EXPLANATORY MEMORANDUM TO

THE INSURANCE BUSINESS TRANSFER SCHEMES (AMENDMENT OF THE CORPORATION TAX ACTS) ORDER 2008

2008 No. 381

1. This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.

2. Description

2.1 The Order amends the corporation tax legislation applying where there is an insurance business transfer scheme. Substantial changes to that legislation are made by Schedule 9 to the Finance Act (FA) 2007.

2.2 The Order also amends the definition of insurance business transfer scheme as a result of changes to Part 7 of the Financial Services and Markets Act 2000 and in particular the categories of insurance business transfer scheme which are excluded from the Part 7 procedures – these changes arise as a result of the UK's implementing the EC Reinsurance Directive.

3. Matters of Special interest to the Select Committee on Statutory Instruments

None

4. Legislative Background

The Order is the first exercise of the power in paragraph 16 Schedule 9. That paragraph is in effect a "sunset clause" as it requires any Order made under it to be made before 1 April 2008. The Order will have effect generally in relation to transfers taking place on or after 1 July 2008, the date on which the majority of the provisions in Schedule 9 will come into effect. Other parts of the Order will have effect for periods current when the Order is made - the power to make the Order with such retrospective effect is in paragraph 16(4) of Schedule 9 to FA 2007.

5. Extent

The instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Economic Secretary to the Treasury (Kitty Ussher MP) has made the following statement regarding Human Rights:

"In my view the provisions of the Insurance Business Transfer Schemes (Amendment of the Corporation Tax Acts) Order 2007 are compatible with the Convention rights."

7. Policy Background

7.1 Schedule 9 to FA 2007 was enacted on the understanding that it was an interim solution as consultation on the necessary changes to the tax legislation on insurance business transfer scheme had not been completed by the time the Finance Bill 2007 was published.

7.2 Since then consultation has continued and the Order is the outcome of that consultation, part of a continuing consultation process started in May 2006 with the publication of a Technical Consultative Document.

7.3 The Order was published in "near final" form on 9 October 2007 as part of the Pre Budget Report, and earlier drafts had been circulated to interested bodies.

7.3 Guidance on the taxation of insurance business transfer schemes and the effect of the Order will be included in HMRC's Life Assurance Manual.

7.4 Technical detail on the amendments made by the Order is contained in the Appendix to this memorandum.

8. Impact

8.1 A preliminary Regulatory Impact Assessment was included in the Technical Consultative Document – see http://www.hmrc.gov.uk/life-assurance/consultation.htm. A full Regulatory Impact Assessment may be published when the overall consultation is complete.

8.2 The impact on the public sector is nil.

9. Contact

Richard Thomas at HM Revenue and Customs Tel 020 7147 2558 or e-mail richard.thomas@hmrc.gsi.gov.uk.

APPENDIX

1. PERIODS OF ACCOUNTS AND ACCOUNTING PERIODS

Periods of account

Article 10 – *substitution of new section 444AA Income and Corporation Taxes Act 1988 ("ICTA")*

Articles 5 and 25 – *amendments of section 432YA ICTA and section 82D Finance Act 1989 ("FA 1989")*

Accounting periods

Article 3 – *repeal of section 12(7A) ICTA*

Articles 8, 28 and 29(2), (3) and (10) – *amendments of section 444A ICTA and sections 211ZA and 213 Taxation of Chargeable Gains Act 1992 ("TCGA")*

SUMMARY

1. Article 10 substitutes a new section 444AA ICTA for the version inserted by Schedule 9 Finance Act 2007 ("FA 2007"). The changes are designed to complement changes to section 12 ICTA in which the special rule for companies carrying on life assurance business where there is any type of transfer of business is replaced (article 3).

2. The object in both cases is to reduce the number of occasions giving rise to the end of an accounting period or period of account, but still to ensure that appropriate figures from a Financial Services Authority ("FSA") return are made available.

3. Articles 5 and 25 make consequential amendments in relation to periods of account.

4. Articles 8, 28 and 29(2), (3) and (10) make consequential amendments in relation to accounting periods.

DETAIL

Articles 10, 5 and 25

1. Article 10 substitutes a new section 444AA ICTA.

2. Subsection (1) sets out the scope: it is where there is a transfer of the whole of a company's long-term business under one or more transfer schemes taking place on the same day. This means that where there is a transfer of part of the business only, the section has no effect, even if the transfer is of substantially the whole of the business.

