

Amendments to the transfer of assets abroad legislation

Who is likely to be affected?

UK residents who have transferred assets so that income has become payable to an overseas person, or who benefit from such transfers.

General description of the measure

The measure adds a new exemption from the transfer of assets charge where EU treaty freedoms are engaged which focuses on the nature of transactions and activities related to the transfer rather than their purpose. There is an existing exemption where there is no tax avoidance purpose, or where the transactions are genuine commercial transactions, and any tax avoidance purpose was incidental.

Policy objective

The measure aims to update this anti-avoidance provision to maintain its compatibility with EU law, and to make certain other amendments to improve the clarity of the rules.

Background to the measure

An infraction notice (Reasoned Opinion) was issued by the European Commission on 16 February 2011. The Commission argued that the transfer of assets legislation breaches the treaty freedoms of establishment and movement of capital.

On 6 December 2011 the Government announced, by way of written ministerial statement, that there would be a consultation on amendments proposed to update the transfer of assets legislation and address the infraction. This was confirmed at Budget 2012.

The consultation document was published on 30 July 2012 and the closing date for comments was 22 October 2012. The Government's response to the consultation was published on 11 December 2012.

Detailed proposal

Operative date

The legislation is expected to come into force on the date that Finance Bill 2013 receives Royal Assent, but with retrospective effect from 6 April 2012 for the new exemption.

Current law

The transfer of assets legislation is designed to prevent individuals avoiding tax by using offshore structures to shelter income. Broadly, the transfer of assets rules impose a charge to income tax on an individual who is ordinarily resident in the UK (from 6 April 2013 the legislation will apply where an individual is resident in the UK) where there has been a transfer of assets and, as a result of the transfer (and/or any associated operations), income becomes payable to a person abroad, but an individual can still enjoy income, or receive or have entitlement to receive a capital sum or other benefits from the arrangements.

There is an exemption from the charge where it would be unreasonable to draw the conclusion, from all the circumstances of the case, that avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were

effected, or (if that is not the case) all the relevant transactions were genuine commercial transactions and it would not be reasonable to draw the conclusion, again from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purposes of avoiding liability to taxation.

Proposed revisions

Legislation will be introduced in Finance Bill 2013 to modify the existing provision by creating a new exemption which operates where the EU treaty freedoms are engaged and which focuses on whether the nature of transactions is genuine and whether they serve the purpose of the freedoms. Business transactions will not be regarded as genuine unless they are on arm's length terms¹ and, in the case of transactions for the purposes of a business establishment, give rise to income attributable to economically significant activity that takes place overseas.

These changes will provide exemption for genuine commercial business activities overseas and also for transactions that do not involve commercial activities but that are nevertheless genuine transactions that are protected by the single market.

The measure will also make a series of other changes to the transfer of assets provisions aimed at clarifying the way certain aspects operate. There will be an amendment to provide more certainty about how benefits received by an individual are matched to the 'relevant income' arising to the person abroad, in circumstances when an individual other than the transferor is the chargeable person.

There will also be an amendment to provide greater clarity around the prevention of double charging, in circumstances where the same income could be the subject of both a transfer of assets charge and also a charge under another part of the Taxes Acts.

Additionally the measure will clarify how the transfer of assets rules operate in relation to reliefs under double taxation agreements. This will ensure that neither treaty provisions nor the transfer of assets legislation is applied in an unintended way to allow a relief that would not otherwise be due.

Summary of impacts

Exchequer impact (£m)	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
	This measure is expected to reduce receipts by approximately £10 million per annum from 2014-15. The final costing will be subject to scrutiny by the Office for Budget Responsibility, and will be set out at Budget 2013.					
Economic impact	The measure is not expected to have any significant economic impacts.					
Impact on individuals and households	This measure amends existing anti-avoidance legislation and will only impact on a small number of individuals engaging in certain cross-border tax avoidance activity.					
Equalities impacts	No equalities impact is expected.					

¹ The extended arm's length test in the existing legislation which includes whether a transaction would have been entered into between unconnected persons dealing at arm's length.

Impact on business including civil society organisations	This measure is expected to have no impact on businesses or civil society organisations.
Operational impact (£m) (HMRC or other)	This measure is not expected to have any significant operational impacts.
Other impacts	Other impacts have been considered and none have been identified.

Monitoring and evaluation

This measure will be kept under review through communication with affected taxpayer groups.

Further advice

If you have any questions about these changes please send an e-mail to PTIConsultation.Specialistpersonaltax@hmrc.gsi.gov.uk

1 Transfer of assets abroad

Schedule 1 amends Chapter 2 of Part 13 of ITA 2007 (tax avoidance: transfer of assets abroad).

SCHEDULES

SCHEDULE 1

Section 1

TRANSFER OF ASSETS ABROAD

PART 1

INTRODUCTION

- 1 Chapter 2 of Part 13 of ITA 2007 (tax avoidance: transfer of assets abroad) is amended as follows.

PART 2

NEW EXEMPTION FOR GENUINE TRANSACTIONS ETC

- 2 In section 718 (meaning of “person abroad” etc) in subsection (2) omit paragraph (a) (UK resident body corporate incorporated outside UK treated as resident outside UK).
- 3 In section 720 (charge to tax on income treated as arising under section 721) in subsection (7) –
- (a) for “742” substitute “742A”, and
 - (b) after “transaction” insert “, etc”.
- 4 In section 727 (charge to tax on income treated as arising under section 728) in subsection (5) –
- (a) for “742” substitute “742A”, and
 - (b) after “transaction” insert “, etc”.
- 5 In section 731 (charge to tax on income treated as arising under section 732) in subsection (4) –
- (a) for “742” substitute “742A”, and
 - (b) after “transaction” insert “, etc”.
- 6 (1) Section 736 (exemptions: introduction) is amended as follows.
- (2) In subsection (1) for “742” substitute “742A”.
- (3) After subsection (2) insert –
- “(2A) The exemption given by section 742A applies only in the case of a relevant transaction effected on or after 6 April 2012.”
- 7 After section 742 insert –

