Notes for Guidance - Taxes Consolidation Act 1997

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Part 35C
Hybrid Mismatches

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Notes for Guidance - Taxes Consolidation Act 1997

PART 35C
HYBRID MISMATCHES
Overview

This Part implements Article 9 of the EU Anti-Tax Avoidance Directive (ATAD) as amended by ATAD2 and contains rules to counteract hybrid mismatches. The rules are referred to as anti-hybrid rules. The purpose of anti-hybrid rules is to prevent arrangements that exploit differences in the tax treatment of a financial instrument or an entity, under the tax laws of two or more jurisdictions, to generate a tax advantage. The tax advantage arising from this is referred to as a hybrid mismatch outcome.

Chapter 1
Interpretation and general (Part 35C)

Summary

Chapter 1 is the interpretation chapter and sets out the meaning of various concepts used in this Part.

835Z – Interpretation

Summary

This section is the interpretation section for the Part. The definitions are mostly self-explanatory while others are defined by reference to other provisions in the Taxes Acts.

Details

Definitions ***(1)***

'**arrangement**' has the same meaning as in the Controlled Foreign Company provisions (Part 35B section 835I) and includes –

(a) any transaction, action, course of action, course of conduct, scheme, plan or proposal,

(b) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and

(c) any series of or combination of the circumstances referred to in paragraphs (a) and (b),

whether entered into or arranged by one or two or more enterprises—

(i) whether acting in concert or not,

(ii) whether or not entered into or arranged wholly or partly outside the State, or

(iii) whether or not entered into or arranged as part of a larger arrangement or in conjunction with any other arrangement or arrangements,

but does not include an arrangement referred to in section 826;

'**associated enterprise**' is defined separately in section 835AA

‘**chargeable period**’ has the same meaning as it has in Part 41A and means an accounting period of a company or a tax period.

‘**controlled foreign company charge’** has the same meaning as it has in Part 35B, Controlled Foreign Company provisions.

‘**deduction**’ means any amount, in respect of a payment, that can be taken into account in calculating the taxable profits or gains of an entity.

‘**deemed payment**’ means the allocation of a payment, profit or gains between a head office of an entity and the permanent establishment of that entity or the allocation of a payment, profit or gains between two permanent establishments of the same entity

‘**Directive (EU) 2016/1164**’ means Council Directive (EU) 2016/1164of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, as amended by Directive (EU) 2017/952;

‘**Directive (EU) 2017/952**’ means Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries;

‘**domestic tax**’ means income tax, corporation tax (including a controlled foreign company charge) or capital gains tax;

‘**double deduction**’ means where the same payment gives rise to a tax deduction in two different territories

‘**double deduction mismatch outcome**’ shall be construed in accordance with section 835AD.

‘**dual inclusion income**’ means any amount that is included in both territories where the mismatch outcome has arisen

‘**enterprise**’ means an entity or an individual

‘**entity**’ means

(a) a person (other than an individual) that has legal personality under the laws of the territory in which it is established,

(b) an undertaking (other than an individual) that has legal personality under the laws of the territory in which it is established,

(c) an agreement, trust or other arrangement that has legal personality under the laws of the territory in which it is established,

(d) an association of persons recognised under the laws of the territory in which it is established as having the capacity to perform legal acts, or

(e) any other legal arrangement, of whatever nature or form, that is within the charge to any of the taxes covered by this Part.

Entity is purposely broadly drafted to include structures that do not have legal personality but should be included within the scope of the anti-hybrid rules such as trusts, common contractual funds and partnerships.

'**financial instrument deduction without inclusion mismatch outcome**' shall be construed in accordance with section 835AJ.

'**foreign company charge**' has the same meaning as it has in Part 35B; the Controlled Foreign Companies provisions.

'**foreign tax**' means a tax that is similar to domestic tax, meaning income tax, corporation tax (including a controlled foreign company charge) or capital gains tax, that is charged in another territory but does not include refundable withholding tax;

'**hybrid entity**' means—

(a) a person (other than an individual),

(b) an undertaking (other than an individual), or

(c) an agreement, trust or other arrangement,

which is treated as a chargeable person in respect of some or all of its profits or gains in one territory (i.e. an opaque entity in country X) but for the purposes of tax charged in another territory, some or all of its profits or gains are treated, as arising or accruing to another enterprise (in this Part referred to as 'the participator') (i.e. a transparent entity in country Y)

'**included**' in respect of a payment has a specific meaning in this Part. It refers to an amount of profits or gains arising from that payment, that is (a) to be regarded as taken into account in the taxable income of the payee or (b) that is subject to a controlled foreign company charge or a foreign company charge (as defined in the Acts).