3. Subsection (2), like its predecessors, requires a company to submit a "proforma" FSA return for the period of account covering the period up to immediately before the transfer date, except where there is already such a return. This return is only likely to exist if the transfer takes place immediately after the company's normal accounting date (say a transfer on 1 January). The proforma return starts from the date of the last actual return.

4. Subsection (3) sets out the entries that must be included in the proforma return. The return is required to contain—

- all the entries that would be included in an actual return for the period up to immediately before the transfer date. In practice it will only be necessary to include Forms which are relevant to the tax computations – but as a very minimum Her Majesty's Revenue and Customs ("HMRC") would want to see Forms 13, 14, 16, 40 – 43, 51 – 54, 58 and 60;
- any entries that would be included in an actual return for the period beginning at midnight on the day of the transfer and ending immediately before the time of the transfer. In practice it will only be necessary to include Forms if there are any such transactions (for example, a bringing into account of an increase in value of assets on line 13 of Form 40) and which are relevant to the tax computations.

5. The effect of subsection (3) is that a period of account ends on the date to which the proforma return is created. Thus closing liabilities, assets, etc will be taken into account as at that date.

6. Subsection (4), like its predecessors, requires a company to submit a "proforma" FSA return for the day of the transfer date. It need only contain the "appropriate entries" set out in subsection (5), namely—

- the entry that would appear in line 32 of Form 40 (the Form 40 fund value of the assets transferred in the insurance business transfer scheme or schemes transferring all the business);
- the entry that would appear in both columns of line 11 of Form 14. This is the mathematical reserves of the company, immediately after the transfer (almost certainly nil) and immediately before (i.e. as in the actual or proforma return to the day preceding the transfer).

7. These are the entries needed to calculate the amount of any profit under section 444ABD ICTA in a case where there is a transfer of the whole business, and subsection (6) confirms that this is indeed the only purpose for which a separate period of account is created by subsection (4). Subsection (6) also makes it clear that there is no separate accounting period created for the day of the transfer.

8. It is of course possible that the day of the transfer will be a separate accounting period – that would happen in the not unusual case where a transfer takes place on the first day of an actual period of account, for example, on the 1 January where a company has, as most do, a calendar year period of account. To have such a one day accounting period can cause problems where other provisions depend on there being a particular number of accounting periods over which amounts are spread, or for which they can be carried back. To avoid making special provision for one day periods, or radically amending the approach of certain provisions, subsection (7) provides that in a case where the transfer takes place on the day after the end of an actual period of account for which there is a periodical return, any profit arising under section 444ABD ICTA (profit where liabilities transferred exceed assets transferred) which would otherwise arise on the day of the transfer is treated as arising on the last day of the actual period of account ending immediately before the transfer.

9. Subsection (8) also makes it clear, like the previous version of section 444AA,

that any actual FSA return which includes the transfer date is to be disregarded.

10. Subsection (9) defines "the transfer date", for this and other sections, as the date on which the scheme takes effect.

11. Articles 5 and 25 omit subsections from sections 432YA ICTA and 82D FA 1989 to remove provisions which treat a section 444AA(3) period of account (that is the Schedule 9 FA 2007 version of that subsection) as disregarded for the purposes of determining how many periods of account are within the scope of the spreading rules where a company recognises an unusual profit as a result of the changes to reserving allowed by the legislation enacted by the FSA following changes made as a result of its Consultation Paper CP 06/16 and Policy Statement PS 06/14. The new version of section 444AA(3) explicitly provides that it only deems there to be a period of account for the limited purpose of taxing a section 444ABD ICTA profit.

12. As a result of the changes, a company carrying on life assurance business will have a period of account not equal to 12 months only if—

- it changes its "financial year" to be shorter or longer than 12 months, or
- it transfers the whole of its long-term business otherwise than at the end of a period of account or the next day.

Articles 3, 8, 28 and 26(2), (3) and (10)

13. Article 3 repeals section 12(7A) ICTA which provides that an accounting period ends whenever there is a transfer of business, whether of part or the whole (though an accounting period would almost certainly end anyway on a whole transfer). It also repeals section 12(7C) ICTA which deems an accounting period to end where there is a deemed period of account under the Schedule 9 FA 2007 version of section 444AA(1) and (3) or an actual period of account ending immediately before a transfer. The substituted section 444AA deals with accounting periods itself, and provides that the deemed period of account given by subsection (2) or (6) does not cause an accounting period to end.