“742A Post-5 April 2012 transactions: exemption for genuine transactions

- (1) Subsection (2) applies for the purpose of determining the liability of an individual to tax under this Chapter by reference to a relevant transaction if—
 - (a) the transaction is effected on or after 6 April 2012, and
 - (b) conditions A and B are met.
- (2) Income is to be left out of account so far as the individual satisfies an officer of Revenue and Customs that it is attributable to the transaction.
- (3) Condition A is that—
 - (a) were, viewed objectively, the transaction to be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances, and
 - (b) were the individual to be liable to tax under this Chapter by reference to the transaction,
the individual’s liability to tax would, in contravention of Title II or IV of the Treaty on the Functioning of the European Union, constitute an unjustified and disproportionate restriction on a freedom protected under that Title.
- (4) Condition B is that the individual satisfies an officer of Revenue and Customs that, viewed objectively, the transaction must be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances.
- (5) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the transaction must not—
 - (a) be on terms other than those that would have been made between persons not connected with each other dealing at arm’s length, or
 - (b) be a transaction that would not have been entered into between such persons so dealing,
having regard to any arrangements under which the transaction is effected and any other relevant circumstances.
- (6) Subsection (7) applies if any asset or income falling within subsection (11) is used for the purposes of, or is received in the course of, activities carried on in a territory outside the United Kingdom by a person (“the relevant person”) through a business establishment which the relevant person has in that territory.
- (7) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the activities mentioned in subsection (6) must consist of the provision by the relevant person of goods or services to others on a commercial basis and involve—
 - (a) the use of staff in numbers, and with competence and authority,
 - (b) the use of premises and equipment, and

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- (c) the addition of economic value, by the relevant person, to those to whom the goods or services are provided, commensurate with the size and nature of those activities.
- (8) In subsection (7)(a) “staff” means employees, agents or contractors of the relevant person.
- (9) To determine if a person has a “business establishment” in a territory outside the United Kingdom, apply sections 1141, 1142(1) and 1143 of CTA 2010 as if in those provisions –
- (a) references to a company were to a person, and
 - (b) references to a permanent establishment were to a business establishment.
- (10) Subsection (5) does not apply if –
- (a) the relevant transfer is made by an individual who makes it wholly –
 - (i) for personal reasons (and not commercial reasons), and
 - (ii) for the personal benefit (and not the commercial benefit) of other individuals, and
 - (b) no consideration is given (directly or indirectly) for the relevant transfer or otherwise for any benefit received by any individual mentioned in paragraph (a)(ii),
- and all assets and income falling within subsection (11) are dealt with accordingly.
- (11) The assets and income falling within this subsection are –
- (a) any of the assets transferred by the relevant transfer;
 - (b) any assets directly or indirectly representing any of the assets transferred;
 - (c) any income arising from any assets within paragraph (a) or (b);
 - (d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).
- (12) In subsections (10) and (11) references to the relevant transfer are to –
- (a) if the transaction mentioned in subsection (1) is a relevant transfer, the transfer, or
 - (b) if the transaction so mentioned is an associated operation, the relevant transfer to which it relates.”
- 8 In section 751 (the Tribunal’s jurisdiction on appeals) after paragraph (d) insert –
- “(da) section 742A (post-5 April 2012 transactions: exemption for genuine transactions),”.
- 9 (1) The amendment made by paragraph 2 above has effect in relation to times on or after 6 April 2012.
- (2) The amendments made by paragraphs 3 to 8 above have effect for the tax year 2012-13 and subsequent tax years.

PART 3

AMENDMENTS RELATING TO THE CHARGES UNDER SECTIONS 720 AND 727

Main provision

- 10 (1) Section 721 (individuals with power to enjoy income as a result of a relevant transaction) is amended as follows.
- (2) In subsection (3) after “the income” insert “of the person abroad”.
- (3) After subsection (3) insert—
- “(3A) The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to sections 724 and 725).
- (3B) Subsection (1) does not apply if—
- (a) the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and
- (b) all income tax for which the individual is liable has been paid.”
- (4) In subsection (4) after “the income” insert “of the person abroad”.
- (5) Omit subsection (5)(a).
- 11 (1) Section 724 (special rules where benefit provided out of income of person abroad) is amended as follows.
- (2) In subsection (2) after “on” insert “an amount equal to”.
- (3) In subsection (3)—
- (a) for “on” substitute “by reference to”, and
- (b) after “previous tax year” insert “under this Chapter”.
- 12 (1) Section 725 (reduction in amount charged where controlled foreign company involved) is amended as follows.
- (2) In subsection (1), as substituted by paragraph 22 of Schedule 20 to FA 2012, for paragraph (b) and the “and” before it substitute—
- “(b) an amount of income is treated as arising to an individual under section 721 for a tax year, and
- (c) the income mentioned in section 721(2) is or includes a sum forming part of the CFC’s chargeable profits for that accounting period.”
- (3) After subsection (2) insert—
- “(2A) In a case in which section 724 applies, the reference to S in the formula in subsection (2) is to be read as a reference to X% of S.
- (2B) “X%” is determined as follows—
- $$100\% \times \frac{A}{I}$$
- where—

A is the amount on which the individual is liable as determined under section 724(2), and

I is the amount of the income mentioned in section 721(2).”

- (4) In relation to cases in which the amendments made by paragraph 22 of Schedule 20 to FA 2012 are to be ignored in accordance with paragraph 50(9) of that Schedule, the amendment made by sub-paragraph (5) below has effect instead of the amendment made by sub-paragraph (2) above.
- (5) In subsection (1) for paragraph (c) and the “and” before it substitute –
- “(c) an amount of income is treated as arising to an individual under section 721 for a tax year, and
 - (d) the income mentioned in section 721(2) is or includes a sum forming part of the controlled foreign company’s chargeable profits for that accounting period.”
- 13 In section 726 (non-UK domiciled individuals to whom remittance basis applies) in subsection (2) for “the extent” substitute “the corresponding extent”.
- 14 (1) Section 728 (individuals receiving capital sums as a result of a relevant transaction) is amended as follows.
- (2) After subsection (1) insert –
- “(1A) The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to subsection (2)).”
- (3) In subsection (2) for the words from “it applies” to the end substitute “if –
- (a) in subsection (1) of that section –
 - (i) the reference to section 721 were a reference to this section, and
 - (ii) the reference to section 721(2) were a reference to subsection (1)(a) of this section, and
 - (b) subsections (2A) and (2B) of that section were omitted.”
- (4) After subsection (2) insert –
- “(2A) Subsection (1) does not apply if –
- (a) the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and
 - (b) all income tax for which the individual is liable has been paid.”
- (5) Omit subsection (3)(a).
- 15 In section 730 (non-UK domiciled individuals to whom remittance basis applies) in subsection (2) for “the extent” substitute “the corresponding extent”.
- 16 (1) Section 743 (no duplication of charges) is amended as follows.
- (2) After subsection (2) insert –
- “(2A) Subsection (2B) applies if –

