICTA within the definition of losses for the purposes of that Schedule. Section 468L was repealed by section 17(1) of F(No 2)A 2005 although section 17(3) confers power to make provision by regulations in place of the provisions repealed by section 17(1) (see the Authorised Investment Funds (Tax) Regulations 2006 (SI 2006/964) as amended). Although paragraph 14(1) of Schedule 28AA to ICTA was not amended in consequence of the repeal of section 468L of that Act, this section does not include a reference to relief under section 468L as there is now no such relief.

Section 157: Direct participation

325. This section explains what is meant by direct participation in the management, control or capital of another person. It is based on section 808B(9) of ICTA, paragraph 4(1) of Schedule 28AA to ICTA and section 85(6) of FA 1999.

326. "Partnership" in paragraph 4(1) is rewritten in *subsection (2)* as "firm" in accordance with rewrite practice ("firm" is defined for the Part in section 217(8)).

Section 158: Indirect participation: defined by sections 159 to 162

327. This section lists the meanings which apply for each reference to indirect participation in the Act. It is based on section 808B(9) of, and paragraphs 4(2), 4A(1) and (2) and 6(4C) of Schedule 28AA to, ICTA and section 85(6) of FA 1999.

328. Sections 159 to 162 set out four possible meanings of indirect participation in the management, control or capital of another person. Any particular reference to indirect participation has two or three of those meanings.

Section 159: Indirect participation: potential direct participant

329. This section provides for a person to be indirectly participating in the management, control or capital of another if that person would be a direct participant in the other (see section 157) were the person to have the rights and powers listed in *subsection (3)*. It

is based on section 808B(9) of, and paragraph 4(2) to (6) and (10) of Schedule 28AA to, ICTA and section 85(6) of FA 1999.

330. *Subsection (6)*, which rewrites paragraph 4(6) of Schedule 28AA, serves to clarify that *all* connected parties must be considered in applying the rule in subsection (3)(e), which rewrites paragraph 4(3)(d) of Schedule 28AA.

Section 160: Indirect participation: one of several major participants

331. This section provides that a person is indirectly participating in the management, control or capital of another person where a 40% holdings test is met. It is based on section 808B(9) of, and paragraph 4(2) and (7) to (10) of Schedule 28AA to, ICTA and section 85(6) of FA 1999.

332. For the 40% test to be met two conditions must apply. The first condition is that the person, along with another person, must between them control the body or firm. Then, looking at the holdings, rights and powers that give the pair control of the body or firm, the second condition is that each of the pair must have at least a 40% share of all holdings, rights and powers of the kinds that give them that control. It is possible to read the section (and the source legislation) as saying that each of the pair must merely have a 40% share of their combined stake. This alternative reading would, however, be less favourable to taxpayers and does not reflect the approach that has been taken in HMRC's published International Manual at INTM 432070.

333. "Enterprise" in *subsections (2)* and *(3)* is not defined. It is a term used in Article 9 of the OECD Model Tax Convention and defined in Article 3 as "the carrying on of any business". Article 3 goes on to say that "business" includes the performance of professional services and of other activities of an independent character. This meaning of enterprise applies here by virtue of section 164 which requires this Part to be read consistently with Article 9.

Section 161: Indirect participation: sections 148 and 175: financing cases

334. Under this section an affected person acting with others to provide financing arrangements to the other affected person is treated as indirectly participating in that person's management, control or capital. It is based on paragraphs 4A(1), (3) to (6) and 6(4C) of Schedule 28AA to ICTA.

Section 162: Indirect participation: sections 148 and 175: further financing cases

335. This section provides for someone other than an affected person acting with others to provide financing arrangements to one of the affected persons to be treated as indirectly participating in the management, control or capital of each affected person. It is based on paragraphs 4A(2) to (6) and 6(4C) of Schedule 28AA to ICTA.

Section 163: Meaning of "connected" in section 159

336. This section gives the meaning of "connected" for section 159 and for *subsection (3)(b)*. It is based on paragraph 4(11) and (12) of Schedule 28AA to ICTA.

Section 164: Part to be interpreted in accordance with OECD principles

337. This section requires the Part to be read in a way that is consistent with the way in which Article 9 of the OECD Model Tax Convention is read when included in a tax treaty entered into by the United Kingdom. It is based on paragraphs 2 and 14(1) of Schedule 28AA to ICTA.

338. This requirement is regardless of whether there is or is not a tax treaty between the United Kingdom and any particular non-UK territory.

