

# Explanatory Note: draft clause

## Settlements: anti-avoidance

### Summary

1. This clause and Schedule introduce anti-avoidance provisions in relation to payments and benefits made from offshore trusts. They have effect from 6 April 2018.

### Details of the clause

2. This clause introduces the Schedule.

### Details of the Schedule

#### Part 1: Further trusts provisions: Capital gains tax

*TCGA 1992*

3. Paragraphs 1 and 2 amend the Taxation of Chargeable Gains Act (TCGA) 1992.
4. Paragraph 1(1) inserts new sections 87D to 87L into TCGA 1992. Sections 87D to 87F amend the operation of the matching rules in sections 87 and 87A where capital payments are made to non-residents and where there are payments to a mixture of resident and non-resident beneficiaries when a settlement comes to an end. Sections 87G to 87H make provision for cases where the trustees of an offshore trust make a capital payment to a close member of a UK resident settlor's family. Section 87I makes provision for cases where the trustees of an offshore trust make a capital payment to a person who is not a close family member and there is an arrangement or intention for the payment to be passed on to a UK resident. Section 87J makes provision for cases where the payment is passed on to a close member of a UK resident settlor's family. Sections 87K and 89L make provision in relation to the operation of the matching rules where the recipient of a capital payment later becomes non-resident.
5. New section 87D disapplies rules contained within sections 87 and 87A of TCGA 1992 that attribute gains accruing to the trustees of an offshore trust to beneficiaries who receive a capital payment. It disapplies those rules when the capital payment is made to a person that is not resident in the UK.
6. New section 87E overrides section 87D to the extent that capital payments are made to a temporary non-resident. The payment is treated as being received by the beneficiary in the period when they return to the UK.
7. New section 87F modifies section 87D where capital payments are received by a mixture of resident and non-resident beneficiaries in the year when the trust ends.

8. New section 87G applies when the beneficiary in receipt of the payment from the trustees is a close member of the settlor's family and in the year of receipt the settlor is UK resident. It provides that sections 87 and 87A are to be applied as if the capital payment were received by the settlor (rather than the close family member in receipt of the payment). Where tax becomes chargeable on the settlor, the settlor may recover the amount from the person in receipt of the payment and require HMRC to confirm the amount.
9. New section 87H defines 'close member of the settlor's family' as the settlor's spouse or civil partner; or a minor child of either the settlor, spouse or civil partner.
10. New section 87I applies when the trustees of an offshore trust make a capital payment to either a person other than a close member of the settlor's family, or a to a close member of the UK resident settlor's family at a time when the settlor is non-UK resident; and there is an arrangement or intention for that payment (or anything that derives or represents it) to be passed on to another person. It provides that if that subsequent recipient is UK resident in the tax year in which they receive the onward payment and the capital payment has not been matched then sections 87 and 87A are to be applied as if the capital payment were made by the trustees to that subsequent recipient (rather than the beneficiary originally in receipt of the payment from the trustees). Where the capital payment has already been matched under section 87 and 87A and the original beneficiary was a UK resident remittance basis user, the gain which accrued to the original beneficiary is treated as accruing instead to the subsequent recipient to the extent that it was not taxed on the original recipient. Likewise, where there is a series of payments via non-residents, the intermediary payments are ignored.
11. New section 87J applies when the subsequent recipient in a section 87I case is a close member of the settlor's family. It provides that sections 87 and 87A are to be applied as if the capital payment was received by the settlor if he is UK resident (rather than the subsequent beneficiary in receipt of the payment). Where tax becomes chargeable on the settlor, the settlor may recover the amount from the person in receipt of the payment and require HMRC to confirm the amount.
12. New section 87K applies if a capital payment is made to a beneficiary who was UK resident when the payment was received but subsequently becomes non-UK resident before some or all of the payment is matched. It confirms that sections 87 and 87A are to be applied without taking into account the unmatched portion of the payment. This does not apply to payments to close members of a UK resident settlor's family (as these are dealt with under sections 87G and 87J).
13. New section 87L modifies the application of new section 87K where a capital payment is made to a temporary non-UK resident beneficiary who returns to the UK. It confirms that sections 87 and 87A are to be applied as if the payment was received during the beneficiary's period of return.
14. Subparagraphs 1(2) to (10) make consequential changes.
15. Subparagraph 1(2) amends section 2(4) and (5) (which deal with chargeable gains accruing under s87), section 16ZC (which deals with losses of remittance basis users) and section 62 (which deals with the general position on the death of a taxpayer) to refer to the new sections 87I and J.
16. Subparagraph 1(3) amends section 86A(1) (which deals with attribution of gains to the settlor in temporary non-residence cases) to refer to the new sections 87I and J.