- (a) in the case of an individual, an amount of income is taken into account in charging income tax under section 720 or 727, and
 - (b) the individual subsequently receives that income.
- (2B) The income received is treated as not being the individual’s income for income tax purposes.”
- (3) In subsection (3) for “subsections (1) and (2)” substitute “this section”.
- (4) Omit subsection (4).
- 17 (1) Section 744 (meaning of taking income into account in charging income tax for section 743) is amended as follows.
 - (2) In subsection (1) for “743(1) and (2)” substitute “743”.
 - (3) In subsection (2) –
 - (a) in paragraph (a) omit “or value of the benefit”, and
 - (b) in paragraph (b) for “income charged” substitute “the income mentioned in section 721(2)”.
 - (4) In subsection (3) for “that income” substitute “the income mentioned in section 728(1)(a)”.
- 18 (1) Section 745 (rates of tax applicable to income charged under sections 720 and 727 etc) is amended as follows.
 - (2) In subsection (1) for “so far as it” substitute “if (and to the corresponding extent that) the income mentioned in section 721(2) or 728(1)(a)”.
 - (3) For subsections (3) and (4) substitute –
 - “(3) Subsection (4) applies to income treated as arising to an individual under section 721 or 728 so far as subsection (1) does not apply to it.
 - (4) The charge to income tax under section 720 or 727 operates by treating the income as if it were income within section 19(2) (meaning of “dividend income”) if the income mentioned in section 721(2) or 728(1)(a) would be dividend income were it the income of the individual.”
- 19 In section 746 (deductions and reliefs where individual charged under section 720 or 727) in subsection (2) –
 - (a) after “if” insert “the amount by reference to which”, and
 - (b) after “728” insert “is determined”.

Commencement and transitional provision

- 20 (1) The amendments made by this Part of this Schedule have effect for the tax year 2013-14 and subsequent tax years.
 - (2) They have effect in relation to relevant transfers occurring before 6 April 2013 as well as relevant transfers occurring on or after that date.
- 21 (1) Sections 721(3B) and 728(2A) of ITA 2007 (as inserted by paragraphs 10(3) and 14(4) above) have effect only if the income of the person abroad arises to that person on or after 6 April 2013.
 - (2) The amendments made by paragraphs 10(5) and 14(5) above have no effect in relation to income arising to a person abroad before 6 April 2013.

PART 4

NEW BASIS FOR DETERMINING INCOME UNDER SECTION 732

Main provision

22 For sections 732 to 735A substitute—

“732 Non-transferors receiving a benefit as a result of relevant transactions

- (1) This section applies if a relevant transfer occurs.
- (2) Income is treated as arising to an individual in a tax year (“the relevant tax year”) for income tax purposes if—
 - (a) in the relevant tax year or any earlier tax year, the individual receives a relevant benefit, and
 - (b) all or part of the relevant benefit is matched (under section 733 as it applies for the relevant tax year) with the relevant income amount for the relevant tax year or any earlier tax year.
- (3) The amount of the income treated as arising is equal to—
 - (a) the amount or value of the relevant benefit, or
 - (b) if only part of the relevant benefit is matched, the amount or value of that part.
- (4) A benefit received by an individual is “relevant” if—
 - (a) the individual is ordinarily UK resident when the benefit is received,
 - (b) the benefit is provided out of assets which are available for the purpose as a result of—
 - (i) the relevant transfer, or
 - (ii) one or more associated operations,
 - (c) the individual is not liable to income tax under section 720 or 727 by reference to the relevant transfer and would not be so liable if the effect of sections 726 and 730 were ignored, and
 - (d) the individual is not liable to income tax on the amount or value of the benefit (apart from section 731).
- (5) The “relevant income amount” for a tax year is the total amount of income arising in the year to persons abroad which, as a result of the relevant transfer or associated operations, can be used directly or indirectly for providing benefits to individuals.
- (6) Income which arises to a person abroad is to be left out of account for the purposes of subsection (5) if it is required to be left out of account because of section 743(1) and (2).
- (7) Income which arises to a person abroad is also to be left out of account for the purposes of subsection (5) if—
 - (a) an individual to whom the income can be used for providing benefits is liable for income tax charged on the income by virtue of a charge not contained in this Chapter, and
 - (b) all income tax for which the individual is liable has been paid.

733 Matching relevant benefits with relevant income amounts

- (1) Take the following steps in order to match relevant benefits with relevant income amounts for the purposes of section 732(2).

Step 1

Find the relevant income amount for the relevant tax year.

Step 2

Find the total amount of relevant benefits received by individuals in the relevant tax year.

Step 3

The relevant income amount for the relevant tax year is matched with—

- (a) if the total amount of the relevant benefits received in the relevant tax year does not exceed the relevant income amount, each relevant benefit so received, and
- (b) otherwise, the relevant proportion of each of those relevant benefits.

“The relevant proportion” is the relevant income amount for the relevant tax year divided by the total amount of the relevant benefits received in the relevant tax year.

Step 4

If paragraph (a) of Step 3 applies—

- (a) reduce the relevant income amount for the relevant tax year by the total amount of the relevant benefits referred to there, and
- (b) reduce the amount of those relevant benefits to nil.

If paragraph (b) of Step 3 applies—

- (a) reduce the relevant income amount for the relevant tax year to nil, and
- (b) reduce the amount of each of the relevant benefits referred to there by the relevant proportion of that relevant benefit.

Step 5

Start again at Step 1 (unless subsection (2) applies).

