



HM Revenue
& Customs

Diverted Profits Tax

The Royal Society
6-9 Carlton House Terrace
London
SW1Y 5AG

08 January 2015

Agenda

09.00 – 09.30 Registration

09.30 – 09.35 Open - Aidan Reilly (HMRC)

09.35 – 09.45 Policy Context and Overview - Mike Williams (HMT)

09.45 – 09.55 Legislative Overview - Aidan Reilly (HMRC)

09.55 – 10.45 Detailed run-through of legislation plus examples
- Andrew Scott (HMRC), Richard Rogers (HMRC) and Bob
Fisher (HMRC)

10:45 – 11:05 Coffee Break

11.05 – 12.20 Q & As

12.20 – 12.30 Wrap-up – Jon Sherman (HMRC)



Legislative Overview

Diverted Profits Tax is aimed at aggressive tax planning **that erodes the UK tax base** through diversion of profits in two key ways:

- Through avoidance of UK permanent establishments
- Through the creation of intra-group expenditure or diversion of income intra-group under arrangements lacking economic substance to exploit tax mismatches where it is reasonable to assume absent the tax benefit the expenditure would not have been incurred or the income would have been in the charge to UK CT.

The legislation also has the secondary aim of removing the information bias to allow for a full and timely examination of high risk transfer pricing transactions by providing strong incentives for full disclosure and early engagement in those high risk cases.



Legislative Overview

- Diverted Profits Tax **is a new tax**
 - Applies to Diverted Profits arising on or after 01 April 2015
 - Charged at a rate of 25%
 - Not self assessed, although there is a disclosure requirement
 - Charge created through a charging notice from HMRC
 - Not CT
 - Not covered by tax treaties
- Diverted profits in all cases ultimately computed on normal CT principles including TP rules, except where the recharacterisation rule applies.



Interaction with tax treaties

- Under UK law tax treaties are given effect in relation to income tax, capital gains tax and corporation tax (and their foreign equivalents).
- As a formal matter, therefore, the **diverted profits tax falls outside the scope of relief available under UK tax treaties.**
- But even if the diverted profits tax were covered by UK tax treaties, the entry conditions for the diverted profits tax mean that it will only be applied to arrangements designed to exploit the provisions of tax treaties to avoid tax. **Therefore the arrangements it targets are the kind where there is no obligation to provide relief under international law.**
- The DPT therefore operates in line with the principles set out in paragraphs 9.4 and 9.5 of the Commentary to Article 1 of the OECD's Model Tax Convention.



Compliance with EU Law

- Considerable care has been taken to ensure compliance with EU law. To that end the tax is directed against arrangements that are abusive or contrived and designed to erode the UK tax base.
- To the extent any justification may be required the tax is also proportionate, affording taxpayers considerable opportunity to establish the extent to which any arrangement under consideration may be commercial.
- Any issue of EU law will be confined to an intra EU/EEA dimension as Article 63 TFEU concerning the free movement of capital will not be engaged by the tax.



OECD-G20 BEPS Project

- The UK is fully engaged in the work to reform the international tax framework through the OECD-G20 BEPS project which is seeking to align taxing rights with economic activity and to ensure that a fairer and more consistent set of international rules is achieved.
- The diverted profits tax is consistent with those principles and the international efforts on tackling BEPS.
- The aggressive tax planning being targeted by the DPT and the way in which such planning is counteracted is in line with Action 7 of the BEPS Action Plan on Artificial Avoidance of Permanent Establishment and Action 9 on Risk and Recharacterisation.



Summary

- The **first case** is designed to address **arrangements which avoid a UK permanent establishment (PE)**. It comes into effect if a person is carrying on activity in the UK in connection with supplies of goods and services by a non-UK resident company to customers in the UK, provided that the detailed conditions are met.
- This rule is supplemented by the “**mismatch condition**” to address the effect of contrived arrangements that exploit tax differentials and involve transactions or entities that lack economic substance.
- The **second case** will apply to certain **arrangements which lack economic substance** involving entities with an existing UK taxable presence. Its primary function is to counteract arrangements that exploit tax differentials. It will apply where the detailed conditions, including those on an “effective tax mismatch outcome” are met. This rule is effectively a free-standing version of the mismatch condition, but applicable to arrangements already within the scope of UK CT



Determination of taxable profit: Avoided PE cases

In most cases the charge will reflect the normal PE attribution rules. Those rules will, of course, include ordinary transfer pricing rules. If there are no mismatch arrangements, that is the end of matters.