14. As a result of the changes, a company carrying on life assurance business will have the same accounting periods as any other company, and will have an accounting period not equal to 12 months only if—

- it changes its "financial year" to be shorter or longer than 12 months, so that in the latter case there will be two accounting periods, one of 12 months and one of the rest, or
- it transfers the whole of its insurance business otherwise than at the end of a period of account or the next day.

15. Article 8 amends section 444A ICTA (carryover to transferee of various attributes) by providing that the assumptions in that section include one that if an accounting period does not end on the transfer date, it is deemed to do so for the purposes of the section, so there is continuity between the last accounting period of the transferor and the deemed first affected accounting period of the transferee. Article 8(4), by omitting section 444A(3ZA) ICTA, removes references to sections 343 and 344 ICTA which are redundant.

16. Articles 28 and 29(2) and (3) do a similar job in amending the assumptions in

sections 211ZA (carryover of allowable losses) and 213 TCGA (carryover of spread amounts and carry back of losses), while article 29(10) omits section 213(10) which defines the accounting period of the transferor ending with the day of transfer.

2. AMENDMENT TO SECTION 431(2) IN CONSEQUENCE OF THE IMPLEMENTATION OF THE REINSURANCE DIRECTIVE

Article 4 amends the definition of "insurance business transfer scheme" in section 431(2) ICTA to reflect amendments made to the Financial Services and Market Act 2000 ("FSMA") in consequence of the implementation of the Reinsurance Directive (2005/68/EC): see generally the Reinsurance Directive Regulations 2007 (S.I. 2007/3253). Those Regulations insert a new Case 5 into section 105(3) FSMA as a case for which court approval is not required. But, because it is desirable that the tax reliefs applying to an insurance business transfer apply to all such transfers whether court approved or not, the definition of "insurance business transfer scheme" in section 431(2) ICTA currently includes schemes within Cases 2, 3 and 4 of section 105(3) FSMA. The amendment is to ensure than a scheme within the new Case 5 is also included within the definition.

3. SECTION 440B – CASE I INSURERS

1. Article 7 amends section 440B(4B) ICTA.

2. Section 440B(4B) was inserted by Schedule 8 FA 2007 as one of a number of further rules applying to those companies such as pure reinsurers which are taxed on a Case I basis. Section 440B(4B) provides that section 211 TCGA does not apply to a Case I life insurer. Section 211 provides tax neutrality for the purposes of that Act where assets pass in a business transfer from the long-term insurance fund (LTIF) of one company to another. Such a rule is not appropriate for a Case I company, as all its assets treated as held in its LTIF fall within section 83 FA 1989 and TCGA cannot apply.

3. It has been suggested that the disapplication of section 211 also applies to the PHI insurance business of a Case I company – in such business certain structural assets held in the LTIF will be within the ambit of TCGA. HMRC believe that section 440B(4B) can be construed to exclude such assets, but, for the avoidance of doubt, the subsection is amended to limit the disapplication explicitly to life assurance business.

4. CASE VI LOSSES AND CASE I LOSSES WHERE TRANSFEROR AND TRANSFEREE ARE TAXED ON DIFFERENT BASES

Article 9 – *insertion of sections 444AZA and 444AZB ICTA*

Article 30 – *insertion of paragraphs 85 and 86 Schedule 7 FA 2007*

SUMMARY

1. New sections 444AZA and 444AZB ICTA are designed to allow a carry over of losses in a similar way to that given by section 444A ICTA. Subsection (3) of that section permits Case VI losses of gross roll-up business ("GRB") to be carried over from a transferor to a transferee where there is an insurance business transfer scheme.

2. Not all companies carrying on life assurance business are taxed on the profits of GRB. If section 431G(3) ICTA applies to a company it is charged to tax under Case I on all its life assurance business, and not under Case VI in respect of its GRB. These sections are designed to cater for cases where the transferor is charged under section 431G(3) and the transferee is not, and vice versa.