If the relevant income amount for the relevant tax year (as reduced at Step 4) is not nil, read references to relevant benefits received in the relevant tax year as references to relevant benefits received in the latest tax year which—

- (a) is before the last tax year for which Steps 1 to 4 have been taken, and
- (b) is a tax year in which relevant benefits (the amounts of which have not been reduced to nil) were received by individuals.

If the relevant income amount for the relevant tax year (as so reduced) is nil, read references to the relevant income amount for the relevant tax year as the relevant income amount for the latest tax year—

- (a) which is before the last tax year for which Steps 1 to 4 have been taken, and
- (b) for which the relevant income amount is not nil.

- (2) This subsection applies if –
 - (a) all relevant benefits received by individuals in the relevant tax year and earlier tax years have been reduced to nil, or
 - (b) the relevant income amounts for the relevant tax year and all earlier tax years have all been reduced to nil.
- (3) The effect of any reduction under Step 4 in subsection (1) is to be taken into account in any subsequent application of this section.

734 Reduction in relevant income amount: previous capital gains charge

- (1) This section applies if –
 - (a) a relevant benefit is received by an individual in the relevant tax year,
 - (b) for that tax year the whole or a part of the relevant benefit is a capital payment to which section 87 or 89(2) of, or paragraph 8 of Schedule 4C to, TCGA 1992 applies (chargeable gains: gains attributed to beneficiaries),
 - (c) it is such a payment because it is not matched with the relevant income amount for the relevant tax year or any earlier tax year, and
 - (d) because of that capital payment, chargeable gains are treated as accruing to the individual in the relevant tax year or a subsequent tax year under any of the provisions referred to in paragraph (b).
- (2) In applying section 732 (and section 733) for any tax year after the relevant tax year, the relevant benefit is to be reduced by the amount of those gains.
- (3) References in this section to chargeable gains treated as accruing to an individual include offshore income gains treated as arising to the individual (see regulations 20 and 22 to 24 of the Offshore Funds (Tax) Regulations 2009 (S.I. 2009/3001)).

734A Further provision about matching

- (1) This section applies where the relevant benefits received in a tax year are to be matched with the relevant income amount for a tax year at Step 3 in section 733(1) as it applies for the relevant tax year.
- (2) Take the following steps to determine how the relevant benefits are matched with the income included in the relevant income amount; and the reductions in the relevant benefits and the relevant income amount which are then to be made at Step 4 in section 733(1) are to be made accordingly.

Step 1

Determine which (if any) of the relevant benefits are benefits received by an individual to whom section 735 applies for the relevant tax year.

Such benefits are referred to below as “section 735 benefits”.

Benefits which are not section 735 benefits are referred to below as “non-section 735 benefits”.

If there are no section 735 benefits, go straight to Step 4.

Step 2

Match the section 735 benefits with UK income included in the relevant income amount.

For this purpose, if the total amount of the section 735 benefits exceeds the total amount of the UK income included in the relevant income amount, apportion the UK income between the section 735 benefits in proportion to their amounts.

If paragraph (b) of Step 3 in section 733(1) applies, references above and at Step 3 below to the section 735 benefits are to be read as references to the relevant proportion of each of the section 735 benefits.

Step 3

So far as the section 735 benefits are not matched at Step 2, match them with non-UK income included in the relevant income amount.

Step 4

Match the non-section 735 benefits with non-UK income included in the relevant income amount that is unmatched after Step 3.

For this purpose, if the total amount of the non-section 735 benefits exceeds the total amount of the unmatched non-UK income, apportion the unmatched non-UK income between the non-section 735 benefits in proportion to their amounts.

If paragraph (b) of Step 3 in section 733(1) applies, references above and at Step 5 below to the non-section 735 benefits are to be read as references to the relevant proportion of each of the non-section 735 benefits.

Step 5

So far as the non-section 735 benefits are not matched at Step 4, match them with UK income included in the relevant income amount that is unmatched after Step 2.

- (3) In this section “UK income” means income which is not non-UK income.
- (4) In this section and section 735 “non-UK income” means income which would be relevant foreign income of the person abroad to whom it arises were that person a UK resident individual.

735 Non-UK domiciled individuals to whom remittance basis applies

- (1) This section applies to an individual for the relevant tax year if—
 - (a) section 809B, 809D or 809E (remittance basis) applies to the individual for the relevant tax year, and
 - (b) the individual is not domiciled in the United Kingdom in the relevant tax year.
- (2) The following subsections apply if—
 - (a) income (“the deemed income”) is treated under section 732 as arising to the individual in the relevant tax year by virtue of a relevant benefit (“the matched benefit”) received by the individual in a tax year being matched with income (“the matched income”) included in a relevant income amount for a tax year, and
 - (b) the matched income includes non-UK income.

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- (3) For the purposes of this section the deemed income is “foreign” to the corresponding extent that the matched income is non-UK income.
 - (4) Treat the foreign deemed income as relevant foreign income of the individual.
 - (5) For the purposes of Chapter A1 of Part 14 (remittance basis) the following are treated as deriving from the foreign deemed income –
 - (a) the matched benefit so far as it is matched with non-UK income, and
 - (b) the matched income so far as it is non-UK income.”
- 23 (1) Section 740 (exemption: relevant transactions include both pre-5 December 2005 and post-4 December 2005 transactions) is amended as follows.
- (2) In subsection (3) for “subsections (4) to (6)” substitute “subsection (4)”.
 - (3) Omit subsections (5) to (7).
- 24 In section 744 (meaning of taking income into account in charging income tax for section 743) in subsection (4) for the words from “relevant income” to the end substitute “any income included in a relevant income amount for a tax year (see section 732(5)).”

Commencement and transitional provision

- 25 (1) The amendments made by this Part of this Schedule have effect for the tax year 2013-14 and subsequent tax years.
- (2) They have effect in relation to relevant transfers occurring before 6 April 2013 as well as relevant transfers occurring on or after that date.
- 26 (1) Paragraphs 27 and 28 below apply for the purposes of section 732 of ITA 2007 (as inserted by paragraph 22 above) in its application for a tax year in relation to a relevant transfer.
- (2) In those paragraphs references to provisions of ITA 2007 are to be read ignoring the amendments made by this Part of this Schedule.
- 27 (1) Subject to what follows, benefits received by an individual are not “relevant” if received in a tax year which is earlier than the tax year 2013-14.
- (2) An individual who has a pre-2013-14 untaxed benefits amount in relation to the relevant transfer is treated as having received a relevant benefit equal to that amount on 5 April 2013.
 - (3) Take the following steps to determine if an individual has a “pre-2013-14 untaxed benefits amount” in relation to the relevant transfer.