339. This section imports into the transfer pricing legislation not only the principles of Article 9 of the OECD Model Tax Convention but also that organisation's transfer pricing guidelines. The Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration referred to in *subsection (4)(a)* were first issued in 1979 and extensively updated in 1995 with revisions and additions published periodically.

340. No Treasury order has been issued under paragraph 2(3)(b) of Schedule 28AA to ICTA, which is the provision rewritten by *subsection (4)(b)*.

341. *Subsection (2)* recognises that paragraph 8 of Schedule 28AA to ICTA is rewritten in Parts 5 (loan relationships) and 7 (derivative contracts) of CTA 2009.

Chapter 3: Exemptions from basic rule

Overview

342. This Chapter gives the exemptions from the basic transfer-pricing rule in section 147 for dormant companies and small and medium-sized enterprises.

Section 165: Exemption for dormant companies

343. This section exempts dormant companies from the basic rule in section 147. It is based on paragraph 5A of Schedule 28AA to ICTA.

Section 166: Exemption for small and medium-sized enterprises

344. This section exempts, with three exceptions, small and medium-sized enterprises (defined in section 172) from the basic rule in section 147. It is based on paragraph 5B(1) and (2) of Schedule 28AA to ICTA.

Section 167: Small and medium-sized enterprises: exceptions from exemption

345. This section gives two of the exceptions to section 166: where there is an election that the exemption should not apply and where the other affected person is a resident of a non-qualifying territory. It is based on paragraph 5B of Schedule 28AA to ICTA.

Section 168: Medium-sized enterprises: exception from exemption: transfer pricing notice

346. This section gives the third exception to the exemption in section 166. This is where the Commissioners for HMRC give a notice (a "transfer pricing notice") to the potentially advantaged person that section 147 is to apply. It is based on paragraph 5C(1) of Schedule 28AA to ICTA.

347. "In question" in paragraph 5C(1)(a) of Schedule 28AA was not rewritten on the ground that it was unnecessary.

348. "The Board" in paragraph 5C(1)(b) (which meant the Commissioners of Inland Revenue) is rewritten as "the Commissioners for Her Majesty's Revenue and Customs" in accordance with section 50(1) of CRCA.

Section 169: Giving of transfer pricing notices

349. This section gives details of transfer pricing notices given under section 168. It is based on paragraph 5C(2) to (4) and (12) of Schedule 28AA to ICTA.

350. "Officer of the Board" in paragraph 5C(4) and (6) is rewritten as "officer of Revenue and Customs" both here and in section 170 in accordance with section 50(2) of CRCA.

Section 170: Appeals against transfer pricing notices

351. This section enables a person receiving a transfer pricing notice to appeal within 30 days against the decision to give the notice. It is based on paragraph 5C(5) to (7) of Schedule 28AA to ICTA.

Section 171: Tax returns where transfer pricing notice given

352. This section allows the taxpayer to make amendments to his tax return following receipt of a transfer pricing notice under section 168. It is based on paragraph 5C(8) to (12) of Schedule 28AA to ICTA.

353. Paragraph 5C(8)(b) refers to the taxpayer appealing "against the notice" although paragraph 5C(5) states that appeals are against the decision *to give* the notice. In rewriting paragraph 5C(8)(b) subsection (1) has been made consistent with section 170(1).

Section 172: Meaning of "small enterprise" and "medium-sized enterprise"

354. This section defines "small enterprise" and "medium-sized enterprise" for purposes of Chapter 3. It is based on paragraph 5D of Schedule 28AA to ICTA.

Section 173: Meaning of "qualifying territory" and "non-qualifying territory"

355. This section defines "qualifying territory" and "non-qualifying territory" for the purposes of Chapter 3. It is based on paragraph 5E of Schedule 28AA to ICTA.

Chapter 4: Position, if only one affected person potentially advantaged, of other affected person

Overview

356. This Chapter provides for claims to be made by the person whose profits have increased or losses decreased (the disadvantaged person) as a result of another person's profits decreasing (the advantaged person). The claim prevents double taxation and is only relevant where both the advantaged and disadvantaged persons are liable to UK taxation.

357. Suppose company A sells goods to connected company B for an amount less than an arm's length price would require. While this reduces A's profits it increases B's profits by the same amount. B may therefore make a claim to reduce its profits by the same amount by which A's are increased to avoid double taxation on the arm's length differential which would otherwise arise.