DETAIL

1. Article 9 inserts new sections 444AZA and 444AZB into ICTA.

2. Section 444AZA(1) sets out the conditions for the application of the section. Those conditions are that there is an insurance business transfer scheme where the transferor is charged to tax on the I minus E basis (and so under Case VI on its GRB profits) but the transferee is taxed under Case I by virtue of section 431G(3) ICTA. As applies to section 444A(3), it is a further condition that the ownership conditions in section 343(1) ICTA are satisfied (broadly that there is a 75% common interest in both companies).

3. Subsection (2) is the operative rule. It permits a GRB loss of the transferee that is unused at the time of transfer to become a Case I loss available to the transferee: but the loss can only be set off against the GRB part of the transferee's Case I profits that represents the transferred business. This part is called "GRBP".

4. GRBP is determined for any period (subsection (3)) by taking the total Case I profits of the transferee from the transferred business ("P") and applying a fraction to it. The numerator of the fraction is the mean of the opening and closing GRB liabilities of the transferee in respect of the transferred business: the denominator is the mean of the opening and closing total liabilities of the transferee in respect of the transferred business.

5. If not all of the transferee's business is transferred business (because, for example, the transferee had an existing business), P is found by applying section 343(9) and (10) ICTA – apportionment of profits and losses on company reconstruction. Those subsections apply in any event to a company charged under Case I.

6. Subsection (4) provides for an appropriate apportionment where the business transferred is not the whole of the transferor's business, so that the Case VI loss has to be split between transferred and retained business. Subsection (5) provides that any dispute on the appropriateness of the split is determinable by the Special Commissioners. This mirrors the provisions of section 444A(5) and (6) ICTA.

7. Section 444AZB deals with the converse case.

8. Section 444AZB(1) sets out the conditions for the application of the section. Those conditions are that there is an insurance business transfer scheme where the transferor is taxed under Case I by virtue of section 431G(3) but the transferee is charged to tax on the I minus E basis (and so under Case VI on its GRB profits). As applies to

section 444A(3), it is a further condition that the ownership conditions in section 343(1) ICTA are satisfied (broadly that there is a 75% common interest in both companies).

9. Subsection (2) is the operative rule. It permits part of the Case I loss of the transferee that is unused at the time of transfer to become a GRB Case VI loss available to the transferee: but the loss can only be set off against the GRB profits of the transferee that represents the transferred business. The part of the Case I loss so available is "the relevant fraction".

10. If not all of the transferee's business is transferred business (because, for example, the transferee had an existing business), GRB profits of the transferee that represent the transferred business are found by applying section 343(9) and (10) ICTA – apportionment of profits and losses on company reconstruction.

11. "The relevant fraction" is determined for any period (subsection (3)) by taking as the numerator of the fraction the mean of the opening and closing GRB liabilities of the transferee in respect of the transferred business; and as the denominator the mean of the opening and closing total liabilities of the transferee in respect of the transferred business.

12. Subsection (4) provides for an appropriate apportionment where the business transferred is not the whole of the transferor's business, so that the Case I loss has to be split between transferred and retained business. Subsection (5) provides that any dispute on the appropriateness of the split is determinable by the Special Commissioners. This mirrors the provisions of section 444A(5) and (6) ICTA.

13. Article 30 inserts new paragraphs 85 and 86 into Schedule 7 FA 2007. They make provision for cases where the transitional provisions in Part 2 of that Schedule have applied.

14. Paragraph 85 deals with the section 444AZA case.

15. Sub-paragraph (1) sets out the condition: that section 444AZA applies to treat a Case VI loss of a transferor as a Case I loss of a transferee.

16 Sub-paragraph (2) is the operative rule. It limits the amount of the Case I losses available to the transferee if the transferor would have been subject to the limitation on use of pension business losses from before 2007 given by paragraph 81 Schedule 7 FA 2007. The limitation is that the Case I losses for any period are the lesser of the amount of those losses and a fraction of "GRBP" (see paragraphs 3 and 4 above).

17. The numerator of the fraction is the mean of the opening and closing pension business liabilities of the transferee in respect of the transferred business; and the denominator is the mean of the opening and closing GRB liabilities of the transferee in respect of the transferred business.

18. Paragraph 86 deals with the section 444AZB case.

19. Sub-paragraph (1) sets out that the paragraph applies where section 444AZB applies to treat a Case I loss of a transferor as a Case VI loss of a transferee, and either of two conditions is met.