When defining what amount is to be regarded as taken into account in the taxable income of the payee, a number of different scenarios are included depending on the tax status of the payee or the tax laws of the territory in which the payee is established. This is because ATAD specifically provides that (i) a mismatch outcome shall not arise where the payee is exempt from tax in the territory in which it is established and (ii) that the anti-hybrid rules should not affect the general features of the tax system of a Member State.

Accordingly, an amount is to be regarded as taken into account in the taxable income of the payee, as follows;

(i) where the payee is chargeable to tax on the amount (but does not include any amount, which is only chargeable to tax when it is remitted),

(ii) where the payee is a pension fund, government body or other entity that is exempt from tax,

(iii) where the payee is established in a territory, or part of a territory, that does not impose a foreign tax, or

(iv) where the payee is established in a territory that does not impose a tax on payments from sources outside that territory (i.e. where the payee is established in a country with a territorial tax regime that does not impose a

tax on payments sourced outside the country i.e. as opposed to a worldwide tax regime).

'**investor**' means an enterprise or the permanent establishment of an entity (other than the payer) who obtains a tax deduction in respect of a payment in the investor territory;

'**investor territory**', in relation to a payment, means a territory, other than the payer territory, where the payment is deductible;

'**mismatch outcome**' means any or all of the following, as the context requires:

(a) a double deduction mismatch outcome;

(b) a permanent establishment deduction without inclusion mismatch outcome;

(c) a financial instrument deduction without inclusion mismatch outcome;

(d) a payment to a hybrid entity deduction without inclusion mismatch outcome;

(e) a payment by a hybrid entity deduction without inclusion mismatch outcome;

These terms are all construed in accordance with the relevant section. The language is taken from ATAD.

'**payee**', in respect of a payment, means an enterprise or permanent establishment of an entity—

(a) which receives that payment or is treated as receiving that payment under the laws of any territory but does not include a situation where the payment is received in a fiduciary or representative capacity,

(b) which is a participator (the term is defined previously in the context of hybrid entity)

(c) which is treated as the beneficial owner of the payment under the laws of any territory, or

(d) on which a controlled foreign company charge or foreign company charge is made by reference to that payment;

'**payee territory**' means a territory in which a payee is established;

'**payer**' means—

(a) an enterprise, or

(b) the permanent establishment of an entity,

which obtains a tax deduction in respect of a payment in a payer territory;

'**payer territory**' means—

(a) where the payment is made by a hybrid entity or a permanent establishment, the territory in which the hybrid entity or permanent establishment is established, and

(b) in all other cases, the territory where the payment giving rise to the tax deduction is incurred, sourced or made;

'**payment**' means—

(a) a transfer of money or money's worth, or

(b) a deemed payment (as previously defined);

'**payment by a hybrid entity deduction without inclusion mismatch outcome**' shall be construed in accordance with section 835AM.

'**payment to a hybrid entity deduction without inclusion mismatch outcome**' shall be construed in accordance with section 835AL

'**permanent establishment deduction without inclusion mismatch outcome**' shall be construed in accordance with section 835AG

'**structured arrangement**' means an arrangement involving a transaction, or series of transactions, under which a mismatch outcome (as defined) arises, where—

(a) the mismatch outcome is priced into the terms of the arrangement, or

(b) the arrangement was designed to give rise to a mismatch outcome;

'**tax period**' means—

(a) in respect of a charge to domestic tax, a chargeable period,

(b) in respect of a charge to foreign tax, a period equivalent to a chargeable period, or

(c) where the entity concerned is not charged to tax, the period for which financial statements are prepared.

(2) Where there is a reference in this Part to i) a provision of the law of another territory similar to this Part or ii) a provision that has a similar effect to this Part, or a provision of this Part, it shall include a provision that –

(a) gives effect to Directive (EU) 2016/1164,

(b) implements the Final Report on Neutralising the Effects of Hybrid Mismatch Arrangements published by the Organisation for Economic Cooperation and Development on 5 October 2015,

(c) implements the Final Report on Neutralising the Effects of Branch Mismatch Arrangements published by the Organisation for Economic Cooperation and Development on 27 July 2017, or

(d) otherwise neutralises a mismatch outcome.