Step 1

Find the amount of the total untaxed benefits of the individual in relation to the relevant transfer for the tax year 2012-13 by taking Steps 1 and 2 in section 733(1) of ITA 2007.

Step 2

Deduct the following from the amount determined at step 1 –

- (a) the amount of any income treated as arising to the individual in relation to the relevant transfer under section 732 of ITA 2007 for the tax year 2012-13, and
- (b) the amount of any chargeable gains relating to the relevant transfer treated as mentioned in section 734(1)(d) of ITA 2007 in the tax year 2012-13.

The result is the individual's pre-2013-14 untaxed benefits amount.

- 28 (1) Subject to what follows, a tax year (an "early tax year") which is earlier than the tax year 2013-14 is not to have a relevant income amount.
- (2) The tax year 2012-13 is to have a relevant income amount which is to be determined by taking the following steps.

Step 1

Find all amounts of income –

- (a) which arise in early tax years to persons abroad, and
- (a) which, as a result of the relevant transfer or associated operations, can be used directly or indirectly for providing a benefit to an individual (a "relevant individual").

Step 2

For every relevant individual, find the available relevant income in relation to the relevant transfer for the tax year 2012-13 by taking Steps 3 to 5 in section 733(1) of ITA 2007.

Step 3

For each relevant individual, deduct from the available relevant income the amount of any income treated as arising to the individual in relation to the relevant transfer under section 732 of ITA 2007 for the tax year 2012-13.

Step 4

Add together all the results from step 3 to give the relevant income amount for the tax year 2012-13.

- 29 Section 732(7) of ITA 2007 (as inserted by paragraph 22 above) has effect only if the income arises to the person abroad on or after 6 April 2013.

EXPLANATORY NOTE

TRANSFER OF ASSETS ABROAD

SUMMARY

1. This Schedule makes changes to the “transfer of assets” anti-avoidance legislation in Chapter 2 of Part 13 of the Income Tax Act 2007 (ITA 2007). This legislation applies to UK resident individuals who have transferred assets so that income has become payable to an overseas person, while the UK resident individual continues to be able to enjoy the income of the person abroad, or receive a capital sum directly or indirectly from the income. The legislation also applies to UK resident individuals who have not made the transfer which results in the income arising to the person abroad, but who can benefit directly or indirectly from the income arising. The changes do two things. They provide a new exemption from charge for “genuine transactions” where European Union treaty freedoms are engaged, and they make a series of other changes to the transfer of assets provisions aimed at clarifying the way certain aspects operate.

DETAILS OF THE SCHEDULE

Part 1

2. Paragraph 1 is introductory and provides for Chapter 2 of Part 13 of ITA 2007 (the transfer of assets abroad provisions) to be amended.

Part 2

3. Paragraph 2 removes from the description of “person abroad” in section 718 ITA 2007 UK resident companies that are incorporated outside the UK as being resident outside the UK. Such companies will now be treated as resident in the UK for the purposes of this legislation.
4. Paragraphs 3, 4 and 5 make amendments to section 720 ITA 2007 consequential to the introduction of new section 742A.
5. Paragraph 6 makes further amendments, in this case to section 736 ITA 2007, consequential to the introduction of new section 742A. It also provides for new section 742A to exempt relevant transactions effected on or after 6 April 2012.

6. Paragraph 7 inserts new section 742A (a new exemption for genuine transactions) into Chapter 2 Part 13 of ITA 2007.
7. Subsections (1) and (2) of new section 742A provide that income is to be left out of account (that is, it will be exempt from charge) if an officer of HM Revenue & Customs (HMRC) is satisfied that it is attributable to a transaction that takes place on or after 6 April 2012 and which meets Conditions A and B.
8. Subsection (3) of new section 742A sets out Condition A. Condition A is met where, if the transaction in question were to be considered to be a genuine one (when viewed objectively, having regard to the circumstances under which it was effected and any other relevant circumstances), and gave rise to a transfer of assets charge, that liability would constitute an unjustified and disproportionate restriction on an EU treaty freedom.
9. Subsection (4) of new section 742A sets out Condition B. Condition B is met where an officer of HMRC is satisfied that the transaction in question should be considered genuine when viewed objectively, having regard to the circumstances under which it was effected and any other relevant circumstances.
10. Subsection (5) of new section 742A makes further provision, about what constitutes a “genuine” transaction for the purposes of meeting Conditions A and B. A transaction will not be considered genuine where it is made other than on arm’s length terms. A transaction is not on arm’s length terms if either:
 - it is on terms other than those that would have been made between persons not connected with each other dealing at arm’s length, or
 - it would not have been entered into at all between persons not connected with each other dealing at arm’s length.

When considering whether a transaction is on arm’s length terms regard must be had to all arrangements and relevant circumstances in connection with which the transaction is carried out.

11. Subsection (6), (7) and (12) of new section 742A make further provision about what constitutes a “genuine” transaction. These provisions concern the use of the assets transferred; any assets directly or indirectly representing those assets; any income arising from the assets transferred and any assets representing the accumulation of income arising in relation to the transaction being considered. That transaction may be a relevant transfer (as defined in section 716), or an associated operation (as defined in section 719). Where such assets are used for the purposes of, or received in

the course of, activities carried out in a territory outside the UK, by a person who has a business establishment in that territory, in order for the transaction to be considered to be a genuine transaction, those activities must consist of the provision, by the person who has the business establishment in the overseas territory, of goods or services to others on a commercial basis. The activities must involve the use of sufficient staff with the appropriate level of competence and authority to carry out them out. The activities must involve the use of premises and equipment commensurate with their size and nature. And the activities must involve the person who has the business establishment adding a commensurate level of economic value to the customers to whom the goods or services are provided.