20. Sub-paragraph (2) gives one of the conditions. It is that the transferor was a pure reinsurer charged to tax under section 439A ICTA in its last pre-2007 period, and carried

on pension business in that period. Section 444AZB will be applicable in a case where the business of the company is transferred to a reinsurer which is not charged under Case I – that will be the case where it is a group reinsurer excluded by regulations from section 431G(3) ICTA.

21. Sub-paragraph (3) gives the other condition. It is that the transferee is a company with an unused pension business loss and is a company to which paragraph 29 Schedule 8 FA 2007 applies. That paragraph applies where in its last pre-2007 period, a company was charged to tax under the I minus E basis and after that period was charged under Case I. "Unused pension business loss" has the meaning given in paragraph 81 Schedule 7 FA 2007.

22. Sub-paragraphs (4) and (5) are the operative parts. They divide the Case VI loss given by section 444AZB(2) so as to treat part of it as an unused pension business loss of the transferee, and part as an unused non-pension business loss. The division is made by finding the appropriate fraction and the relevant fraction of the section 444AZB Case VI loss.

23. The numerator of the appropriate fraction (sub-paragraph (6)) is the mean of the opening and closing pension business liabilities of the transferred business; and the denominator is the mean of the opening and closing total liabilities of the transferred business.

24. The numerator of the relevant fraction (sub-paragraph (7)) is the mean of the opening and closing non-pension business liabilities (for example, overseas life assurance business or life reinsurance business) of the transferred business; and the denominator is the mean of the opening and closing total liabilities of the transferred business.

5. TRANSFEROR CASE I PROVISIONS

Articles 11 to 16 (and article 6(a) and (c)) – amendments etc of sections 444AB to 444ABD ICTA (transferor Case I rules)

SUMMARY

These articles amend sections 444AB to 444ABB and 444ABD, repeal section 444ABC and insert a new section 444ABBA ICTA.

DETAIL

1. Article 11 amends section 444AB ICTA.

2. It substitutes a new subsection (1) which now provides for the application of section 444AB in a retained assets case (to which section 444ABB ICTA applies) where the whole or substantially the whole of a company's business is transferred, and in the case where assets are transferred to another company but not to the transferee's long-term insurance fund (a relevant non-transferred assets case – "RNTA"), in both a whole or part business case.

3. Subsection (2) (dealing with RNTA) is amended to omit references to a transfer

of assets to a transferee in an insurance business transfer scheme, as it has been pointed out that the transfer of assets may be to another person altogether. The subsection is also amended so as to put beyond doubt that it does not apply where the transferee is not in an EEA territory but has a fund which functions in the same way as a with-profits fund in the UK. Previously there was some doubt if a narrowly literal interpretation was employed.

4. New subsection (5A) restores the rule in subsection (10) of the pre Schedule 9 FA 2007 version of section 444AB treating assets held in trust by the transferor for the transferee as not being retained. But it now also excludes assets held to meet liabilities which have been reinsured with a putative transferee pending a transfer of the relevant assets.

5. A substituted version of subsection (6) defines "the relevant period of account" for this and other sections. It is either the period deemed by section 444AA(2) to exist (i.e. the one deemed to end immediately before a whole business transfer) or, if that subsection does not apply, the period of account containing the transfer date. "The relevant period of account" is the one in which the amount treated as a trading receipt by section 444AB is brought into account.

6. Article 12 amends section 444ABA ICTA.

7. It substantially rewrites subsection (1) and omits the rest, bar subsection (7) (a signpost to a dictionary) which is amended. As a result the section is simpler and, as a result of the repeal of section 444ABC, applies to both whole and part transfers.

8. The main change made to subsection (1) is to provide that the amount deducted from the fair value of the assets which become RNTA is called BTO, not RVA, and is defined to be the lesser of two more abbreviations, ABTO and AL13 where—

- ABTO is the amount shown (or treated as shown) in line 32 of Form 40 for the period of account including the transfer date;
- AL13 is the unallocated surplus shown in the last FSA return to end before the transfer. In this case this may be the return deemed to exist under section 444AA(2) ICTA.

9. Subsection (7) is amended to remove the signpost back to section 444AB ICTA for the definition of the term "the relevant period of account" for this section as it is no longer used.