If there are mismatch arrangements, the charging rules operate in addition by asking whether the transactions that the company would have entered into anyway (ie if tax were not a consideration and as an alternative to the mismatch arrangement) would have given rise to allowable deductions (ignoring TP). If they would have done, then normal PE attribution rules (including TP) will determine the charge. And if those alternative arrangements (i.e. what would have happened absent tax) would have resulted in income within the charge to CT, the charge also includes that income.

However, if the alternative arrangements aren't as above (i.e. they would not have given rise to allowable deductions), then the legislation allows for them to be recharacterised, and the charge work by reference to those notional arrangements on a JR basis.



Determination of taxable profit: Pure mismatch cases

The charging rules operate by asking whether the transactions are ones that the company would have entered into anyway (ie if tax were not a consideration and as an alternative to the mismatch arrangement) would have given rise to allowable deductions (ignoring TP). If they are, then normal TP rules will determine the charge. And if those alternative arrangements (i.e. what would have happened absent tax) would have resulted in income within the charge to CT, the charge also includes that income.

However, if the alternative arrangements aren't as above (i.e. they would not have given rise to allowable deductions), then the legislation allows for them to be recharacterised, and the charge works by reference to those notional arrangements on a JR basis.



Determination of taxable profit: Pure mismatch cases

Consequently, in the second case, the TP analysis will often be the beginning and end of the charging mechanism (because the transactions won't be recharacterised).

So, if there has already been an agreed HMRC TP position, and all facts have been presented to HMRC, e.g. if there was a TP adjustment already determined by HMRC or an APA is in place, then there won't be a DPT charge even if the transactions in question give rise to mismatch outcomes,

The only exception to this is if the arrangement is one that falls to be recharacterised or if the alternative arrangement would have resulted in UK income.



Determination of taxable profit: summary

It follows that in both cases (the avoided PE case and the free-standing mismatch), the application of TP principles will generally be key.

In this regard another key feature of the legislation is that when the tax is **initially** calculated and becomes due, there will be a statutory presumption that there should be 30% disallowance in a case when, having applied the above mismatch rules, it is reasonable as a consequence of the transaction being subject to the mismatch arrangements, for HMRC to assume that expenses might have been inflated (which won't be the case where, on the basis of all the relevant facts, TP already determined or an APA in place).

The final disallowance may, however, be a different figure (and if it is lower then the tax will be repaid with interest).



First rule – Avoidance of a UK PE

Section 2

- There is a company (the “foreign company”) that is not resident in the UK.
- Another person (“the avoided PE”) is carrying on an activity in the UK in connection with the supplies of goods or services by the foreign company to customers in the UK. It does not matter if that person is a UK resident.
- It is reasonable to assume that the activity of the avoided PE or the foreign company (or both) is designed so as to ensure that the foreign company is not carrying on a trade in the UK through a permanent establishment by reason of the avoided PE’s activity. It does not matter whether it is also designed to secure any commercial or other objective.
- It is reasonable to assume that either or both of the following conditions are met:
 - the mismatch condition, or
 - the tax avoidance condition.



The mismatch condition

The mismatch condition is met if -

- in connection with the supplies of the goods or services, arrangements are in place as a result of which provision (“the material provision”) is made or imposed as between the foreign company and another person by means of a transaction or series of transactions;
- the participation condition is met in relation to the foreign company and A (broadly, the companies are connected);
- there is an effective tax mismatch outcome as between the foreign company and A (the connected person pays less than 80% of the tax that would have been paid by the foreign company);
- the insufficient economic substance condition is met (the value of the tax reduction exceeds other financial benefits or economic contribution and it is reasonable to assume the arrangement was designed to secure the tax reduction); and
- the material provision is not an excluded loan relationship.