12. Subsection (8) of new section 742A defines “staff” as employees, agents or contractors engaged by the person who has the overseas business establishment.
13. Subsection (9) of new section 742A explains how to determine whether a person has a “business establishment” in a territory, by analogy with the provisions at sections 1141, 1142(1) and 1143 of the Corporation Tax Act 2010 which define a permanent establishment of a company.
14. Subsection (10) of new Section 742A sets out circumstances where the arm’s length test in subsection (5) does not apply to a transaction. This will be the case where:
 - the relevant transfer is made by an individual wholly for personal (not commercial) reasons, for the personal benefit (not commercial) benefit of other individuals,
 - no consideration is given (whether directly or indirectly) for the relevant transfer or otherwise for any benefit received by the other individuals, and
 - all the assets and income described in subsection (11) in relation to the transaction being considered, are used only in this respect.

This may be the case where, for example, an individual settles assets into a non-resident trust for the benefit of his family.

15. Subsection (11) of new section 742A defines assets and income for the purposes of subsections (6) and (10) as:
 - (a) any of the assets transferred by the relevant transfer;
 - (b) any assets representing any of the assets transferred;
 - (c) any income arising from the assets within (a) or (b);

- (d) any assets representing the accumulation of income arising from any assets within paragraph (a) or (b).
16. Paragraph 8 inserts a provision into section 751 of ITA 2007 to extend the jurisdiction of the tribunal on any appeal to cover the new section 742A.
17. Paragraph 9 sets out the dates from which the changes in Part 2 of the Schedule take effect. Sub-paragraph (1) provides for resident companies which are incorporated abroad to be treated as resident with effect from 6 April 2012. Subparagraph 2 provides for all other amendments set out in part 2 to take effect for the 2012-13 and subsequent tax years.

Part 3

18. Paragraph 10 sub-paragraph (1) provides that amendments will be made to section 721 (individuals with power to enjoy income as a result of a relevant transaction).
19. Paragraph 10 sub-paragraph (2) clarifies that the income that would be chargeable to income tax if it were the individual's in Condition B in section 721(3) is the income of the person abroad.
20. Paragraph 10 sub-paragraph (3) inserts new subsection (3A) and new subsection (3B) into section 721.
21. New subsection 721(3A) clarifies that the income that is treated as arising to the individual in subsection 721(1) is not the income that the individual abroad receives, but an amount that is equal to it. This is subject to the provisions in section 724 (where benefit is provided out of the income of a person abroad) and 725 (where the income that the individual can enjoy form part of the profits of a controlled foreign company).
22. New subsection 721(3B) provides that where the individual has been charged to tax on the deemed income in subsection 721(1) under provisions other than those in Chapter 2 of Part 13 ITA 2007 and that income tax liability on the deemed income has actually been paid then there is no further charge under section 721.
23. Paragraph 10 sub-paragraph (4) clarifies that the income referred to in subsection 721(4) is the income of the person abroad and achieves consistency of drafting in the section as a whole.
24. Paragraph 10 sub-paragraph (5) removes the provision which allows section 721 to apply even where income might be chargeable under other provisions. It is an amendment consistent with new subsection 721(3B).

25. Paragraph 11 sub-paragraphs (1) to (3) make amendments to section 724 in order to make it clear that where this section applies the tax charge under section 720 is on an amount which is equal to the amount or value of the benefit that the individual can enjoy rather than on the benefit itself.
26. Paragraph 12 amends section 725 which provides for a reduction in the amount charged under section 721 where there is a controlled foreign company involved.
27. Sub-paragraph (2) of paragraph 12 amends subsection 725(1), which is amended by paragraph 22 of Schedule 20 to FA 2012. Subsection 725(1) provides that section 725 applies where an amount of income is treated as arising to an individual under section 721 and the income arising to a person abroad includes an amount forming part of a controlled foreign company's (CFC) chargeable profit.
28. Sub-paragraph (3) of paragraph 12 inserts new subsections (2A) and (2B) into section 725. These provide a formula to determine the reduction in the amount of income to be treated as arising to an individual where (i) there is a CFC involved and the amount of income treated as arising to the individual is reduced under section 725 as a result and (ii) the special rules in section 724 apply to determine the amount on which an individual is chargeable rather than section 721.
29. Sub-paragraph (4) of paragraph 12 provides that where the amendments made to section 725(1) by paragraph 22 of Schedule 20 to FA 2012 are to be ignored then sub-paragraph (2) does not apply. Instead subsection 725(2) is amended by sub-paragraph (5).
30. Sub-paragraph (5) of paragraph 12 amends subsection 725(1) where paragraph 22 of Schedule 20 to FA 2012 is to be ignored. The amendments to subsection 725(1) are to provide clarification.
31. Paragraph 13 amends section 726 to reflect that the income treated as arising to an individual under section 721 is an amount equal to the income of the person abroad.
32. Paragraph 14 sub-paragraphs (1) to (5) makes amendments to section 728.
33. Sub-paragraph (2) inserts new subsection 728(1A) which provides that the amount of income treated as arising to an individual under this section is equal to the amount of the income of the person abroad (subject to subsection 728(2)).
34. Sub-paragraph (3) makes consequential amendments to subsection 728(2) as a result of the amendments to section 725 which applies in

determining the amount of income treated as arising to an individual under section 728.

35. Sub-paragraph (4) inserts new subsection 728(2A) which provides that where an individual has been charged to tax on income that is treated as arising to them (under subsection 728(1)) under provisions other than those in Chapter 2 of Part 13 ITA 2007 and that income tax liability on the deemed income has actually been paid then there is no further charge under section 728.
36. Sub-paragraph (5) deletes subsection 728(3)(a).
37. Paragraph 15 amends subsection 730(2) to reflect that the income treated as arising to an individual under section 728 is an amount equal to the income of the person abroad.
38. Paragraph 16 amends section 743.
39. Sub-paragraph (2) inserts new subsection 743(2A) and (2B) which provide that where an amount of income is taken into account in charging an individual to income tax under section 720 or 727 and that income is subsequently received by the individual then it will not be charged to tax again. Subsection 743(4) is consequently deleted.
40. Paragraph 17 makes consequential amendments to section 744 to reflect the various amendments in Part 3 of this schedule.
41. Paragraph 18 makes consequential amendments to section 745 to reflect that sections 721 and 728 have been amended to provide that the income treated as arising under these sections is an amount equal to the amount of the income of the person abroad.
42. Paragraph 19 makes consequential amendments to subsection 746(2) to reflect that sections 721 and 728 have been amended to provide that the income treated as arising under these sections is an amount equal to the amount of the income of the person abroad.
43. Paragraph 20 provides for the amendments made by paragraphs 10 to 19 to take effect for 2013-14 and subsequent tax years and to apply to all relevant transfers whether they occurred before, on or after 6th April 2013.
44. Paragraph 21 provides that the new sections 721(3B) and 728(2A) only take effect only where the income abroad arises to the person abroad after 6 April 2013.