17. Subparagraph 1(4) amends the split year provisions to take account of the changes in new section 87E. It deems the gain to accrue in the UK part of the year.
18. Subparagraph 1(5) amends section 87B(1) (which deals with remittance basis) to refer to the new sections 87I and J and corrects a drafting omission.
19. Subparagraph 1(6) amends section 89(3) (which deals with migrant settlements) to refer to the new sections 87D to L.
20. Subparagraph 1(7) amends section 91 (which deals with the increase in tax payable where there is a delay between the gain arising and the capital payment) to refer to the new sections 87I and J.
21. Subparagraph 1(8) amends sections 279A and C (which deal with deferred unascertainable consideration) to refer to the new sections 87I and J.
22. Subparagraph 1(9) amends Schedule 4C (which has provisions about transfers of value linked with trustee borrowing) to refer to new sections 87I and J.
23. Subparagraph 1(10) links to subparagraph 4(b) which deletes subsection 87(7) (which deals with apportionment of gains in a split year). Subparagraph 1(10) omits paragraph 101 of Schedule 45 of the Finance Act 2013 which inserted subsection 87(7).
24. Subparagraphs 1(11) to (15) provide for the commencement of new sections 87D to 87L of TCGA 1992.
25. Subparagraph 1(11) confirms that new sections 87D and 87E (disregard of capital payments to non-residents and temporary non-residents) take effect in relation to payments received in the tax year 2018-19 or later tax years and, where payments have not been made prior to 2018-19, for payments received prior to tax year 2018-19. There is an exception for new section 87D(3) which confirms that it applied to payments received on or after 6 April 2018.
26. Subparagraph 1(12) confirms that new sections 87F (disregarded payments in year settlement ends) and 87G (settlor liable if capital payment received by close family member) have effect in relation to payments received in tax year 2018-19 or later years.
27. Subparagraph 1(13) confirms that new sections 87I and 87J (onward payment rules) have effect in relation to onward payments made on or after 6 April 2018, even in cases where the original payment is received before that date.
28. Subparagraph 1(14) confirms that new sections 87K and 87L (payments to migrating beneficiaries) have effect where the particular tax year is 2018-19 or later.
29. Subparagraph 1(15) confirms that the amendments made to section 89 (migrant settlements) have effect for the tax year 2018-19 and later tax years
30. Paragraph 2 modifies the effect of new sections 87E and 87L of TCGA 1992 when a period of temporary non-UK residence began before 8 July 2015. Here, any capital payment received by the beneficiary will be taxed based on the beneficiary's status at the date of payment rather than the date of return to the UK.

## Part 2: Further trusts provisions: Income tax

### ITTOIA 2005

31. Paragraphs 3 introduces amendments to Chapter 5 (settlements: amounts treated as income of settlor) of Part 5 (miscellaneous income) of the Income Tax (Trading and Other Income) Act (ITTOIA) 2005. Chapter 5 comprises of sections 619 to 648 of the Act.
32. Paragraph 4 amends section 619(1) of ITTOIA 2005 to charge income tax on the amount or value of benefits treated as income as a result of new section 643A (as inserted by paragraph 9).
33. Paragraph 5 makes a consequential amendment to section 621 of ITTOIA 2005 confirming that tax is charged under Chapter 5 on all benefits to which section 619(1) applies.
34. Paragraph 6 amends section 622 of ITTOIA 2005 so that an individual other than the settlor is liable for tax charged under new section 643A.
35. Paragraph 7 makes consequential amendments to section 623 of ITTOIA 2005.
36. Paragraph 8 makes a consequential amendment to section 636 of ITTOIA 2005.
37. Paragraph 9 inserts new sections 643A to 643L into ITTOIA 2005 which contain provisions treating income as arising to the settlor or a close family member of the settlor where benefits are provided to such individuals and there is available protected foreign source income.
38. New section 643A provides that where a person has an untaxed benefits total for a tax year an amount equal to so much of that total as does not exceed the settlement's available protected income is treated as income of that person. This is subject to subsections (3) and (4) which, where the individual is not the settlor, deem the income (or part of the income) to be that of the settlor in certain cases.
39. Those cases are where the individual is, at subsection (3) (a), a non-UK resident; at subsection (3) (b), a UK resident remittance basis user and none of the deemed income is remitted to the UK in the tax year; and, at subsection (4), a UK resident remittance basis user and only part of the deemed income is remitted in the tax year.
40. Where subsection (4) applies only the unremitted remainder is deemed to be income of the settlor.
41. Subsection (5) provides that where there is a choice as to the individuals to whom income is treated as arising under s 643A, income is to be treated as arising to such one or more of them and in such proportions as appears to HMRC to be just and reasonable.
42. New section 643B defines 'untaxed benefits total' for the purposes of new section 643A. It is the difference between the total amount of benefits provided by the trustees to an individual and the amount of those benefits which have either already been subject to income tax or capital gains tax or treated as arising to a person under s 643A in a previous year. If the individual is the settlor benefits provided when the settlor is either domiciled in the UK or deemed domiciled as a result of having a UK domicile of origin are not included in the total. The section sets out the steps to be worked through to calculate the amount of benefits to be taken into account.