Excluded loan relationships

- For the purpose of the mismatch condition an excluded loan relationship is where the material provision is made or imposed by means of a transaction or series of transactions that only give rise to one or more loan relationships. This is either loan relationships within the meaning of section 302 CTA 2009 or what would be treated as such by Part 6 of CTA2009.
- The existence of a loan relationship within a provision does not automatically mean that the provision is an excluded loan relationship. The exclusion requires that the one or more loan relationships are the only relationships that the transaction or transactions (by means of which the provision is made or imposed) give rise to.



The tax avoidance condition

- This condition is met if, in connection with the supply of goods or services, arrangements are in place one of the main purposes of which is to avoid a charge to tax in the UK.
- This would be the case, for example, where the arrangement would not have been carried out at all were it not for the opportunity to avoid the UK tax charge, or where any non-tax objective was secondary to the benefit of obtaining the tax advantage



Exclusions

There is an exclusion for cases where the activity of the avoided PE is within either:

- Section 1142 CTA 2010 – Agent of independent status - subject to the qualification described below), or
- Section 1144 – Alternative finance arrangements

The exclusion in relation to independent agents only applies if the foreign company and the avoided PE are not connected (s1122 CTA 2010), unless the avoided PE is regarded as an agent of independent status through the rules on independent brokers, investment managers or Lloyd's agents.

Section 2 does not apply if both the avoided PE and the foreign company are SMEs

There is also an exemption (at section 12) where the foreign company's total sales revenues (together with those of connected companies) from all supplies of goods or services made to customers in the UK in a 12-month accounting period are no greater than £10 million. If the AP is shorter the UK sales threshold is reduced proportionately.



Consequences of section 2 applying

- The provisional estimated charge and the final charge may differ.
- The charge to tax is computed in accordance with **section 8**
- In most cases the charge will reflect the normal CTA 09 PE attribution rules, subject to the normal transfer pricing of arrangements that would affect that. The exception is where the arrangement falls to be recharacterised.
- **Section 9** explains how the Designated Officer is to determine the initial estimated charge for the purpose of securing upfront payment of tax. Where the arrangement is one that meets the mismatch condition but does not fall to be recharacterised there is a statutory disallowance of 30% of any expense if it is reasonable to assume that the expense might be inflated.



Section 3: mismatch arrangements:

Applies where a UK company, **or a UK PE of a foreign company**, is party to an arrangement meeting a number of requirements mirroring those in the mismatch condition.



Section 3 – Mismatch requirements

- There is a company (C) that is UK resident and another person (P) whether or not UK resident
- provision (“the material provision”) has been made or imposed between them by means of a transaction or series of transactions
- C and P are connected in accordance with the participation condition
- there is an effective tax mismatch outcome between C and P (the connected person pays less than 80% of the tax that would have been paid by C)
- the insufficient economic substance condition is met (the value of the tax reduction exceeds other financial benefits or economic contribution and it is reasonable to assume the arrangement was designed to secure the tax reduction)
- the material provision is not an excluded loan relationship.



Effective tax mismatch outcome

There is an effective tax mismatch outcome if the material provision results in the following:

- an increase in expenses of the first party for which a deduction is allowable for a relevant tax and / or a reduction in income that would otherwise have been taken into account by the first party in computing its liability for a relevant tax, and
- the reduction in the first party's liability to a relevant tax exceeds any resulting increase in the second party's total liability to corporation tax, income tax or any non-UK tax and
- the second party does not meet the 80% payment test.



The tax reduction

The reduction in the first party's liability to a relevant tax is measured by:

$$A \times TR$$

Where:

“A” is the amount of the increase in expenses or reduction in income (referred to in the first bullet of the previous slide) and

“TR” is the rate at which, assuming the first party has profits chargeable to the relevant tax for the accounting period, those profits would be chargeable to that tax.



