



Taxation (International and Other Provisions) Act 2010

2010 CHAPTER 8

PART 4

TRANSFER PRICING

CHAPTER 4

POSITION, IF ONLY ONE AFFECTED PERSON POTENTIALLY ADVANTAGED, OF OTHER AFFECTED PERSON

Claim by affected person who is not advantaged

174 Claim by the affected person who is not potentially advantaged

- (1) Subsection (2) applies if—
 - (a) only one of the affected persons (in this Chapter called “the advantaged person”) is a person on whom a potential advantage in relation to United Kingdom taxation is conferred by the actual provision, and
 - (b) the other affected person (in this Chapter called “the disadvantaged person”) is within the charge to income tax or corporation tax in respect of profits arising from the relevant activities (see section 216).
- (2) On the making of a claim by the disadvantaged person—
 - (a) the profits and losses of the disadvantaged person are to be calculated for tax purposes as if the arm’s length provision had been made or imposed instead of the actual provision, and
 - (b) despite any limit in the Tax Acts on the time within which any adjustment may be made, all such adjustments are to be made in the disadvantaged person’s case as may be required to give effect to the assumption that the arm’s length provision was made or imposed instead of the actual provision.

- (3) Provision about claims under this section is made by—
- section 175 (claim not allowed in some cases where actual provision relates to a security issued by one of the affected persons),
 - section 176 (claim cannot be made unless advantaged person has made return on the basis that the arm's length provision applies),
 - section 177 (when claim may be made or amended), and
 - sections 181 to 184 (option to make claims in accordance with section 182 in some cases where actual provision relates to a security issued by one of the affected persons).
- (4) Subsection (2) has effect subject to—
- section 180 (closing trading stock and closing work in progress in a trade),
 - sections 188 and 189 (effect of claims under this section on double taxation relief),
 - Chapter 5 (provision, where liabilities of an affected person under securities issued by that person are guaranteed, for attribution to guarantor of things done by that affected person),
 - section 447(5) and (6) of CTA 2009 (this Part generally does not affect how exchange gains or losses from loan relationships are accounted for), and
 - section 694(8) and (9) of CTA 2009 (this Part generally does not affect how exchange gains or losses from derivative contracts are accounted for).

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

- (1) A claim under section 174 may not be made if—
- (a) the participation condition (see section 148) would not be satisfied but for section 161 or 162,
 - (b) the actual provision is provision in relation to a security issued by one of the affected persons (“the issuer”), and
 - (c) a guarantee is provided in relation to the security by a person with whom the issuer has a participatory relationship.
- (2) For the purposes of subsection (1), one person (“A”) has a “participatory relationship” with another (“B”) if—
- (a) one of A and B is directly or indirectly participating in the management, control or capital of the other, or
 - (b) the same person or persons is or are directly or indirectly participating in the management, control or capital of each of A and B.
- (3) In subsections (1)(b) and (4)(a) “security” includes securities not creating or evidencing a charge on assets.
- (4) For the purposes of subsection (1)(b), any—
- (a) interest payable by a company on money advanced without the issue of a security for the advance, or
 - (b) other consideration given by a company for the use of money so advanced, is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.
- (5) The reference in subsection (1)(c) to a guarantee includes—
- (a) a reference to a surety, and

- (b) if the issuer is a company, a reference to any other relationship, arrangements, connection or understanding (whether formal or informal) such that the person making the loan to the issuer has a reasonable expectation that in the event of a default by the issuer the person will be paid by, or out of the assets of, one or more companies.

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

- (1) A claim may not be made under section 174 unless a calculation has been made in the case of the advantaged person on the basis that the arm's length provision was made or imposed instead of the actual provision.
- (2) A claim made under section 174 must be consistent with the calculation made on that basis in the case of the advantaged person.
- (3) For the purposes of subsections (1) and (2), a calculation is to be taken to have been made in the case of the advantaged person on the basis that the arm's length provision was made or imposed instead of the actual provision if (and only if)—
 - (a) the calculations made for the purposes of any return by the advantaged person have been made on that basis because of this Part, or
 - (b) a relevant notice (see section 190) given to the advantaged person takes account of a determination in pursuance of this Part of an amount to be brought into account for tax purposes on that basis.