Section 174: Claim by the affected person who is not potentially advantaged

358. This section allows the affected person who is not potentially advantaged to make a claim to calculate profits in accordance with the arm's length provision imposed on the advantaged person. It is based on paragraphs 6(1) and (2) and 6A(1) of Schedule 28AA to ICTA and paragraph 5(1) of Schedule 2 to CTA 2009.

359. "For the purposes of this paragraph" in paragraph 6(2) of Schedule 28AA has not been rewritten on the grounds that it was unnecessary to do so since the person making the claim can be expected to identify the purpose for which the claim is made. This omission is consistent with the approach taken in paragraph 6C(2) of Schedule 28AA to ICTA.

360. Paragraph 6(2) of Schedule 28AA makes a claim subject to paragraph 8 of the Schedule. *Subsection (4)* of this section recognises that paragraph 8 is rewritten Parts 5 (loan relationships) and 7 (derivative contracts) of CTA 2009.

361. Subsection (4) provides that *subsection (2)* is subject to section 180 (which rewrites the trading stock rules in paragraph 6A of Schedule 28AA). Although paragraph 6A was not listed in the opening words of paragraph 6(2) of Schedule 28AA, the opening words of paragraph 6A achieve the same result as would have been achieved by such listing.

Section 175: Claims under section 174 where actual provision relates to a security

362. This section prevents a claim from being made under section 174 where the participatory condition is satisfied as a result of indirect participation of a kind within sections 161 and 162 and a guarantee has been issued in respect of a security. It is based on paragraphs 1A(7), (9) and (10) and 6(4A) and (4B) of Schedule 28AA to ICTA.

Section 176: Claims under section 174: advantaged person must have made return

363. As a result of this section a claim under section 174 may not be made by the disadvantaged person unless an arm's length calculation of the advantaged person's profits has been made and the claim is in accordance with that calculation. It is based on paragraph 6(3) and (4) of Schedule 28AA to ICTA.

Section 177: Time for making, or amending, claim under section 174

364. This section provides the time limit for making or amending claims under section 174. It is based on paragraph 6(5) and (6) of Schedule 28AA to ICTA.

Section 178: Meaning of "return" in sections 176 and 177

365. This section provides the interpretation of "return" in sections 176 and 177. It is based on paragraph 6(7) of Schedule 28AA of ICTA.

Section 179: Compensating payment if advantaged person is controlled foreign company

366. This section provides for a compensating adjustment to be made to the disadvantaged company where the advantaged company is a non-UK resident company whose profits have been apportioned to UK residents under the controlled foreign company (CFC) provisions in Chapter 4 of Part 17 of ICTA. It is based on paragraph 6B of Schedule 28AA to ICTA.

367. Because the CFC's profits on which the adjustment is made are not those of a person on whom a potential advantage in relation to United Kingdom taxation is conferred, the "advantaged person" does not fall within section 174(1). There is no advantage to the CFC in relation to United Kingdom taxation.

368. Special provision is therefore required to allow a claim under section 174. This is done by treating the CFC as if it fell within that section.

369. "Chargeable profits" in *subsection (1)(b)* is the term used by the controlled foreign company legislation for the CFC's taxable profits (section 747(6) of ICTA).

370. In *subsection (3)* the amended readings to sections 174 to 178 are necessary because the return of the chargeable profits of the CFC is not made by the "advantaged person" (the CFC) but by the company which controls that company and on whom the apportionment of chargeable profits will be made. Likewise the relevant notice will be given to the same company.

Section 180: Application of section 174(2)(a) in relation to transfers of trading stock etc

371. This section provides for a broad timing match between the adjustments arising on the advantaged and disadvantaged company where there is a transfer of stock between the two. It is based on paragraph 6A of Schedule 28AA to ICTA.

372. A mismatch in timing may arise with stock transfers because, while an increase to open market value of the stock transferred will immediately result in an increase to the transferor company's profits, the compensating adjustment will not arise in the case of the transferee company until that stock has been disposed of.

Section 181: Section 182 applies to claims where actual provision relates to a security

373. This and the following three sections relate to claims under section 174 where a security has been issued between companies. This section provides that the claim may be made in accordance with section 182. It is based on paragraphs 1A(9) and (10) and 6C(1) and (2) of Schedule 28AA to ICTA.

Section 182: Making of section 182 claims

374. This section provides the basic requirements for the claim. It is based on paragraph 6C(3) to (5) of Schedule 28AA to ICTA.