10. Article 13 amends section 444ABB ICTA.

11. It substantially rewrites subsection (1) in response to industry suggestions and inserts a new subsection (1A) containing definitions. The main change made to subsection (1) is to provide that the amount deducted from the fair value of the assets which are retained assets is (ABDP – RL13 – RRL), but not so as to reduce the amount below nil.

ABDP is the section 444ABD ICTA profit that is treated as chargeable (excess of liabilities transferred over assets transferred).

RL13 is the amount by which AL13 exceeds VE where—

- AL13 here is given (by subsection (1A)) the same meaning as in section 444ABA ICTA, the unallocated surplus shown in the last FSA return to end before the transfer (including where relevant the return deemed to exist under section 444AA(2) ICTA);
- VE is (subsection (1A)) VL32 less VTL (if positive);
- VL32 is (subsection (1A)) the value of the assets in line 32 of Form 40 shown in the last FSA return to end before the transfer (including where relevant the return deemed to exist under section 444AA(2));
- VTL means (subsection (1A)) the amount of the liabilities transferred by the insurance business transfer scheme.

RRL is the value of any relevant retained liabilities immediately after the transfer date, that is (subsection (1A) liabilities of the company's long-term business which are still owed by the company immediately after the transfer date (because they have neither been satisfied by payment nor transferred or novated to the transferee or any other company). The value is that shown in any of lines 17, 21 to 23 and 31 to 38 in Form 14 shown in the last FSA return to end before the transfer (including where relevant the return deemed to exist under section 444AA(2)).

12. Article 14 inserts a new section 444ABBA into ICTA.

13. It responds to a request by the insurance industry to allow a transferee in a section 444ABA ICTA case to meet the tax charged as a result of the application of section 444AB(4) ICTA in relation to relevant non-transferred assets where section 444ABA(1) produces an amount other than nil. This is because the assets will no longer be in the transferor's hands and the shareholders of transferor may wish to wind it up quickly after the transfer.

14. Subsection (1) gives the scope – as usual, it is where there is an insurance business transfer scheme.

15. Subsection (2) allows for a joint election. This is modelled on the election in section 444AD ICTA which is repealed by Schedule 9 FA 2007. The effect of the election is that the transferee becomes liable for the tax arising as a result of section 444ABA, and not the transferor.

16. The election is in respect of corporation tax, not the section 444ABA(1) amount. This is to ensure that the election is not simply used to shelter the section 444ABA(1) amount with losses of the transferee.

17. Subsection (3) provides that the election is irrecoverable and must be made to an officer of HMRC within 90 Days of the transfer date. A copy of the election is to be included in the transferee's CTSA return for the first period of account to end after the transfer. As with section 444AD ICTA and other joint election cases, the CTSA rule about elections do not apply.

18. Subsection (4) puts the onus on the transferor to inform the transferee of the amount of CT transferred within 8 months of the transfer date – subsection (4)(a). This ensures that the transferee knows how much to pay before the due date and when to pay it – subsection (4)(b). That due date is the transferor's due date, so the transferor is also obliged to tell the transferee when that date is. If the transfer is of the whole business that date will be 9 months after the transfer. In any other case it will be 9 months after the

end of the accounting period of the transferor next ending after the transfer.

19. Subsection (5)(b) ensures that the corporation tax the subject of the election does not enter the calculation of the quarterly instalments of the transferee, and that the transfer of the liability does not give rise to a repayment to the transferor by reference to the aggregate of quarterly instalments of the transferor.

20. Subsection (6) is a signpost back to section 444AA ICTA for the meaning of "the transfer date".

21. Article 15 omits section 444ABC ICTA as its function is now performed by section 444ABA ICTA (as amended by article 12). Article 6(a) and (c) makes consequential amendments to section 432E.

22. Article 16 amends section 444ABD ICTA.

23. Subsection (1) is amended by adding a reference to Form 40 missing from the Schedule 9 FA 2007 version of the section and by providing that the profits given by subsection (1) are taken into account in accordance with the directions in subsection (1A) (Case I) and subsection (1C) (gross roll-up business - Case VI).

24. Subsection (1A) provides the rule where a company is a Case I company as provided for by section 431G(3) ICTA. The appropriate fraction of the section 444ABD ICTA profits referable to life assurance business is that given in section 432G(1) ICTA – subsection (1B) – namely LABL/TL where LABL is the amount of the life assurance business liabilities transferred and TL the whole of the liabilities transferred. It will only be necessary to apply this fraction if the company carries on PHI business. Subsection (1A) also makes it clear that any section 444ABD profit is only to be brought into account as provided for by the section, and so not as a result of any general provisions of Case I of Schedule D.