The tax increase

The increase in the second party's total liability to corporation tax, income tax or any non-UK tax is the lower of:

- the total amount of corporation tax, income tax and non-UK tax which falls to be paid by the second party as a result of the material provision (so far as is not refunded), and
- the total amount of corporation tax, income tax or any non-UK tax that would be payable by the second party in consequence of the material provision, based on two assumptions.



The tax increase

The **first assumption** is that the second party's tax liability **includes any withholding tax** on payments made to the second party (to the extent it is not refunded).

The **second** is that **all reasonable steps have been taken to minimise the amount of tax** for which the second party is liable in the country or territory in question. Such steps include claiming or otherwise securing the benefit of, reliefs, deductions, reductions or allowances and making elections for tax purposes.

However, in determining the level of tax paid by the second party, **no regard is had to any loss relief** that it would be able to use to cover the profit. This means in effect that the second party is treated as paying tax where the only reason for it not doing so is that it has losses to cover the profit. Those losses may either be its own or ones surrendered to it by another company.



The 80% payment test

Ensures that the legislation applies only if the tax reduction resulting from the material provision is significant.

The test is met (i.e. the legislation does not apply) if:

- As a result of the material provision, there is an increase in the second party's liability to tax, or would have been apart from loss relief;
- the whole or part of that increase is paid by the second party (and not refunded); and
- the amount paid (and not refunded) by the second party is at least 80% of the corresponding reduction in the first party's liability to a relevant tax.

In considering the second point, an amount of a tax reduction resulting from loss relief obtained by the second party is treated as if the amount had been paid.

So if the second party makes a profit in the accounting period of the test but a loss in the next accounting period which it carries back to the year of the test, this would effectively be ignored in calculating the second party's liability to tax for the accounting period of the test. In the same way losses carried forward from an earlier accounting period would effectively be ignored.



Is there substance behind the tax reduction?

Section 3, and the mismatch condition in section 2, also require the insufficient economic substance condition to be met.

This requires a comparison to be made between:

- the value of the tax reduction resulting from the effective tax mismatch outcome, and
- any other financial benefit flowing from the transaction, series of transactions, or involvement of any entity that is party to those transactions.



Is there substance behind the tax reduction?

First test: Where the effective tax mismatch outcome is referable to a single transaction the condition is met if, for the first party and the second party taken together, the financial benefit of the tax reduction is greater than any other financial benefit and it is reasonable to assume the transaction was designed to secure the tax reduction.

Second test: The same test is adapted where the effective tax mismatch outcome is referable to any one or more transactions in a series, so that it applies to that transaction or transactions.

Final test: This is applied in relation to an entity that is party to the transaction or one of the transactions in the series, and considers the contribution of economic value to the transaction(s) in terms of the functions and activities of the entity's staff. It compares this to the financial benefit of the tax reduction. The test is met if the person's contribution of economic value is less than the value of the tax reduction and it is reasonable to assume that the entity's involvement in the transaction(s) was or were designed to secure the tax reduction.



The DPT charge: Avoided PE cases – basic rule

The basic transfer pricing charge will apply if section 2 applies and either

- the mismatch condition is not met; or
- the mismatch condition is met, and
 - the material provision results in expenses of the foreign company for which a deduction would have been allowable (ignoring transfer pricing) in calculating chargeable profits, and
 - it is reasonable to assume that any alternative provision that would have been made or imposed (in the absence of the effective tax mismatch outcome) would also have resulted in allowable expenses of the same type and for the same purpose as those expenses.



The DPT charge: Avoided PE cases – basic rule

- The taxable diverted profits of the foreign company are the amount that it is just and reasonable to assume would be the chargeable profits, computed in accordance with sections 20 to 32 CTA 2009, had the avoided PE been a UK permanent establishment through which the foreign company carried on the relevant trade.
- The foreign company's accounting period is determined on the assumption that it is within the charge to corporation tax.
- But if the alternative provision would have resulted in income within the charge to CT then that income must be added to the chargeable profits.



