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STATUTORY INSTRUMENTS

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**2009 No. 3001**

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

**PART 2**

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

**CHAPTER 2**

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

*Charge to tax on certain amounts treated as distributions*

**Treatment of certain amounts as distributions**

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

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

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

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

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

*Charge to tax on disposal of asset*

**The charge to tax**

**17.**—(1) There is a charge to tax if—

- (a) a person disposes of an asset,
  - (b) either condition A or condition B is met, and
  - (c) as a result of the disposal, an offshore income gain arises to the person making the disposal.
- (2) Condition A is that the asset is an interest in a non-reporting fund at the time of the disposal.
- (3) Condition B is that—
- (a) the asset is an interest in a reporting fund at the time of the disposal,

- (b) the reporting fund was previously a non-reporting fund (becoming a reporting fund as the result of an application under regulation 52),
- (c) the interest was an interest in a non-reporting fund during some or all of the material period,
- (d) an election under regulation 48 was not prevented by paragraph (5) of that regulation, and
- (e) no election has been made under regulation 48(2).

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

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

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

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

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

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

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

(5) Paragraph (1) is subject to—

- (a) regulation 19 (income treated as arising under regulation 17: remittance basis);
- (b) regulation 20(1) (offshore income gain arising to non-resident trustees not treated as income of settlor);
- (c) regulation 20(5) (application to gains of non-resident settlements);
- (d) regulation 24(6) (application of section 13 of TCGA 1992).

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

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

- (a) section 809B, 809D or 809E of ITA 2007(3) (remittance basis) applies to the individual for that year, and
- (b) the individual is not domiciled in the United Kingdom in that year.

(2) The income is treated as relevant foreign income of the individual.

(3) For the purposes of Chapter A1 of Part 14 of ITA 2007(4) (remittance basis)—

- (a) any consideration obtained on the disposal of the asset is treated as deriving from the income, and

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

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

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

- (b) unless the consideration so obtained is of an amount equal to or exceeding the market value of the asset, the asset is treated as deriving from the income.
- (4) In paragraph (3)—
  - (a) “the asset” means the asset the disposal of which causes the income to be treated as arising, and
  - (b) “the disposal” means the disposal mentioned in sub-paragraph (a) of that paragraph.
- (5) This regulation does not apply for the purposes of regulation 20.

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

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

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

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

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

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

- (a) references to section 2(2) amounts (except those in paragraph 7B(2)(b) and (4) of Schedule 4C) were to OIG amounts,
- (b) references to chargeable gains (except the one in paragraph 1(5) of Schedule 4C) were to offshore income gains,
- (c) references to anything accruing were to it arising (and similar references, except the one in paragraph 1(5) of Schedule 4C, were read accordingly),
- (d) sections 87(4), 88(2) to (5) and 97(6) and paragraphs 1(3A), 3 to 7 and 12 of Schedule 4C were omitted, and
- (e) regulation 21 did not apply.

(4) Section 87A of TCGA 1992(7) applies for a tax year by virtue of paragraph (3) before it applies for that year otherwise than by virtue of that paragraph.

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

(6) Section 12 was substituted by paragraph 60 of Schedule 7 to the Finance Act 2008; sections 87 to 87C were substituted for section 87 by paragraph 108 of Schedule 7 to the Finance Act 2008; section 88 was amended by section 130(2) of the Finance Act 1998 (c. 36), paragraph 35 of Schedule 12 to the Finance Act 2006 (c. 25), and by paragraph 6 of Schedule 2 and paragraph 109 of Schedule 7 to the Finance Act 2008; section 89 was amended by paragraph 110 of Schedule 7 to the Finance Act 2008; sections 90 and 90A were substituted for section 90 by paragraph 111 of Schedule 7 to the Finance Act 2008; section 96 was amended by section 127(3) of the Finance Act 1998, section 96 of, and paragraph 3 of Schedule 26 to, the Finance Act 2000 (c. 17); section 97 was amended by section 129(2) of the Finance Act 1998, paragraph 4 of Schedule 26 to the Finance Act 2000, paragraph 15 of Schedule 12 to the Finance Act 2006 and paragraph 302 of Schedule 1 to the Income Tax Act 2007 (c. 3); and section 98 was amended by paragraph 5 of Schedule 26 to the Finance Act 2000, paragraph 16 of Schedule 12 to the Finance Act 2006 and paragraph 303 of Schedule 1 to the Income Tax Act 2007. Schedule 4C was inserted by paragraph 1 of Schedule 26 to the Finance Act 2000. Paragraph 1 of Schedule 4C was substituted by paragraph 2 of Schedule 29 to the Finance Act 2003 (c. 14) and paragraph 7B of Schedule 4C, in its present form, was substituted by paragraph 137 of Schedule 7 to the Finance Act 2008.