375. *Subsection (3)* allows the claim to be made before the calculation of profits has been made by the advantaged person. This allows tax to be deducted from the arm's length sum rather than the actual sum, thus enabling inward investors to obtain certainty on the consequences of loan financing.

Section 183: Giving effect to section 182 claims

376. This section gives rules applicable to a section 182 claim. It is based on paragraph 6C(6) to (9) of Schedule 28AA to ICTA.

377. *Subsection (1)* means that a section 182 claim is made outside the rules applied by Schedule 18 to FA 1998 to company tax returns and assessments as the claim relates to the deduction of tax.

378. Because the claim may be made before a section 176 calculation has been made, *subsection (3)* allows claims to be treated as if they were consistent with the eventual calculation.

Section 184: Amending a section 182 claim if it is followed by relevant notice

379. This section allows either the advantaged or disadvantaged person to amend a section 182 claim where a closure notice or similar has been served on the advantaged person, in the former case the amendment being treated as made on the disadvantaged person's behalf. It is based on paragraph 6C(10) to (12) of Schedule 28AA to ICTA.

Section 185: Notice to potential claimants

380. This section requires an officer of Revenue and Customs, on giving a closure etc notice, to inform a disadvantaged person who appears to be entitled to make or amend a claim for compensating relief or to be party to proceedings on an appeal relating to a transfer pricing adjustment. It is based on section 111(1), (2), (4) and (5) of FA 1998 and section 87(5) of FA 1999.

Section 186: Extending claim period if notice under section 185 not given or given late

381. This section allows the Commissioners for HMRC to extend the time limit for the making or amendment of claims for compensating relief if they consider any person has been prejudiced as the result of a notice under section 185 not being given or being given late. It is based on section 111(3) of FA 1998.

Section 187: Tax treatment if actual interest exceeds arm's length interest

382. This section requires a company not to deduct tax from interest so far as it exceeds interest payable under the arm's length rule. It is based on paragraph 6E of Schedule 28AA to ICTA.

383. Without this rule tax would be deductible from the whole of the interest notwithstanding that that interest was not allowed in the calculation.

Section 188: Double taxation relief by way of credit for foreign tax

384. This section requires a reduction in the amount of DTR given against United Kingdom tax, whether given unilaterally or by treaty, where a disadvantaged person's profits are reduced as a result of a claim under section 174. It is based on paragraphs 7(1), (2), (5) and (6) and 14(1) and (3) of Schedule 28AA to ICTA.

385. Without the reduction required by this paragraph a UK resident would obtain relief for foreign tax which would exceed the actual foreign tax payable on the reduced profits. The foreign tax is therefore restricted to what would have been payable if the adjusted profits were the actual profits.

Section 189: Double taxation relief by way of deduction for foreign tax

386. This section requires a restriction in foreign tax given as a deduction from United Kingdom profits under section 112 where a disadvantaged person's profits are reduced as a result of a claim under section 174. It is based on paragraph 7(3) to (5) of Schedule 28AA to ICTA.

387. Without the reduction required by this section a UK resident would obtain relief for foreign tax which would exceed the actual foreign tax payable on the reduced profits. The foreign tax is therefore restricted to what would have been payable if the adjusted profits were the actual profits.

Section 190: Meaning of "relevant notice"

388. This section gives the definition of "relevant notice" for the purposes of this Chapter. It is based on paragraphs 6(7) and 6C(10) of Schedule 28AA to ICTA and section 111(6) of FA 1998.

Chapter 5: Position of guarantor of affected person's liabilities under a security issued by the person

Overview

389. This Chapter provides for the guarantor company to obtain a deduction for interest which is disallowed on the advantaged company under section 147 (basic transfer pricing rule) because section 153 (guarantees on issue of a security) operates to cause the guarantee given on the issue of the security to be treated as one that would not be given if the parties were at arm's length.

Section 191: When sections 192 to 194 apply

390. This section explains that section 192 (as supplemented by sections 193 and 194) applies when interest paid under a security is disallowed under section 147 as a result of the operation of section 153 in the case of a guarantee given for liabilities under the security. It is based on paragraphs 1A(7), (9) and (10) and 6D(1) and (10) of Schedule 28AA to ICTA.

Section 192: Attribution to guarantor company of things done by issuing company

391. This section requires the guarantor company to be treated as the issuing company on the making of a claim but only in order to allow the guarantor company to obtain a deduction for the disallowed interest. It is based on paragraphs 1A(7) and 6D(2), (3), (10) and (11) of Schedule 28AA to ICTA.