45. Paragraph 22 substitutes new section 732, new section 733, new section 734, new section 734A, and new section 735, for the current provisions in sections 732 to 735A inclusive.
46. Subsection (1) of new section 732 notes that this section only applies if a relevant transfer occurs.
47. New subsection (2) provides that income is treated as arising to an individual in a tax year (the ‘relevant tax year’) where the individual receives a relevant benefit in that tax year or any earlier tax year, and all or part of the relevant benefit is matched (under section 733) with the relevant income amount for the relevant tax year or any earlier tax year.
48. New subsection (3) provides that the amount of the income treated as arising is equal to the amount or value of the relevant benefit, or part of it should only part of the relevant benefit be matched.
49. New subsection (4) defines the conditions to be fulfilled for a benefit received by an individual to be considered ‘relevant’:
 - (a) the individual must be ordinarily UK resident when the benefit is received (although from 2013-2014 the individual must be UK resident),
 - (b) the benefit must be provided out of assets available for that purpose as a result of the relevant transfer or an associated operation.
 - (c) the individual could not liable to tax under section 720 or 727 as a result of the relevant transfer, and
 - (d) the individual is not otherwise liable to income tax on the benefit.
50. New subsection (5) defines ‘relevant income amount’ as the amount of income arising to persons abroad in a year which, as a result of the relevant transfer or associated operations, can be used to provide benefits to individuals.
51. New subsection (6) provides that any amount which is required to be left out of account because of section 743(1) and (2) should be excluded from the relevant income amount.
52. New subsection (7) provides that income which arises to a person abroad is to be left out of account for the purposes of subsection (5) if the individual who may be provided with benefits is liable for income tax on that income other than under Chapter 2 Part 13 ITA 2007, and has paid that tax in full.

53. Subsection (1) of new section 733 provides the five steps to be taken in order to match relevant benefits with relevant income amounts in order to ascertain the amount of income to be treated as arising to an individual in a tax year in accordance with subsection 732(2). It also defines ‘relevant proportion’.

Step 1 is to find the relevant income amount for the tax year (as defined in section 732(5)).

Step 2 is to find the total relevant benefits received by all individuals in that tax year.

Step 3 is to match the relevant income for the year with the total relevant benefits for the year. If the amount of the relevant benefits is greater than the amount of the relevant income then the relevant income is matched with the relevant proportion of the each of the relevant benefits. The relevant proportion is calculated by dividing the relevant income amount for the tax year by the total amount of the relevant benefits received in that tax year.

Matched income is charged to tax under section 732(2).

Step 4 is carried out to establish the relevant benefits or relevant income that is not matched after step 3.

- If the relevant benefits in the year are not greater than the amount of the relevant income then (i) the amount of the relevant income is reduced by the amount of the relevant benefits matched and (ii) the amount of the relevant benefits is reduced to nil, or
- If the relevant benefits in the year are greater than the amount of the relevant income then (i) the amount of the relevant income is reduced to nil and (ii) the amount of each of the relevant benefits is reduced by the benefits that have been matched under step 3 (the relevant proportion).

Step 5 requires that if there is unmatched relevant income or unmatched relevant benefits for a tax year after steps 1 to 4 are completed then those steps are to be repeated with reference to unmatched relevant income or unmatched relevant income from earlier years. The effect of this is that unmatched relevant income of the year is matched with unmatched relevant benefits of earlier year(s) or unmatched relevant benefits of the year are matched with unmatched relevant income of earlier year(s). The matching is done with relevant income or relevant benefits of a later year in priority to those of an earlier year. Once relevant benefits are matched with relevant income there is a charge to tax under section 732(2).

These steps are repeated unless subsection 733(2) applies.

54. New subsection (2) applies if either (a) all the relevant benefits received by individuals or (b) all the relevant income amounts in the relevant tax year and earlier years have been reduced to nil.
55. New subsection (3) notes that the effect of any reduction under Step 4 in subsection (1) is to taken into account in any subsequent applications of this section.
56. New section 734 provides for relief where a relevant benefit is received by an individual in a tax year and all or part of it has been treated as a chargeable gain in that or a subsequent tax year because section 87 or 89(2) TCGA 1992 or paragraph 8 of Schedule 4C to TCGA 1992 applies. New subsection 734(1) sets out when the section applies
57. New subsection (2) provides that in the application of section 732 and section 733 for any tax year after the relevant tax year, the relevant benefit is to be reduced by the amount of the gains.
58. New subsection (3) provides that the chargeable gains mentioned in this section include offshore income gains as defined by the Offshore Funds (Tax) Regulations 2009 (S.I. 2009/3001).
59. New section 734A provides further matching rules to take into account the rules in section 735 for non-domiciled individuals to whom remittance basis applies.
60. Subsection (1) of new section 734A provides that the section applies when relevant benefits are to be matched with the relevant income amount for the tax year at step 3 in section 733(1).
61. New subsection (2) sets out the 5 steps which should be taken to determine how relevant benefits are matched with income included in the relevant income amount and how the reductions at Step 4 of section 733(1) are to be made.

Step 1 is to determine the 'section 735 benefits' which are benefits received by an individual to whom section 735 applies (broadly an individual to whom remittance basis applies) for the relevant year. Benefits which are not section 735 benefits are referred to as non-section 735 benefits in this section.

Step 2 is to match section 735 benefits with UK income (as defined in subsection 734(3)) in the relevant income amount, apportioning the UK income between the section 735 benefits if the total amount of the section 735 benefits exceeds the UK income.

If the relevant benefits in the relevant year exceeds the relevant income amount then the ‘section 735 benefits’ are the relevant proportions of each of the section 735 benefits.