25. Subsection (1C) provides the corresponding rule where a company is an I minus E company with gross roll-up business ("GRB"). The appropriate fraction of the section 444ABD profits referable to GRB is that given in section 432G(4) ICTA – subsection (1D) – namely GRBL/TL where GRBL is the amount of the GRB liabilities transferred and TL the whole of the liabilities transferred. It will only be necessary to apply this fraction of the company carries on PHI business. Subsection (1C) also makes it clear that any section 444ABD profit is only to be brought into account as provided for by the section, and so not as a result of any general provisions of Case I of Schedule D.

26. A section 444ABD profit is brought into account in the one day period of account given by section 444AA(3) ICTA and the accounting period ending on that day in a case where there is a whole business transfer: otherwise it is brought into account in the period of account and accounting period first ending after the transfer.

27. Subsection (1E) deals with the case where the liabilities transferred are less than the Form 40 line 32 value assets. This case represents the acquisition by the transferee of surplus of the transferor, and the additional amount of assets does not represent a payment by the transferor to rid itself of trading liabilities, which is what makes a deductible expense an amounts of assets up to the value of those liabilities. In any event section 444AC ICTA already provides for an exclusion of surplus in the hands of the transferee.

28. The effect of subsection (1E) is to put it beyond doubt that no loss represented by the excess is to be taken into account in any manner, whether it arises in a whole or part business transfer.

6. TRANSFEREE CASE I PROVISIONS

Articles 17 and 18

1. Article 17 amends section 444AC ICTA.

2. Subsection (1) of section 444AC is amended so that it applies to any transfer of business. Accordingly section 444ACZA ICTA (which deals with part transfers) is repealed by article 18.

3. Subsection (1) is also amended to show that there is only one condition required to be met. That arises because Condition B in subsection (3) of the version of section 444AC included in Schedule 9 FA 2007 is repealed (it required there to be an amount of surplus shown in the transferor's FSA return). The only condition is in subsection (2), that the transferor's business was not mutual.

4. Subsection (4), which defines the amount to be excluded from the Case I profit of the transferee, is amended to make the amount the smaller of—

- the transferred surplus, and
- a positive amount shown in line 13 of Form 14 in the transferor's FSA return for the last period that ends before the transfer date.

5. Subsection (5) is amended to give a revised meaning of transferred surplus. It is VE – RBTO.

VE means the same as in section 444ABB ICTA, that is VL32 less VTL (if positive) where—

- VL32 is the value of the assets in line 32 of Form 40 shown in the last FSA return to end before the transfer (including where relevant the return deemed to exist under section 444AA(2) ICTA);
- VTL means the amount of the liabilities transferred by the insurance business transfer scheme.

RBTO means the part of BTO that relates to relevant non-transferred assets transferred to the transferee.

BTO means the same as in section 444ABA ICTA, the lesser of ABTO and AL13 where—

- ABTO is the amount shown in line 32 of Form 40 for the period of account including the transfer date. This means the actual FSA return covering that date, rather than a deemed one;
- AL 13 is the unallocated surplus shown in the last FSA return to end before the transfer. In this case, this may be the return deemed to exist under section 444AA(2) ICTA.

“Relevant non-transferred assets” takes its meaning from section 444AB ICTA and means assets that are transferred to the transferee but not to its long-term insurance fund.

6. The object of these changes is to ensure that there is only excluded an amount of surplus if it certain that assets representing that surplus have been transferred to the transferee’s long-term insurance fund and not anywhere else.

7. THE TARGETED ANTI-AVOIDANCE RULE

Articles 19 to 23 (and article 6(b) and (d))

1. Article 19 amends section 444AEA ICTA. It makes two changes. First, it amends subsection (1) to confine section 444AEA (and therefore also sections 444AEB and 444AEC ICTA) to consideration of a case where a Case I advantage might arise from the whole of “transfer scheme arrangements”. This is to enable a separate set of rules in sections 444AECA to 444AECC ICTA (inserted by article 22) to apply to consideration of a case where a Case I advantage might arise from only a part of such arrangements. It should be noted however that this divide is not between cases where the transfer is of the whole of the transferor’s business and the case where it is a part transfer. Both sections 444AEA to 444AEC and sections 444AECA to 444AECC can apply to whole transfers and to part transfers: it is the wider arrangements which are being looked at separately.

