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Legislative Comment

Finance Act notes: section 26 and Schedule 10: amendments to the transfer of assets abroad legislation

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Legislation: [Finance Act 2013 \(c.29\) s.26, Sch.10](#)

[Income Tax Act 2007 \(c.3\) Pt 13 Ch.2, s.742A](#)

Section 26 of the Finance Act 2013 (FA 2013) introduces [Schedule 10](#) which makes a number of amendments to the transfer of assets abroad (TAA) legislation now found in [Chapter 2 of Part 13 of the Income Tax Act 2007](#) (ITA 2007) (but still known to many as "the s.739 legislation"). The amendments have been introduced as a consequence of an infraction action brought by the European Commission in 2011 claiming that the existing legislation was incompatible with EU law. A consultation paper was issued in July 2012 on possible amendments,¹ and draft legislation was published with a response document in December 2012. [Schedule 10 to FA 2013](#) implements only some of the amendments arising from this consultation: a further round of consultation was initiated in July 2013, and this is discussed briefly below.

There is a sense that, at this stage, only those minimal changes have been made to the TAA legislation to ensure that the infraction proceedings are withdrawn, rather than any more fundamental reform of legislation which goes back in direct line to 1936. There are essentially three groups of changes made to the TAA legislation at this stage.

First, the legislation has been amended so that a company incorporated outside the UK is no longer automatically regarded as non-resident for purposes of the legislation. This was an element of the legislation that had existed since 1936, so that a company incorporated outside the UK was treated as non-resident even though it was in fact fully resident in the UK and fully liable to corporation tax on the basis that its management and control was in the UK. That rule was clearly inappropriate so far as EU law was concerned as it meant that a company incorporated, for example, in Luxembourg but managed and controlled in the UK was treated as a non-resident company and its income was subject to attribution to a transferor or a person receiving a benefit. That would not have been the case had the company been incorporated in the UK and centrally managed and controlled here. This was a long overdue change and it is hard to see how the removal of that rule in any way exposed the UK to a risk of tax avoidance. Secondly, perhaps the most significant change is the introduction of a new exemption for "genuine transactions" in new [section 742A ITA 2007](#). This new exemption is unusual in being drafted expressly by reference to rights under EU law. The exemption is quite complex (probably a deliberate policy of complex drafting in this case), but in essence applies where it is proved that the relevant transaction was a genuine transaction carried out in exercise of one of the four freedoms: free movement of persons, capital, services and goods. There is a further requirement that the terms of the transaction should be those that would apply between parties at arm's length, but this is subject to an exception where the transaction is carried out for the purpose of the transferor or family members. Where the transaction involves the creation of a permanent establishment in another Member State, this has to reflect HMRC's interpretation of the freedom of establishment, so that the permanent establishment has to have staff, premises and equipment commensurate with its activities.

It is hard to avoid the comment that this new exemption has been drafted purely to meet the arguments that the previous legislation was incompatible with EU law and without any intention that this exemption should actually be relied upon in practice. It has to be remembered, of course, that there are already exemptions in the legislation for, broadly, bona fide commercial transactions.

The new exemption for "genuine transactions" only applies to transactions post-April 5, 2012. This of itself is something of an issue: if the previous legislation was incompatible with EU law, then a prospective change does not remedy that with regard to transactions that took place before April 6, 2012.

The final changes to the legislation introduced by [Schedule 10 to FA 2013](#) are a group of changes intended to clarify the form and scope of the charge under the TAA legislation. Certain provisions are amended to avoid a potential double charge to tax. It is also made clear that

the charge to tax is on a notional attribution of income, rather than the actual income of the non-resident person; the aim of this change being to put beyond doubt, so it would seem, any argument that the charge to tax is overridden by a double taxation convention.

The changes introduced by [Schedule 10 to FA 2013](#) are only part of the process of amending and updating the TAA legislation. In July 2013 HMRC issued a further consultation document with a summary of responses to broader comments on the legislation, and a further consultation.² This document responds to some of those questions in the July 2012 consultation which raised much more broad issues relating to the TAA legislation. For example, a number of broader comments suggested that the legislation was outdated and needed a thorough revision.

It is now clear that the legislation will not be replaced in its entirety. However, a round of further questions are asked for consultation, most of them focussing on how the legislation might be adjusted to provide greater certainty in its operation. At the same time as publishing this new consultation paper, HMRC also published a very extensive set of draft guidance on the TAA legislation which, when finalised, would become part of the Revenue Manuals. Part of the response of HMRC to the broader criticisms of the TAA legislation is that some of the uncertainty will be reduced by this draft guidance. This leads to the comment, of course, that it remains undesirable to have legislation drafted in a way that leaves uncertainty, and for that uncertainty then to be addressed via non-statutory guidance.

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1.HMRC, *Reform of two anti-avoidance provisions (i) the attribution of gains to members of closely-controlled non-resident companies and (ii) the transfer of assets abroad (July 30, 2012)*, available at: http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032219 [Accessed September 4, 2013].

2.HMRC, *Reform of an anti-avoidance provision: Transfer of Assets Abroad, Summary of responses and further consultation (July 18, 2013)*, available at: <https://www.gov.uk/government/consultations/reform-of-an-anti-avoidance-provision-transfer-of-assets-abroad> [Accessed September 4, 2013].

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