43. New section 643C defines 'available protected income' for the purposes of new section 643A. The amount of benefits treated as income as a result of section 643A cannot exceed the amount of available protected income.
44. New section 643D provides that where a benefit is included in calculating an amount of chargeable gain deemed to accrue to a beneficiary that amount is deductible when computing the amount of adjusted benefit under section 643B.
45. New section 643E provides that where tax becomes chargeable on the settlor as a result of section 643A(3) or (4), the settlor may recover the amount from the person in receipt of the payment and require HMRC to confirm the amount.
46. New section 643F provides that where under section 643A income is deemed to arise to a remittance basis user in a tax year then the income is also treated as 'relevant foreign income' (which, under section 832, is charged when remitted).
47. New section 643G provides ordering rules for matching benefits or available protected income to income deemed by section 643A as arising to an individual for the purposes of section 643F.
48. New section 643H defines a close member of the settlor's family for the purposes of section 643B to s643K.
49. New section 643I applies where an amount is treated under section 643A as income of an individual (and is not treated as income of the settlor under s 643A(3) or (4)) and there are arrangements for the benefit to be passed to another person ('the subsequent recipient') who is UK resident for the tax year in which the onward payment is made or matching year if that is a later year than the gift. It provides that in certain cases the amount transferred, or where applicable remitted, is treated for income tax purposes as income of the subsequent recipient (and not the original beneficiary).
50. Those cases are where the subsequent recipient is, at subsection (2), not a remittance basis user; and, at subsection (3), is a remittance basis user and the onward payment is remitted.
51. New section 643J applies where there is an onward payment to which s 643I applies; the subsequent recipient is a close member of the settlor's family and is either a UK resident remittance basis user or a non-UK resident. It provides that the amount of the onward payment is treated for income tax purposes as income of the settlor if he is UK resident (rather than the subsequent beneficiary in receipt of the payment). Where tax becomes chargeable on the settlor, the settlor may recover the amount from the person in receipt of the payment and require HMRC to confirm the amount.
52. New section 643K applies if the trustees of a settlement provide a benefit to an individual who is not the settlor or a close member of the settlor's family; and there are arrangements for the benefit to be passed to another person ('the subsequent recipient') who is the settlor or a close member of the settlor's family. It deems the amount to be treated as income of the subsequent recipient (rather than the beneficiary originally in receipt of the payment from the trustees). Likewise, where there is a series of payments via non-residents, the intermediary payments are ignored.
53. New section 643L provides that income treated as arising to a remittance basis user as a result of new section 643I or 643J is relevant foreign income.