Example

- For example, if the just and reasonable alternative provision would have resulted in the foreign company paying a royalty to a different company, then the profits of the avoided PE are to be determined based on the actual transaction that the foreign company has entered into.
- This means that a deduction will be available for the amount of the royalty properly attributable to the avoided PE. If the amount of that royalty is greater than it would have been at arm's length then this will be counteracted as part of the normal attribution process under sections 20 to 32 CTA 2009.
- Had tax not been a consideration then the IP that attracts the royalty may have been held by a company resident in a different territory. Provided that the recipient of that royalty would not have been within the scope of UK CT there will be no further charge. But if the income would have been within the scope of CT then the chargeable profit is increased by that amount.



The “recharacterisation charge”

However, if,

- the mismatch condition is met, and
- it is reasonable to assume that the alternative provision that would have been made or imposed would not have resulted in allowable expenses of the same type and for the same purpose as the expenses which result in the effective tax mismatch outcome

then for the purpose of calculating what would have been the chargeable profits of the avoided PE it is assumed that the alternative provision has in fact been made or imposed.

The alternative provision is that which it is just and reasonable to assume would have been made or imposed if the avoided PE had been a UK PE through which the foreign company carried on the trade and which would not itself have resulted in an effective tax mismatch outcome. For this purpose, making or imposing no provision is to be treated as an alternative provision.



Example: Double Irish structure

Assume the existence of a global group.

The group generates most of its European revenue from online sales to UK customers based around valuable IP.

The IP has been developed in the US and is held in the US for US sales.

But a company resident in a tax haven holds the IP for European sales.

Those sales are made through an Irish company that avoids a taxable presence in the UK, but very little profit ends up in Ireland because it is all stripped out through the royalty payment.

In the absence of the TMO it is reasonable to assume the IP would have been held in the US. This would still have resulted in the Irish company paying a royalty for the use of the IP. As a result the basic rule rather than the recharacterisation rule applies. So the DPT charge is based on the arm's length price that would have been payable by the avoided PE for use of the IP based on the tax haven company holding it, and taking into account that company's functionality and substance.



The DPT charge: section 3 mismatch arrangements: Basic rule

The basic charge will apply if section 3 applies and

- The material provision results in expenses of the UK company for which a deduction would have been allowable (ignoring transfer pricing) in calculating its profits chargeable to CT and
- It is reasonable to assume that any alternative provision that would have been made or imposed would also have resulted in allowable expenses of the same type and for the same purpose as those expenses.



The DPT charge: section 3 mismatch arrangements: Basic rule

The taxable diverted profits of the UK company are the additional profits that are chargeable to CT by reason of the application of transfer pricing to the results of the material provision (so far as not included in the company's CT self-assessment before the end of the review period).

But if the alternative provision would have resulted in income within the charge to CT then the UK company's profits chargeable to DPT shall be increased by that income.



The “recharacterisation charge”

However, if -

- it is reasonable to assume that the alternative provision that would have been made or imposed would not have resulted in allowable expenses of the same type and for the same purpose as the expenses which result in the effective tax mismatch outcome

then the DPT charge is based on the alternative provision and not the actual provision. For this purpose, making or imposing no provision is to be treated as an alternative provision.

The alternative provision is that which it is just and reasonable to assume would have been made or imposed in the absence of the tax mismatch outcome.



Recharacterisation example

Company B needs to invest in new expensive fixed plant and machinery (P&M) to carry on its trade in the UK.

At the time the P&M is needed, the parent company (A) injects capital into a subsidiary (C) in a zero-tax territory, enabling Company C to purchase the necessary P&M. This is then leased to Company B leaving the UK company with relatively small profits over a number of years. Company C itself has no full time staff and the only functions it performs are to own this P&M and some routine administration in relation to the leasing payments it receives.

The material provision between B and C is the provision of P&M under lease and as a result of that material provision, there is an effective tax mismatch outcome. The payments are allowable in B's tax computation but are not taxed in the hands of company C.

The contribution by the staff of C provides little economic value, and that value is much less than the financial benefit of the associated tax reduction.