2. The second change relates to the period for which any counteraction (deeming an amount of a Case I advantage to be a trading receipt within section 83(2) FA 1989) is applied. The amendments are to subsections (3) and (4). Subsection (3) deals with the transferor and provides that the period in question depends on when the Case I advantage is obtained. If it is in a period of account that includes the transfer date or an earlier period, the charge arises in the period of account ending immediately before the transfer date, if there is one, or else the period including that date. If it is obtained in a later period, the charge arises in that later period.

3. Subsection (4) is amended so that for the transferee the charge is always in the period in which the advantage is obtained.

4. Articles 20 and 21 amend sections 444AEB (calculation of Case I advantage of transferor) and 444AEC (calculation of Case I advantage of transferee) in similar ways.

5. Each of subsections (1) and (2) of the two sections is amended—

- to show that they apply to the whole of the transfer scheme arrangements;
- to refer to advantages “expected to be obtained”. This is because, at the time that the advantage needs to be calculated (the relevant time), not all (and possibly not any) of the transfer scheme arrangements will have been executed.

6. Section 444AEB(6) is amended to include a definition of the relevant time to mean the time at which a clearance application under section 444AED ICTA is made, or, if no such application is made, the transfer date.

7. Article 22 inserts new sections 444AECA to 444AECC into ICTA.

8. These sections are a copy of sections 444AEA to 444AEC (after amendment by articles 19 to 21) but for the following points—

- They refer to a case where any part of the transfer scheme arrangements is being tested.
- Subsection (2) of each of sections 444AECB and 444AECC provides for a set off of a Case I disadvantage arising from another part of the transfer scheme arrangements in arriving at an overall net advantage.

9. Article 23 amends section 444AED(1) ICTA to refer to section 444AECA.

10. Article 6(b) and (d) makes consequential amendments to section 432E ICTA.

8. CHANGES OF VALUE OF ASSETS BROUGHT INTO ACCOUNT: NON-PROFIT COMPANIES

1. Article 26 amends section 83YA FA 1989 which applies where a non-profit company (one where any with-profits business is insignificant) creates a "book value difference" by having a positive amount in line 51 of Form 14 in its periodical return.

2. Article 26(2) substitutes the term "admissible" for "fair" value in section 83YA(7)(a) where the amount of a transfer-in is being computed. Use of "fair value" may unintentionally increase the amount of relief available, so the term "admissible", which better reflects the value actually shown in a periodical return, is used instead. Article 26(3) borrows the definition of "admissible value" from section 83XA(9) FA 1989.

3. Section 83YA(7)(a) is also amended to make it clear that any relevant transfer-in can only be one that came from a non-profit fund of the transferor.

9. CARRY BACK OF SECTION 213 LOSSES TO TRANSFEROR

1. Article 29(4) to (9) amends section 213 TCGA. After its amendment by the Finance Act 2003, section 213 permits a net loss arising on section 212 TCGA assets to be carried back to be used by the transferor, but only in a case where companies were in the same group at the time of transfer and where the transfer of business concerned was such that the transferee started business with the transferred assets and liabilities, and not where the transferee had existing business. This was done to ensure that the losses carried back were clearly related to the transferred business.

2. The changes in section 213 are designed to allow a carry back where the transferee was carrying on existing business as well. Accordingly article 29(4)(a) omits section 213(8A)(a) which contains the "new business only" condition.

3. But to ensure that the losses carried back are related to assets transferred, the concept of a "transferred assets net amount" is created. This is defined in a new subsection (8J) inserted by article 29(9), and means a net amount (of losses on section

212 assets over gains) but only in relation to those section 212 assets transferred by the insurance business transfer scheme from the transferor to the transferee.

4. This term is then used in place of simply “net amount” in the relevant places in section 213(8A)(c) and (d), (8B) and (8F): see article 29(4)(b), (5) and (6). Section 213(8H) which applies to all carry backs at present is split. The original subsection is amended by article 29(7) so as to remove references to section 213(8A) and (8B), while a new subsection (8HA) inserted by article 29(8) deals with these two subsections, referring again only to “transferred assets net amount”.

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