54. Paragraph 10 of Schedule 13 introduces amendments to Chapter 2 (transfers of assets abroad) of Part 13 (tax avoidance) of the Income Tax Act (ITA) 2007. Chapter 2 comprises of sections 714 to 751 of the Act.
55. Paragraph 11 amends section 731 of ITA 2007, the charge to tax on income arising under section 732, in consequence of new sections 733B and 733C (see paragraph 13 to the Schedule).
56. Paragraph 12 amends section 732(1) (e) of ITA 2007 to ensure that double taxation does not arise under section 731 and other provisions.
57. Paragraph 13 inserts new sections 733B and 733C into ITA 2007.
58. New section 733B applies where income is treated as arising to an individual ('the original beneficiary') and there are arrangements for the benefit to be passed to another person ('the subsequent recipient') who is UK resident for the tax year in which the onward payment is made or matching year if that is a later year than the gift. It provides that the income is to be treated for the purposes of section 731 as if it arose to person B under section 732.
59. New section 733C applies if the subsequent recipient, to whom income is treated as arising as under new section 733B, is a close member of the settlor's family and is either a UK resident remittance basis user who has not remitted the income or is not a UK resident; and the settlor is UK resident and not UK domiciled or deemed domiciled because under 835BA Condition A (i.e. a person born in the UK with a UK domicile of origin who returns to the UK).. It provides that the income is to be treated for the purposes of section 731 as if it arose to the settlor under section 732.
60. Paragraph 14 amends section 734(1) (b) of ITA 2007 to prevent double taxation where the chargeable amount determined under section 732 is also a chargeable gain under new section 87G of TCGA 1992 (inserted by paragraph 1(1)).
61. Paragraph 15 inserts new section 735C into ITA 2007. It applies in relation to income that is treated under section 733B or 733C as arising to a person for the purposes of section 731 as if it arose to them under section 732. It treats the income as relevant foreign income where the person is a remittance basis user.

#### *Consequential amendments*

62. Paragraph 16 of Schedule 13 amends section 97(3) of TCGA 1992 and Schedule 1 of ITA 2007 in consequence of Part 2 of the Schedule.

#### *Commencement*

63. Paragraph 17 of Schedule 13 provides for the commencement of Part 2 of the Schedule.
64. Paragraph 18 provides that new section 643D(3) of ITTOIA 2005 is to be treated as inserted by HM Treasury under powers conferred by section 354 of the Taxation (International and Other Provisions) Act 2010.

## **Background note**

65. Income arising, and gains accruing, to the trustees of an offshore trust are, broadly, treated as arising or accruing as follows:

- Sections 86 and 87 of TCGA 1992: Section 86 treats gains accruing to the trustees of an settlor-interested offshore trust as accruing to a UK resident settlor who is also domiciled or (since 6 April 2017) deemed domiciled in the UK; otherwise section 87 attributes the gains to beneficiaries to the extent that they receive a capital payment that is matched to the gain.
  - Chapter 5 of Part 5 of ITTOIA 2005: Chapter 5 treats income arising to the trustees of a settlor-interested offshore trust as arising to the settlor (irrespective of whether the settlor enjoys the income). Capital sums (such as loans) paid to such settlors in excess of the trustees' undistributed income is also treated as income arising to the settlor. Where the remittance basis applies to the settlor, foreign source income is taxed in the year in which it is remitted.
  - Chapter 2 of Part 13 of ITA 2007: Chapter 2 applies where a person transfers assets as a result of which income becomes payable to a person abroad, such as to the trustees of an offshore trust. It deems income to arise to the transferor where that person is UK resident and has power to enjoy the income that arises to the trustees; receives a capital sum from the person abroad; or receives a benefit provided out of the transferred assets that is matched to the income. Rules prevent double taxation under Chapter 2 and other provisions (such as Chapter 5 of Part 5 of ITTOIA 2005). Where the remittance basis applies to the transferor, foreign source income is taxed in the year in which it is remitted.
66. Income treated as arising, and gains treated as accruing, as above, may not be immediately liable to UK tax where the person is not UK tax resident or is a UK resident non-UK domicile remittance basis user.
67. The measure was announced in December 2016 at paragraphs 2.3.1 (treatment of capital gains in trusts) and 2.3.5 (recycling benefits from protected settlements) of the government's response to further consultation on reforms to the taxation of non-domiciles. The consultation response can be found at:  
<https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles-further-consultation>
68. In a technical briefing on the non-domicile reforms published on 21 March 2017 the government announced that because the draft legislation was incomplete certain elements, included the provisions relating to this measure, would be included in a future Finance Bill. The technical briefing can be found at:  
<https://www.gov.uk/government/publications/non-domicile-taxation-technical-briefing-on-overseas-trusts/non-domicile-taxation-technical-briefing-on-overseas-trusts>
69. If you have any questions about this change, or comments on the legislation, please contact Aidan Close on 03000 585255 (aidan.close@hmrc.gsi.gov.uk).