Recharacterisation example

The DPT charge

Based on the specific facts of the case, it is reasonable to assume that C's involvement in the transaction was designed to secure the tax reduction, and.

If it is also reasonable to assume that, in the absence of the effective tax mismatch outcome, B would have purchased the P&M itself it would not have incurred a leasing expense.

In this situation the alternative provision would assume that B acquired and owned the P&M. Capital allowances would have been available to it in that situation.



Estimating the charge

- The charge is imposed by a notice issued by a Designated Officer. There is no scope for requesting postponement of tax charged by the notice.
- The basic rule is that the charge will be the Designated Officer's best estimate in accordance with section 8 or section 10.
- However, there is a specific rule for determining the estimated charge if the "inflated expenses condition" is met. This condition is particularly aimed at arrangements such as "double Irish" structures where profits deriving from UK sales ultimately flow to a territory where little or no tax is paid on them.
- This special rule will not apply in recharacterisation cases.



Inflated expense condition

The inflated expense condition is met if:

- the mismatch condition is met;
- the material provision results in expenses of the foreign company that would be taken into account as a deduction for corporation tax purposes, if a UK permanent establishment existed (ignoring any adjustment that would be due under Part 4 TIOPA 2010 (transfer pricing));
- those expenses, or part of them, are responsible for the effective tax mismatch outcome; and
- as a result it is reasonable for the Designated Officer to assume that those expenses, or part of them, exceed an arm's length amount.



Inflated expense condition

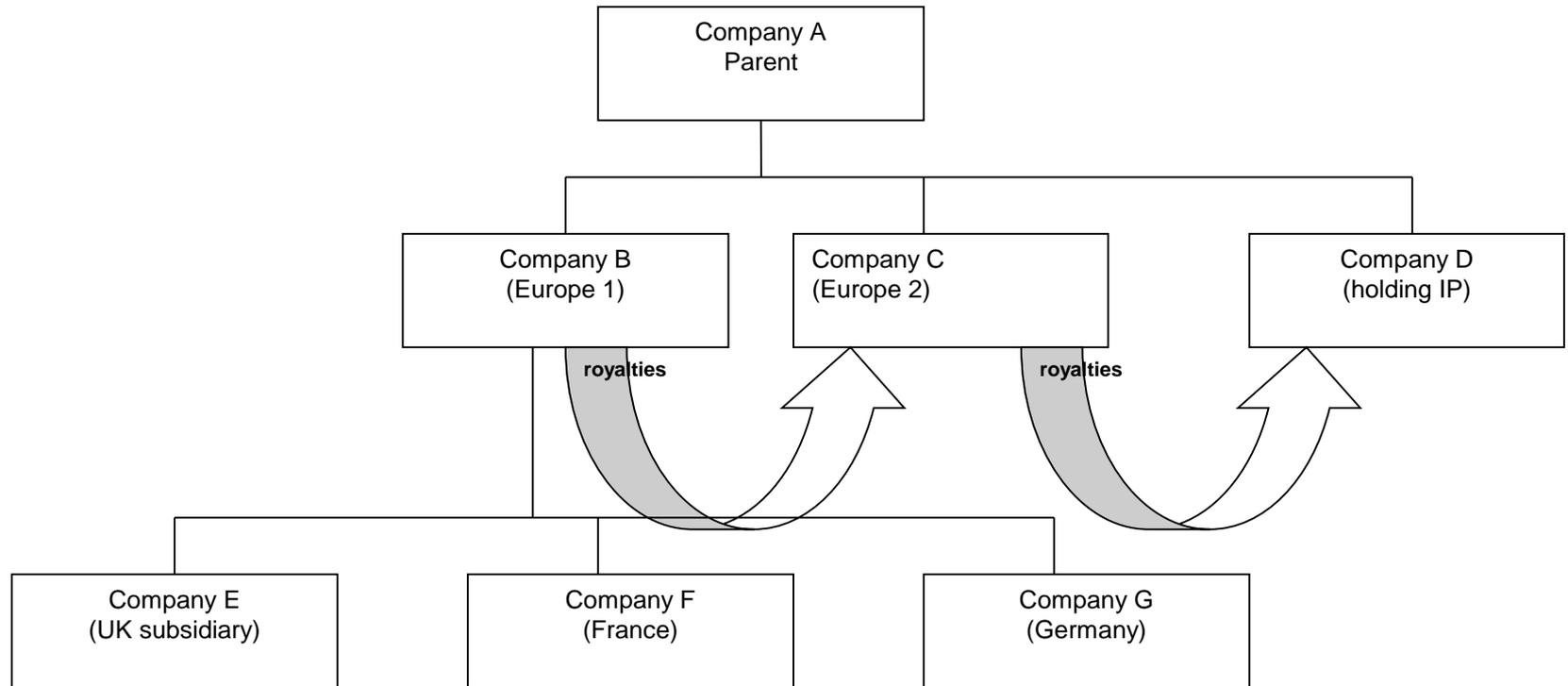
If the inflated expense condition is met, and it is reasonable to assume that