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

- (1) A claim under section 174 can be made only in the period mentioned in subsection (2) or (3).
- (2) If a return has been made by the advantaged person on the basis mentioned in section 176(1), the period is the two years beginning with the day of the making of the return.
- (3) If a relevant notice (see section 190) taking account of such a determination as is mentioned in section 176(3)(b) has been given to the advantaged person, the period is the two years beginning with the day on which that notice was given.
- (4) Subsection (5) applies if—
 - (a) a claim under section 174 is made in relation to a return made on the basis mentioned in section 176(1), and
 - (b) a relevant notice taking account of such a determination as is mentioned in section 176(3)(b) is subsequently given to the advantaged person.
- (5) The disadvantaged person is entitled, within the period mentioned in subsection (3), to make any such amendment of the claim as may be appropriate in consequence of the determination contained in the relevant notice.
- (6) Subsections (1) and (5) have effect subject to section 186(3) (which provides for the extension of the period for making or amending a claim).

178 Meaning of “return” in sections 176 and 177

- (1) In sections 176 and 177 “return” means—

- (a) any return required to be made under TMA 1970 or under Schedule 18 to FA 1998 for income tax or corporation tax purposes, or
 - (b) any voluntary amendment of a return within paragraph (a).
- (2) In subsection (1)(b) “voluntary amendment” means—
- (a) an amendment under section 9ZA or 12ABA of TMA 1970 (amendment of personal, trustee or partnership return by taxpayer), or
 - (b) an amendment under Schedule 18 to FA 1998 other than one made in response to the giving of a relevant notice (see section 190).

*Claims: special cases***179 Compensating payment if advantaged person is controlled foreign company**

- (1) Subsection (2) applies if—
- (a) the actual provision is provision made or imposed in relation to a controlled foreign company,
 - (b) in determining for the purposes of Chapter 4 of Part 17 of ICTA the amount of that company’s chargeable profits for an accounting period, its profits and losses are to be calculated in accordance with section 147(3) or (5) in the case of that provision,
 - (c) the whole of those chargeable profits are to be apportioned under section 747(3) of ICTA to one or more companies resident in the United Kingdom, and
 - (d) tax is chargeable under section 747(4) of ICTA in respect of the whole of those chargeable profits, as so apportioned to those companies.
- (2) Sections 174 to 178 have effect as if the controlled foreign company were a person on whom a potential advantage in relation to United Kingdom taxation were conferred by the actual provision.
- (3) In applying sections 174 to 178 in a case in which they apply because of subsection (2) —
- (a) references to the advantaged person in sections 176(3)(a) and (b) and 177(2), (3) and (4)(b) include a reference to any of the companies mentioned in subsection (1)(c), and
 - (b) references to corporation tax include a reference to tax chargeable under section 747(4) of ICTA.
- (4) In this section—
- “controlled foreign company” has the same meaning as in Chapter 4 of Part 17 of ICTA, and
 - “accounting period”, in relation to a controlled foreign company, has the same meaning as in that Chapter.

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

- (1) Section 174(2)(a) does not affect the credits to be brought into account by the disadvantaged person in respect of—
- (a) closing trading stock, or
 - (b) closing work in progress in a trade,

for accounting periods ending on or after the day given by subsection (2).

- (2) That day is the last day of the accounting period of the advantaged person in which the actual provision was made or imposed.
- (3) For the purposes of this section “trading stock”, in relation to any trade, has the meaning given by—
 - (a) section 174 of ITTOIA 2005, or
 - (b) section 163 of CTA 2009.

Alternative way of claiming if a security is involved

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

- (1) Subsection (2) applies if—
 - (a) both of the affected persons are companies, and
 - (b) the actual provision is provision in relation to a security issued by one of those companies.
- (2) A claim under section 174 may be made in accordance with section 182.
- (3) For the purposes of this Part, a “section 182 claim” is a claim under section 174 made in accordance with section 182.
- (4) In subsections (1)(b) and (5)(a) “security” includes securities not creating or evidencing a charge on assets.
- (5) For the purposes of subsection (1)(b), any—
 - (a) interest payable by a company on money advanced without the issue of a security for the advance, or
 - (b) other consideration given by a company for the use of money so advanced, is to be treated as if payable or given in respect of a security issued for the advance by the company, and references to a security are to be read accordingly.

182 Making of section 182 claims

- (1) A section 182 claim may be made by—
 - (a) the disadvantaged person, or
 - (b) the advantaged person.
- (2) A section 182 claim made by the advantaged person is to be taken to be made on behalf of the disadvantaged person.
- (3) A section 182 claim may be made before or after a calculation within section 176(1) has been made.
- (4) A section 182 claim must be made either—
 - (a) at any time before the end of the period mentioned in section 177(2), or
 - (b) within the period mentioned in section 177(3).
- (5) Subsection (4) has effect subject to section 186(3) (which provides for the extension of the period for making a claim).