Step 3 is to match any section 735 benefits unmatched after step 2 with non-UK income in the relevant income amount.

Step 4 is to match non-section 735 benefits with unmatched (after step 3) non-UK income in the relevant income amount that is unmatched after step 3, making necessary apportionments described if the amount of the non-section 735 benefits exceeds the unmatched non-UK income.

Step 5 is to match non-section 735 benefits not matched at Step 4 with UK income unmatched after step 2.

62. New subsection (3) defines UK income as income which is not non-UK income.
63. New subsection (4) defines non-UK income as income which would be relevant foreign income of the person abroad to whom it arises if that person was UK resident.
64. Subsection (1) of new section 735 provides that the section applies to individuals who are non-domiciled in the UK and who pay tax on a remittance basis in the relevant year.
65. New subsection (2) provides that subsections (3) to (5) apply if income (‘deemed income’) is treated as arising to an individual under section 732 by virtue of a relevant benefit being matched with any non-UK income.
66. New subsection (3) provides that deemed income is treated as ‘foreign’ income to the extent that it can be matched with non-UK income.
67. New subsection (4) provides that foreign deemed income is treated as the individual’s relevant foreign income.
68. New subsection (5) provides for certain amounts to be treated as deriving from the foreign deemed income for the purposes of the remittance basis provisions in Chapter A1 of Part 14.
69. Paragraph 23 subparagraphs (1) to (3) provides for consequential amendments to section 740.
70. Paragraph 24 provides a consequential amendment to subsection 744(4) to reflect substituted section 732.

71. Paragraph 25 subparagraph (1) provides that the amendments made by paragraphs 22 to 29 apply for the 2013 – 14 tax year and all later years. Subparagraph (2) provides that the legislation has effect for relevant transfers whether those transfers took place before, on or after 6th April 2013.
72. Paragraph 26 provide that in the transitional provisions for section 732 set out in paragraphs 27 and 28 references to ITA 2007 are to be read disregarding the amendments made by this Part of this Schedule.
73. Paragraphs 27 and 28 provide transitional rules for the new matching rules in this Schedule where the old matching rules in section 733 ITA 2007 also applied. This is so that untaxed benefits and available relevant income unmatched under the old rules are taken into account under the new matching rules.
74. Paragraph 27 sub-paragraph (1) provides that, subject to subsequent subparagraphs, the benefits that an individual receives are not ‘relevant’ benefits if they are received prior to 2013-14 tax year.
75. Sub-paragraph (2) provides that an individual who has any pre-2013-2014 untaxed benefits in relation to the relevant transfer is treated as having received that amount of relevant benefit on 5 April 2013.
76. Sub-paragraph (3) sets out the steps that need to be taken to determine the quantum of an individual’s pre 2013-14 untaxed benefits amount. Broadly, this is by taking the untaxed benefits for 2012-2013 by following the steps in section 733 ITA 2007 and deducting any income treated as arising to the individual together with any chargeable gains within section 734(1)(d) ITA 2007 for 2013-2014.
77. Paragraph 28 sub-paragraph (1) says that subject to the provisions in subparagraph (2) a year earlier than 2013-14 must not have a relevant income amount.
78. Subparagraph (2) provides for 2012-13 to have a relevant income amount and sets out the four steps to be taken to calculate it. Broadly, for each relevant individual the available relevant income for 2012- 2013 is found by following the steps in section 733(1) ITA 2007. The amount of any income treated as arising to that individual under section 732 ITA 2007 for 2012-2013 is then deducted from the available relevant income. The net amounts for each relevant individual are then added and the total is the relevant income amount for 2012-2013.
79. Paragraph 29 provides for new section 732(7) to apply only if the income arises to a person abroad after 6th April 2013.

BACKGROUND

80. This legislation updates this anti-avoidance provision to maintain its compatibility with EU law, and makes certain other amendments to improve the clarity of the rules.
81. Broadly, the “transfer of assets” rules impose a charge to income tax on an individual who is ordinarily resident in the UK (or, from 6 April 2013, an individual who is resident in the UK) where there has been a transfer of assets and, as a result of the transfer (and/or any associated operations), income becomes payable to a person abroad, but an individual can still enjoy income, or receive or have entitlement to receive a capital sum or other benefits from the arrangements.
82. An infraction notice (Reasoned Opinion) was issued by the European Commission on 16 February 2011. The Commission argued that the transfer of assets legislation breaches the treaty freedoms of establishment and movement of capital.
83. On 30 July 2012 the Government published a consultation document proposing a way of reforming the legislation to ensure EU compatibility, and also certain other changes to improve the clarity of the provisions. The Government's response to the consultation was published on 11 December 2012, together with this draft legislation.
84. The legislation adds a new exemption which operates where the EU treaty freedoms are engaged and which focuses on whether the nature of transactions is genuine and whether they serve the purpose of the freedoms. (There is an existing exemption where there is no tax avoidance purpose, or where the transactions are genuine commercial transactions, and any tax avoidance purpose was incidental.) Business transactions will not be regarded as genuine unless they are on arm's length terms and, in the case of transactions for the purposes of a business establishment, give rise to income attributable to economically significant activity that takes place overseas.
85. These changes will provide exemption for genuine commercial business activities overseas and also for transactions that do not involve commercial activities but that are nevertheless genuine transactions that are protected by the single market.
86. This legislation also makes a series of other changes to the transfer of assets provisions aimed at clarifying the way certain aspects operate. There is an amendment to provide more certainty about how benefits received by an individual are matched to the ‘relevant income’ arising to the person abroad, in circumstances when an individual other than the transferor is the chargeable person.

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87. There is also an amendment to provide greater clarity around the prevention of double charging, in circumstances where the same income could be the subject of both a transfer of assets charge and also a charge under another part of the Taxes Acts.
88. Finally there is a change that clarifies how the transfer of assets rules operate in relation to reliefs under double taxation agreements. This will ensure that neither treaty provisions nor the transfer of assets legislation is applied in an unintended way to allow a relief that would not otherwise be due.
89. If you have any questions about these changes or comments on the legislation, please contact Sue Pennicott on 020 7147 2627 (email: sue.pennicott@hmrc.gsi.gov.uk).