392. The closing words of the first sentence of paragraph 6D(2) have not been rewritten as adding nothing to the preceding provisions of the sub-paragraph.

Section 193: Interaction between claims under sections 174 and 192(1)

393. This section ensures that only one compensating adjustment is given where the guarantor makes a claim under section 192 and the lender makes a claim under section 174. This may happen where the lender and borrower are connected for the purposes of this Part. It is based on paragraph 6D(4) to (7) of Schedule 28AA to ICTA.

Section 194: Claims under section 192(1): general provisions

394. This section explains who can make the claim under section 192 and applies the provisions, as appropriate, in sections 175 to 177. It is based on paragraph 6D(8) and (9) of Schedule 28AA to ICTA.

Chapter 6: Balancing payments

Overview

395. Balancing payments may be made following a transfer pricing adjustment and are not taken into account in computing profits and losses. These payments enable the result of a transaction between two connected persons to be adjusted so that the persons end up in a position they would have been in had they been taxed on the basis of their actual transaction.

396. Balancing payments may also be made in cases where a guarantee is given and there is a transfer pricing adjustment as a result of the operation of section 153. Here the guarantor makes a payment to the borrower in recognition of the fact that the guarantor has received the benefit of the interest deduction, thus restoring the cash position to its original state.

397. The disadvantaged person or guarantor may alternatively elect to pay the additional tax incurred by the advantaged person following a transfer pricing adjustment.

Section 195: Qualifying conditions for purposes of section 196

398. This section provides the qualifying conditions for section 196. It is based on paragraph 7A(1) of Schedule 28AA to ICTA.

Section 196: Balancing payments between affected persons: no charge to, or relief from, tax

399. This section prevents balancing payments from being taken into account for tax purposes up to the level of the available compensating adjustment. It is based on paragraph 7A(1) to (3) of Schedule 28AA to ICTA.

Section 197: Qualifying conditions for purposes of section 198

400. This section provides the qualifying conditions for section 198. It is based on paragraphs 1A(7), (9) and (10) and 7C(1) of Schedule 28AA to ICTA.

Section 198: Balancing payments by guarantor to issuer: no charge to, or relief from, tax

401. This section prevents balancing payments by the guarantor company from being taken into account for tax purposes. It is based on paragraph 7C(1) and (2) of Schedule 28AA to ICTA.

Section 199: Pre-conditions for making election under section 200

402. This section provides the conditions for section 200. It is based on paragraphs 1A(9) and (10) and 7B(1) to (3) and (10) of Schedule 28AA to ICTA.

Section 200: Election to pay tax rather than make balancing payments

403. This section allows the disadvantaged person to elect to pay the tax of the advantaged person rather than to make a balancing payment within section 196. It is based on paragraph 7B(2) and (4) of Schedule 28AA to ICTA.

Section 201: Pre-conditions for making election under section 202

404. This section provides the conditions for section 202. It is based on paragraphs 1A(7), (9) and (10), 7B(2) and 7D(1) to (3) of Schedule 28AA to ICTA.

Section 202: Election, in guarantee case, to pay tax rather than make balancing payments

405. This section allows the disadvantaged person in a guarantee case to elect to pay the tax of the advantaged person rather than to make a balancing payment within section 198. It is based on paragraphs 7B(2) and (4) and 7D(2) and (4) of Schedule 28AA to ICTA.

Section 203: Elections under section 200 or 202

406. This section explains how elections under sections 200 and 202 are to be made and the effect of such elections. It is based on paragraphs 7B(5) to (9) and 7D(2) of Schedule 28AA to ICTA.

Section 204: Meaning of "capital market condition" in sections 199 and 201

407. This section explains the meaning of "capital market condition" and is based on paragraphs 1A(8), 7B(1), (3), (9) and (10) and 7D(2) to Schedule 28AA to ICTA.

408. Paragraph 7B(9) of Schedule 28AA excludes from the definition of "independent person" a person who has a participatory relationship with either of the affected persons. Paragraph 7B(10) applies the definition of "participatory relationship" given in paragraph 1A of Schedule 28AA. That definition is expressed to be about cases where one company has a participatory relationship with another company. It therefore suggests that a person excluded by paragraph (b) of the definition of "independent person" must necessarily be a company. While there may be an argument that the definition in paragraph 1A should apply with modifications to make it work in the context of paragraph 7B, such an argument is not considered persuasive.

