



Avoidance schemes using total return swaps

Who is likely to be affected?

Groups of companies using total return swaps or other financial derivatives for tax avoidance.

General description of the measure

The measure blocks avoidance schemes where deductions are claimed for payments between companies in the same group under derivative contracts which are linked to company profits.

Policy objective

This measure supports the Government's objectives of promoting fairness and tackling avoidance in the tax system. It ensures that deductions are not allowed for corporation tax purposes where a payment is made under a derivative contract which is, in substance, a payment of profits.

Background to the measure

This measure was announced on 5 December 2013. No formal consultation is planned.

Detailed proposal

Operative date

This measure will apply from 5 December 2013 to schemes entered into on any date.

Current law

The tax treatment of derivatives is set out in Part 7 of the Corporation Tax Act 2009. Chapter 11 contains rules connected with tax avoidance.

Proposed revisions

Legislation will be introduced in Finance Bill 2014 to introduce a new section 695A in Chapter 11 of the CTA 2009 which will provide that no deduction is allowable for corporation tax purposes when a payment is made from one group member to another using a derivative, and where that payment equates, in substance, to the profits of a group company.

Summary of impacts

Exchequer impact (£m)	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
	+40	+40	+20	+10	nil	nil
	<p>These figures are set out in Table 2.1 of the Autumn Statement and have been certified by the Office for Budget Responsibility. More details can be found in the policy costings document published alongside the Autumn Statement.</p> <p>This measure supports the Exchequer in its commitment to protect revenue.</p>					
Economic impact	The measure is not expected to have any significant economic impacts.					
Impact on individuals and households	This measure will have no impacts on individuals and households.					
Equalities impacts	There are no impacts on any group which shares a protected characteristic.					
Impact on business including civil society organisations	This measure will have no impact on business and civil society organisations who are undertaking normal commercial transactions; it will only impact on the small number of businesses that are using the avoidance schemes.					
Operational impact (£m) (HMRC or other)	The costs to HM Revenue & Customs will be negligible.					
Other impacts	Other impacts have been considered and none have been identified.					

Monitoring and evaluation

The measure will be monitored through monitoring of disclosures of new avoidance schemes to circumvent the measure, and through regular communication with affected taxpayers and practitioners.

Further advice

If you have any questions about this change, please contact Chris Murrice on 03000 585953 (email: chris.murrice@hmrc.gsi.gov.uk) or Tony Sadler on 03000 585479 (email: tony.sadler@hmrc.gsi.gov.uk).

Declaration

David Gauke MP, Exchequer Secretary to the Treasury, has read this Tax Information and Impact Note and is satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impacts of the measure.

1 Disguised distribution arrangements

- (1) In Chapter 11 of Part 7 of CTA 2009 (derivative contracts: tax avoidance), after section 695 (but before the following italic heading) insert—

“695A Disguised distribution arrangements

- (1) This section applies if—
- (a) a company (“A”) is a party to arrangements involving one or more derivative contracts (each of which is referred to in this section as a “specified contract”),
 - (b) another company (“B”) is also a party to the arrangements (whether or not at the same time as A),
 - (c) A and B are members of the same group,
 - (d) the arrangements result in what is, in substance, a payment (directly or indirectly) from A to B of all or a significant part of the profits of the business of A or of a company which is a member of the same group as A or B (or both) (“the profit transfer”), and
 - (e) the arrangements are not arrangements of a kind which companies carrying on the same kind of business as A would enter into in the ordinary course of that business.
- (2) No debits in respect of a specified contract, which—
- (a) relate to the profit transfer, and
 - (b) apart from this section, would be brought into account by A or B for the purposes of this Part,
- are to be so brought into account.
- (3) Where one or more debits in respect of a specified contract are not brought into account by virtue of subsection (2), credits arising from the same contract which—
- (a) relate to the same profit transfer, and
 - (b) apart from this section, would be brought into account by A or B for the purposes of this Part,
- are not to be so brought into account to the extent that the total of those credits does not exceed the total of those debits.
- (4) Subsection (3) does not apply to any credit which arises directly or indirectly in consequence of, or otherwise in connection with, arrangements the main purpose of which, or one of the main purposes of which, is the securing of a tax advantage for any person.
- (5) For the purposes of this section a company is a member of the same group as another company if it is (or has been) a member of the same group at a time when the arrangements mentioned in subsection (1) have effect.
- (6) In this section—
- “arrangements” includes any scheme, arrangement or understanding of any kind, whether or not legally enforceable, involving a single transaction or two or more transactions;
- “group” has the meaning given by section 357GD of CTA 2010;
- “tax advantage” has the meaning given by section 1139 of CTA 2010.”