- the material provision would not have been made in the absence of the effective tax mismatch outcome; but
- the alternative provision (within the meaning of section 8) would still have resulted in expenses of the foreign company of the same type and for the same purposes as the expenses responsible for the tax mismatch outcome,

then the expenses allowed as a deduction in calculating the chargeable profits of the foreign company to be included in the charging notice should be reduced by 30%.



Avoided PE case – wider arrangements



Notification

The notification must be made

- in writing; and
- within 3 months from the end of the relevant accounting period.

The company is not required to quantify the profits potentially chargeable to DPT when making the notification.

Failure to notify within the time limit may give rise to a penalty.

Accounting Periods

For companies within the charge to corporation tax accounting period has the meaning it has for corporation tax. For a non UK resident to which section 2 applies the accounting period is the accounting period that would apply for corporation tax purposes if the foreign company had carried on trade in the UK through a PE. Such a period cannot commence before 1 April 2015.



Preliminary notice

Content of the notice

- The notice should explain how the charge has been calculated and who must pay it.

Timing of issuing the preliminary notice

- A preliminary notice must be issued no later than two years after the end of the accounting period to which the notice relates.



Representations

Following the date of receipt of the preliminary notice , the company has 30 days to send written representations to HMRC.

The grounds on which such representations can be made are unrestricted, but HMRC may only consider at this stage representations on certain specific matters.

All representations on those matters should be considered before issuing the charging notice but there is no requirement for HMRC to consider other representations, especially those in relation to:

- any provisions of Part 4 TIOPA 2010 related to Transfer Pricing, or
- any attribution of profits of a company to a permanent establishment (including notional attribution in Section 2 cases).



Representations to be considered by HMRC

- An arithmetical error in the calculation of the amount of diverted profits tax
- An error in a figure on which an assumption in the preliminary notice is based
- The small or medium sized requirement is not met
- One of the exclusions apply in Section 2 related to:
 - Section 1142 CTA 2010 – Agent of independent status
 - Section 1144 CTA 2010 – Alternative finance arrangements
- With regard to Section 3 and 4 either:
 - the participation condition is not met, or
 - the 80% payment test is not met, or
 - the material provision is an excluded loan relationship



Charging notice

Following the issue of a preliminary notice and consideration of any written representations HMRC must decide whether to:

- Issue a charging notice to the company for the accounting period that the preliminary notice refers, or
- Notify the company that no charging notice will be issued for the period that the preliminary notice refers.

Timing

Such a notification to the company must be made within 30 days immediately following the end of the 30 day period that the company who received the preliminary notice had to make written representations.



Charging notice

Who issues the notice?

The notice will be issued by the Designated Officer.

Who should be issued with the charging notice?

The notice should be issued to the company for which Section 2, Section 3 or Section 4 applies and in addition a copy to be provided in the case of;

- Section 2 to the Avoided PE
- Section 4 to the UK permanent establishment



Payment of tax

The full amount of the tax included in the charging notice or the additional tax included in a supplementary charging notice is payable within 30 days following the date on which the notice is issued.