Chapter 7: Oil-related ring-fence trades

Overview

409. This Chapter has to be read with section 147(4). Between them they apply the Part to transactions between the ring-fence trade of an oil company and other activities engaged in by that same company as if they were separate enterprises.

Section 205: Provision made or imposed between ring-fence trade and other activities

410. If provision is made or imposed as between the ring-fence trade of an oil company and other activities of that company this section has the effect that this Part applies as if that trade and those other activities were carried on by two separate persons controlled by the same person. It is based on paragraph 11(1), (3) and (4) of Schedule 28AA to ICTA.

411. In *subsection (1)(a)* the words "oil-related" have been added to "ring-fence trade" in paragraph 11(1) and (3) of Schedule 28AA to make clear the area of taxation referred to. "Oil-related ring-fence trade" is defined in section 206.

Section 206: Meaning of "oil-related ring-fence trade" in sections 205 and 218

412. This section gives the meaning of "oil-related ring-fence trade" and is based on paragraph 11(1) of Schedule 28AA to ICTA and section 85(7) of FA 1999.

Chapter 8: Supplementary provisions and interpretation of Part

Overview

413. This Chapter contains provisions on various matters relating to the Part: application to unit trusts, transfer-pricing determinations requiring the sanction of the Commissioners for HMRC, determination of appeals, effects on capital allowances and chargeable gains, the manner of making adjustments and some definitions.

Section 207: Application of Part to unit trusts

414. This section explains how the transfer pricing rules in this Part are applied to unit trusts. It is based on paragraph 14(5) of Schedule 28AA to ICTA.

Section 208: The determinations which require the Commissioners' sanction

415. This section provides that certain determinations in transfer pricing cases require the sanction of the Commissioners for HMRC. It is based on section 110(1), (4) and (9) of FA 1998.

Section 209: Determinations exempt from requirement for Commissioners' sanction

416. This section sets out the circumstances in which a Commissioners' sanction under section 208 is not required. It is based on section 110(5) to (7) of FA 1998.

Section 210: The requirement for the Commissioners' sanction

417. This section applies certain rules where a transfer-pricing determination requires the Commissioners' sanction. It is based on section 110(1) to (3) of FA 1998.

418. If a transfer-pricing determination requires the Commissioners' sanction, the determination will be one made for the purposes of a notice or matter mentioned in section 208(3). This section applies when the notice, or notice of the matter, is given. If the determination (so far as relating to the notice or matter) has not been approved by the Commissioners or if the determination has been approved but the taxpayer is not informed that approval has been given, the notice or matter has the effect it would have if it had been prepared without taking account of the determination.

Section 211: Restriction of right to appeal against Commissioners' approval

419. This section provides that the Commissioners' approval of a determination for the purposes of section 210(2) or (4) may not be questioned on an appeal. It is based on section 110(8) of FA 1998.

Section 212: Appeals

420. This section provides rules relating to proceedings on appeals against matters relevant to this Part. It is based on paragraph 12 of Schedule 28AA to ICTA.

Section 213: Capital allowances

421. This section prevents the transfer pricing provisions from applying for the purposes of capital allowances and balancing charges. It is based on paragraph 13(1) and (2) of Schedule 28AA to ICTA.

Section 214: Chargeable gains

422. This section prevents the transfer pricing provisions from applying for the purposes of chargeable gains. TCGA has its own arm's length rule. It is based on paragraph 13(1) and (2) of Schedule 28AA to ICTA.

Section 215: Manner of making adjustments to give effect to Part

423. This section explains how adjustments under this Part are to be made. It is based on paragraphs 6C(8) and 14(4) of Schedule 28AA to ICTA.

Section 216: Meaning of "the relevant activities"

424. This section gives the meaning of "the relevant activities". It is based on paragraph 14(1) of Schedule 28AA to ICTA.

Section 217: Meaning of "control" and "firm"

425. This section gives the meaning of "control" and "firm" for the purposes of this Part and also applies a special meaning of "control" for applying the transfer pricing rules in relation to company oil sales. It is based on paragraphs 9 and 14(2) of Schedule 28AA to ICTA.

426. The definition of "control" is by reference to section 1124 of CTA 2010 which has rewritten section 840 of ICTA.

427. Under the definition of control for company oil sales, the oil producer, seller and buyer are connected persons for the purposes of the Part where the control threshold would not otherwise be met because the shareholding is insufficient. This allows the transfer pricing rules to apply where the oil-producing company is owned by a consortium.