183 Giving effect to section 182 claims

- (1) A section 182 claim is not a claim within paragraph 57 or 58 of Schedule 18 to FA 1998 (company tax returns, assessments and related matters).
- (2) Accordingly, paragraph 59 of that Schedule (application of Schedule 1A to TMA 1970) has effect in relation to a section 182 claim.
- (3) If—
 - (a) a section 182 claim is made before a calculation within section 176(1) has been made,
 - (b) such a calculation is subsequently made, and
 - (c) the claim is not consistent with the calculation,
 the affected persons are to be treated as if (instead of the claim actually made) a claim had been made that was consistent with the calculation.
- (4) All such adjustments are to be made (including by the making of assessments) as are required to give effect to subsection (3).
- (5) Subsection (4) has effect despite any limit on the time within which any adjustment may be made.

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

- (1) Subsection (2) applies if—
 - (a) a section 182 claim is made,
 - (b) a return is subsequently made by the advantaged person on the basis mentioned in section 176(1), and
 - (c) a relevant notice (see section 190) taking account of such a determination as is mentioned in section 176(3)(b) is subsequently given to the advantaged person.
- (2) If any amendment of the claim is appropriate in consequence of the determination contained in the relevant notice, the amendment may be made by—
 - (a) the disadvantaged person, or
 - (b) the advantaged person.
- (3) If an amendment under subsection (2) is made by the advantaged person it is to be taken to be made on behalf of the disadvantaged person.
- (4) Any amendment under subsection (2) must be made within the period mentioned in section 177(3).
- (5) Subsection (4) has effect subject to section 186(3) (which provides for the extension of the period for making an amendment).

*Notification to persons who may be disadvantaged***185 Notice to potential claimants**

- (1) Subsection (2) applies if—
 - (a) a relevant notice (see section 190) is given to any person,

- (b) the notice, or anything contained in it, takes account of a transfer-pricing determination, and
 - (c) it appears to an officer that there is a person (“DP”) who is or may be a disadvantaged person by reference to the subject-matter of the determination.
- (2) The officer must give to DP a notice containing particulars of the determination.
- (3) A contravention of subsection (2) does not affect the validity—
- (a) of the relevant notice, or
 - (b) of any determination to which the notice relates.
- (4) For the purposes of this section, a person is a disadvantaged person by reference to the subject-matter of a transfer-pricing determination if (and only if) the person—
- (a) is entitled, in consequence of the making of the determination, to make or amend a claim under section 174, or
 - (b) will be entitled, because of section 212(3), to be a party to any proceedings on an appeal relating to the determination.
- (5) In this section—
- “officer” means officer of Revenue and Customs, and
 - “transfer-pricing determination” means a determination of an amount that is to be brought into account for tax purposes in respect of—
- (a) any assumption made under section 147(3) or (5), or
 - (b) any advance-pricing-agreement assumptions (see section 222(6)).

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

- (1) If there is a contravention of section 185(2), the Commissioners must consider whether, as a result of the contravention, any person has been prejudiced with respect to the making or amendment of a claim under section 174.
- (2) Subsection (3) applies if—
- (a) there is a contravention of section 185(2), or
 - (b) a notice required by section 185(2) is given after the relevant notice concerned.
- (3) The Commissioners may, if they think fit, treat the period for the making or amendment of a claim under section 174 in the case concerned as extended by such further period as appears to them to be appropriate.
- (4) In this section “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs.

Treatment of interest where claim made

187 Tax treatment if actual interest exceeds arm’s length interest

- (1) Subsection (6) applies if the following conditions are met.
- (2) Condition A is that interest is paid by any person under the actual provision.
- (3) Condition B is that section 147(3) or (5) applies in relation to the actual provision.
- (4) Condition C is—

- (a) that the amount (“ALINT”) of interest that would have been payable under the arm’s length provision is less than the amount of interest paid under the actual provision, or
 - (b) that there would not have been any interest payable under the arm’s length provision (so that ALINT is nil).
- (5) Condition D is that the person receiving the interest paid under the actual provision makes—
- (a) a claim under section 174, or
 - (b) a section 182 claim.
- (6) The interest paid under the actual provision, so far as it exceeds ALINT—
- (a) is not to be regarded as chargeable under Chapter 2 of Part 4 of ITTOIA 2005,
 - (b) is not subject to the provisions of Part 15 of ITA 2007 (deduction of income tax at source), and
 - (c) is not required to be brought into account under Part 5 of CTA 2009 (loan relationships) as a non-trading credit.