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- (2) The amendment made by this section has effect in relation to accounting periods beginning on or after 5 December 2013.
This is subject to subsections (3) to (6).
- (3) In the case of a company which has an accounting period beginning before 5 December 2013 and ending on or after that date (“the straddling period”), for the purposes of subsections (2) and (4) so much of the straddling period as falls before that date, and so much of that period as falls on or after that date, are treated as separate accounting periods.
- (4) The amendment does not have effect in relation to debits, arising from a specified contract, which relate to the profit transfer and are or would be brought into account for an accounting period beginning on or after 5 December 2013 to the extent that the total of those debits does not exceed the amount (if any) by which—
- (a) the total amount of credits arising from that contract which—
 - (i) relate to the profit transfer, and
 - (ii) are or would be brought into account for the purposes of Part 7 of CTA 2009 for any accounting period ending before 5 December 2013, exceeds
 - (b) the total amount of debits arising from that contract which relate to the profit transfer and are or would be brought into account as mentioned in paragraph (a)(ii).
- (5) In the case of credits to which subsection (6) applies, section 695A of CTA 2009 has effect as if—
- (a) subsection (2) of that section applied to credits in respect of a specified contract as it applies to debits in respect of a specified contract,
 - (b) subsection (3) of that section were omitted, and
 - (c) in subsection (4) the reference to subsection (3) were to subsection (2).
- (6) This subsection applies to credits which, had A or B had an accounting period beginning with 5 December 2013 and ending with 22 January 2014, would have been brought into account for that period by A or (as the case may be) B for the purposes of Part 7 of that Act (ignoring section 695A of CTA 2009).

EXPLANATORY NOTE

DISGUISED DISTRIBUTION ARRANGEMENTS

SUMMARY

1. Clause X stops tax avoidance schemes involving total return swaps. Where arrangements are entered into involving total return swaps or other derivative contracts, and the effect of the arrangements is to transfer profits of a company to other group companies, this measure will prevent any deduction being given for payments under the arrangements.

DETAILS OF THE CLAUSE

2. Subsection (1) introduces a new section 695A into Chapter 11 of Part 7 of the Corporation Tax Act 2009.
3. Section 695A(1) sets out the circumstances in which section 695A applies. These circumstances are set out in subsections (1)(a) to (1)(e).
4. Section 695A(1)(a) sets out the first condition, which is that a company A is party to arrangements involving derivative contracts.
5. Section 695A(1)(b) sets out the second condition, which is that another company B is also a party to the arrangements.
6. Section 695A(1)(c) sets out the third condition which is that companies A and B are members of the same group.
7. Section 695A(1)(d) sets out the fourth condition, which is that as a result of the arrangements there is a payment from A to B of all or a substantial part of the profits of a company which is a member of a group with A or B or both. The payment can be in substance, can be either the whole or a significant part, and can be direct or indirect.
8. Subsection 695A(1)(e) sets out the fifth condition, which is that the arrangements are not arrangements of a kind which companies carrying on the same kind of business as company A would enter into in the ordinary course of that business.
9. Section 695A(2) provides that debits arising in these circumstances are not to be brought into account.
10. Section 695A(3) applies to credits arising from the arrangements. It provides that credits arising will not be brought into account, but only to the extent that they do not exceed debits arising from the same arrangements which have not been brought into account as a result of subsection (2).

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11. Section 695A(4) provides an exclusion from subsection (3) in respect of credits only. It provides that, notwithstanding subsection (3), a credit can be brought into account if it arises from tax avoidance arrangements.
12. Section 695A(5) sets out when companies are in the same group for the purposes of section 695A.
13. Subsection 695A(6) sets out definitions of some terms used in Section 695A.
14. Subsections (2) to (6) of Clause X contain commencement provisions.
15. Subsection (2) provides that the clause has effect in relation to accounting periods beginning on or after 5 December 2013, subject to subsections (3) to (6)
16. Subsection (3) provides that for companies which have accounting periods straddling 5 December 2013, the parts of the accounting period falling before and after that date are treated as separate accounting periods.
17. Subsection (4) provides that the clauses do not have effect for debits arising from the arrangements to the extent that credits arising from the same arrangements were brought into account for accounting periods ending before 5 December 2013.
18. Subsection (5) provides that for credits to which subsection (6) applies, the legislation is to have effect as though section 695A (2) referred to credits and debits.
19. Subsection (6) sets out the credits to which subsection (5) applies. It provides that they are those credits which would have been brought into account if the companies had an accounting period beginning with 5 December 2013 and ending with 22 January 2014.

BACKGROUND NOTE

20. This measure closes a tax avoidance scheme using derivative contracts.
21. The schemes targeted by the measure involve the use of a derivative contract described as a total return swap under which payments are made, and a deduction is claimed for payments under the total return swap. The payments involved are in substance distributions of profits. It will apply to any arrangements involving any derivative contract which have the effect of making a payment of all or a significant part of the profits of a company to another company in the same group. The effect of the legislation will be to make it clear that no deduction is due for payments of this nature.
22. If you have any questions about this change, or comments on the legislation, please contact Chris Murrice on 03000 585953 (email: chris.murrice@hmrc.gsi.gov.uk) or Tony Sadler on 03000 585479 (email: tony.sadler@hmrc.gsi.gov.uk).