Liability to pay the tax lies with the company to which the notice is issued, and provisions exist to collect this from a non-UK resident company or alternatively to collect from a related company to the non-UK resident company.

Postponement of tax

The tax cannot be postponed on any grounds.



Interaction with other taxes and double taxation

DPT is a separate tax from income or corporation tax. Any payment of DPT is ignored in its entirety for the purpose of calculating income or corporation tax.

Therefore:

- no deduction or relief is allowed in respect of the DPT paid by the company.
- no amount paid by the company can be treated as a distribution.

However, the company is allowed a credit against the payment of DPT for taxes paid, that are calculated by reference to the profits being charged to DPT. For this purpose taxes can include:

- corporation tax; or
- a non-UK tax which corresponds to corporation tax.

For this purpose, withholding tax paid on payments made to a person is (unless it is refunded) to be treated as tax paid by the person.



HMRC review

- Following the issue of the charging notice HMRC has a further period in which they must review the charging notice and make amendments as necessary.
- In carrying out this review, there are no limitations to the representations HMRC may consider and the special rules disallowing 30% of expenditure under the inflated expenses condition must be disregarded.
- This means that through the review period, the amount of the expenditure disregarded can be either increased or decreased based on due consideration of the evidence presented.



Designating the end of the review period

The review period begins immediately after the 30 day period during which the DPT included in the charging notice must be paid and ends 12 months later. But the review period may end within the 12 months if:

- following the issue of a supplementary charging notice, the company notifies HMRC that it wants to terminate the review, or
- the company and the responsible officer agree in writing to terminate the review.

Before notifying the company of the designated end of the review period, the officer responsible for the case must seek approval and sign off by the Designated Officer.



Amending notice

- During the review period HMRC can issue an amending notice if based upon the evidence the Designated Officer considers that the profits included in the original charging notice for an accounting period were excessive.
- The amending notice has the effect of reducing the amount of profits included in the charging notice and reducing the DPT included in that notice accordingly.
- There is no restriction on the number of amending notices that can be issued within the review period.
- An amending notice can reduce the amount of DPT to zero.
- Where an amending notice is issued, any tax overpaid in relation to the original charging notice, or a supplementary charging notice, must be repaid with interest.



Supplementary charging notice

- HMRC can issue a supplementary charging notice if it is considered that the amount of profits included in the charging notice for an accounting period is insufficient.
- The supplementary charging notice brings additional amounts of profits into charge that were not included in the original charging notice and brings into charge additional amounts of diverted profits tax (DPT). The supplementary charging notice does not replace the original charging notice.
- Only one supplementary charging notice can be issued in the period and a supplementary charging notice cannot be issued during the last 30 days of the review period.
- Any additional tax due as a result of the supplementary charging notice must be paid within 30 days from the date the notice is issued. A supplementary charging notice may later be amended (downwards) in the same as an original charging notice, but (as with an original charging notice) this can only be done if the company has paid in full the DPT charged by the supplementary charging notice.



Appeals against charging and supplementary charging notices

- A company may appeal a charging notice or supplementary charging notice after the end of the review period and the appeal must be made within 30 days from the end of the review period.
- The appeal must be made in writing and state the grounds on which it is made.
- Following receipt of an appeal, the special rules disallowing 30% of expenditure under the inflated expenses condition must be disregarded when determining whether the level of taxable diverted profits has been properly computed.
- Appeals may be settled by agreement or by the Tribunal. The Tribunal has power to:
 - confirm the charging notice or supplementary charging notice,
 - amend the charging notice or supplementary charging notice, or
 - cancel the charging notice or supplementary charging notice.



Some areas to look at

- Signposting to the actual consequences of meeting the conditions in sections 2 - 7
- The definition of “excluded loan relationship” at section 2(6)
- Making the sections on computing taxable diverted profits (8 and 10) clearer, including through the order of subsections.
- Credit for UK or foreign tax on the same profits (section 19)
- The detail of the duty to notify (section 13)
- Consideration of mismatch condition where CFCs are involved.





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Thank you