Adjustment of double taxation relief where claim made

188 Double taxation relief by way of credit for foreign tax

- (1) Subsection (2) applies if—
- (a) a claim is made under section 174, and
 - (b) the disadvantaged person (“DP”) is entitled on that claim to make a calculation, or to have an adjustment made, on the basis that the arm’s length provision was made or imposed instead of the actual provision.
- (2) Assumptions A and B are to be made in DP’s case in relation to any credit for foreign tax which DP has been, or may be, given—
- (a) under any double taxation arrangements, or
 - (b) under section 18(1)(b) and (2) (relief under unilateral relief arrangements).
- (3) Subsection (2) has effect subject to section 189(2).
- (4) Assumption A is that the foreign tax paid or payable by DP does not include any amount of foreign tax which would not be or have become payable were it to be assumed for the purposes of that tax that the arm’s length provision had been made or imposed instead of the actual provision.
- (5) Assumption B is that the amount of DP’s relevant profits in respect of which DP is given credit for foreign tax does not include the amount (if any) by which DP’s relevant profits are treated as reduced in accordance with section 174.
- (6) If any adjustment is required to be made for the purpose of giving effect to any of the preceding provisions of this section—
- (a) it may be made by setting the amount of the adjustment against any relief or repayment to which DP is entitled in pursuance of DP’s claim under section 174, and
 - (b) nothing in the Tax Acts limiting the time within which any assessment is to be or may be made or amended prevents that adjustment from being so made.

- (7) In subsection (5) “DP’s relevant profits” means the profits arising to DP from the carrying on of the relevant activities (see section 216).
- (8) In this section—
- “double taxation arrangements” means arrangements that have effect under section 2(1) (double taxation relief by agreement with territories outside the United Kingdom), and
- “foreign tax” means—
- (a) any tax under the law of a territory outside the United Kingdom, or
- (b) any amount that, for the purposes of any double taxation arrangements, is to be treated as if it were tax under the law of a territory outside the United Kingdom.
- (9) In determining for the purposes of this section whether a person is—
- (a) under any double taxation arrangements, or
- (b) under section 18(1)(b) and (2),
- to be given credit for foreign tax, ignore any requirement that a claim is made before such a credit is given.

189 Double taxation relief by way of deduction for foreign tax

- (1) Subsection (2) applies if—
- (a) a claim is made under section 174,
- (b) the disadvantaged person (“DP”) is entitled on that claim to make a calculation, or to have an adjustment made, on the basis that the arm’s length provision was made or imposed instead of the actual provision,
- (c) the application of that basis in the calculation of DP’s profits or losses for any chargeable period involves a reduction in the amount of any income, and
- (d) that income is also income that is to be reduced in accordance with section 112(1) (deduction for foreign tax where no credit allowed).
- (2) If this subsection applies—
- (a) the reduction mentioned in subsection (1)(c) is to be treated as made before any reduction under section 112(1), and
- (b) tax paid, in the place in which any income arises, on so much of that income as is represented by the amount of the reduction mentioned in subsection (1)(c) is to be disregarded for the purposes of section 112(1).
- (3) If any adjustment is required to be made for the purpose of giving effect to any of the preceding provisions of this section—
- (a) it may be made by setting the amount of the adjustment against any relief or repayment to which DP is entitled in pursuance of DP’s claim under section 174, and
- (b) nothing in the Tax Acts limiting the time within which any assessment is to be or may be made or amended prevents that adjustment from being so made.

*Interpretation of Chapter***190 Meaning of “relevant notice”**

In this Chapter “relevant notice” means—

- (a) a closure notice under section 28A(1) of TMA 1970 in relation to an enquiry into a return under section 8 or 8A of TMA 1970,
- (b) a closure notice under section 28B(1) of TMA 1970 in relation to an enquiry into a partnership return,
- (c) a closure notice under paragraph 32 of Schedule 18 to FA 1998 in relation to an enquiry into a company tax return,
- (d) a notice under section 30B(1) of TMA 1970 amending a partnership return,
- (e) a notice of an assessment under section 29 of TMA 1970,
- (f) a notice of a discovery assessment under paragraph 41 of Schedule 18 to FA 1998 (which includes a discovery assessment under that paragraph as applied by paragraph 52 of that Schedule), or
- (g) a notice of a discovery determination under paragraph 41 of Schedule 18 to FA 1998.