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

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

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

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

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

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

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

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

(5) If—

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

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

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

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

### *Application of TCGA 1992*

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

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

(a) section 2(1) of TCGA 1992 (persons chargeable to capital gains tax);

(b) section 10 of TCGA 1992(9) (non-resident with a United Kingdom branch or agency);

(c) section 10B of TCGA 1992(10) (non-resident company with United Kingdom permanent establishment).

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

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

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

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

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

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

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

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

- (2) The section applies as if, in subsection (2)—
  - (a) the reference to section 86A were omitted;
  - (b) for the reference to capital gains tax there were substituted a reference to income tax;
  - (c) in paragraph (a), for the reference to chargeable gains and losses there were substituted a reference to offshore income gains;
  - (d) in paragraph (b)—
    - (i) for the reference to chargeable gains there were substituted a reference to offshore income gains;
    - (ii) for the reference to section 13 or 86 there were substituted a reference to regulation 24;
  - (e) paragraph (c) were omitted; and
  - (f) for the reference to gains or, as the case may be, losses there were substituted a reference to offshore income gains.
- (3) The section applies as if, in subsection (3)—
  - (a) for the reference to gains and losses there were substituted a reference to offshore income gains; and
  - (b) for the reference to any gain or loss there were substituted a reference to any offshore income gains.
- (4) The section applies as if subsection (4) were omitted.
- (5) The section applies as if, in subsection (5)—
  - (a) for the reference to gains and losses there were substituted a reference to offshore income gains;
  - (b) for the reference to any chargeable gain or allowable loss there were substituted a reference to an offshore income gain; and
  - (c) for the reference to section 10 or 16(3) there were substituted a reference to regulation 22(1)(b).
- (6) The section applies as if subsection (6) were omitted.
- (7) The section applies as if, in subsection (7), for the reference to capital gains tax there were substituted a reference to income tax.
- (8) The section applies as if, in subsection (9ZA)—
  - (a) for the reference to foreign chargeable gains there were substituted a reference to offshore income gains to which regulation 19 applied; and
  - (b) the second sentence of that subsection were omitted.
- (9) The section applies as if, in subsection (9B)—

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

- (a) in paragraph (a)—
  - (i) for the reference to section 87 or 89(2) there were substituted a reference to regulation 20;
  - (ii) for the reference to chargeable gains there were substituted a reference to offshore income gains; and
- (b) in paragraph (b) the references to subsections (2)(c) and (6) were omitted.
- (10) The section applies as if, in subsection (9C)—
  - (a) for the reference to capital gains tax there were substituted a reference to income tax; and
  - (b) for the reference to chargeable gains there were substituted a reference to offshore income gains.

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

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

- (2) The section applies as if—
  - (a) for any reference to a chargeable gain there were substituted a reference to an offshore income gain; and
  - (b) for any reference to anything accruing there were substituted a reference to it arising (with similar references being read accordingly).
- (3) The section applies as if, in subsection (5), paragraphs (b) and (c) were omitted.
- (4) The section applies as if, in subsection (7), for the reference to capital gains tax there were substituted a reference to income tax or corporation tax.
- (5) The section applies as if subsection (8) were omitted.
- (6) If this regulation applies, the person to whom the offshore income gain arises is treated as the person making the disposal.
- (7) To the extent that an offshore income gain is treated, by virtue of this regulation, as having accrued to any person resident or ordinarily resident in the United Kingdom, that gain shall not be deemed to be the income of any individual for the purposes of Chapter 2 of Part 13 of ITA 2007 (transfer of assets abroad).

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