(3) Where a word or expression is used in this Part and is also used in Directive (EU) 2016/1164 it shall have the same meaning in this Part as it has in the Directive.

(4) Subject to section 835AVA(3) (relating to the reverse hybrid rule), **the territory in which an entity is established** means –

(a) in respect of an entity,

(i) where the entity is registered, incorporated or created in one territory but has its place of effective management in another territory, the territory in which it has its place of effective management and

(ii) in all other cases where the entity is registered, incorporated or created

and

(b) in respect of a permanent establishment, the territory in which the permanent establishment carries on a business.

Section 835AA – Associated enterprises

Summary

This section sets out the relevant definitions and test(s) for determining associated enterprises.

Details

Definitions ***(1)***

'**consolidated group for financial accounting purposes**' means a group consisting of -

(i) a parent entity, and

(ii) all other entities, other than non-consolidating entities,

which are included in the same consolidated financial statements.

'**non-consolidating entity**' means an entity that is (or would be) valued in consolidated financial statements –

(a) using fair value accounting, or

(b) on the basis that it is an asset held for resale or held for distribution

all within the meaning of international accounting standards. Essentially the results of the entity are not included on a line by line basis within the consolidated income statement or consolidated statement of financial position but rather the entity is valued separately on the face of the statement of financial position.

'**parent entity**' means an entity that prepares, or would prepare, consolidated financial statements under generally accepted accounting practice.

'**significant influence in management of**' means the ability to participate on the board of directors or equivalent governing body of the entity and in the financial and operating policy decisions of that entity, including where that power does not extend to control or joint control of that entity.

Tests for associated enterprises ***(2)***

Enterprises shall be **associated enterprises** –

where one enterprise directly or indirectly, possesses or is beneficially entitled to— ***(a)***

(i) not less than 25 per cent of the issued share capital of the other enterprise, or

(ii) where the other enterprise is an entity not having share capital, an interest of not less than 25 per cent of the ownership rights in an enterprise,

if one enterprise, directly or indirectly, is entitled to exercise not less than 25 per cent of the voting power in the other enterprise, where that other enterprise is an entity, ***(b)***

if one enterprise directly or indirectly, holds such rights as would— ***(c)***

(i) entitle them, directly or indirectly, to receive 25 per cent or more of the distributed profits of the other enterprise where the other enterprise is a company, or

(ii) where the other enterprise is an entity other than a company, if the share of the profits of that other enterprise to which the they are entitled to either directly or indirectly is 25 per cent or more,

where the two enterprises are, in accordance with paragraph (a), (b) or (c), associated to a third enterprise ***(d)***

where both enterprises – ***(e)***

(i) are entities, and

(ii) are part of the same consolidated group for financial accounting purposes.

Where both enterprises – ***(f)***

(i) are entities, and

(ii) would, if consolidated financial statements were prepared under international accounting standards, be part of the same consolidated group for financial accounting purposes.

where one enterprise has **significant influence** in the management of the other enterprise. ***(g)***

Where an enterprise **acts together** with another enterprise with respect to voting rights, share ownership rights or similar ownership rights, the enterprise shall be treated, for the purposes of the tests in (a), (b) and (c) of subsection (2), as possessing, holding or being entitled to the rights of each other. ***(3)***

For the purposes of the tests set out in (a), (b) and (c) of subsection (2), the rights or powers of a **nominee** of an enterprise shall be attributed to that enterprise ***(4)***

For the purposes of— ***(5)***

(a) chapter 2 (Double Deduction),

(b) Chapter 3 (Permanent Establishments),

(c) Chapter 8 (Imported mismatch outcomes), and

(d) the application of this Part to hybrid entities,

a reference, in subsection (1), to **‘25 per cent’ shall be substituted by ‘50 per cent’.**

Subject to subsection (7), references to a transaction between associated enterprises includes transactions where the enterprises concerned are or were associated enterprises at the time— ***(6)***

(a) the transaction was entered into,

(b) the transaction was formed, or

(c) a payment arises under the transaction.

References to a transaction between associated enterprises shall not include a transaction between enterprises who were associated at the time the transaction was entered into or formed, but are neither – ***(7)***

(a) associated enterprises at the time the payment arises under the transaction, nor

(b) associated enterprises at the time a deduction in respect of the payment in (a) arises.

and it is reasonable to consider that the enterprises ceased to be associated for *bona fide* commercial reasons and not to avoid the application of this Part.

Section 835AB – Worldwide system of taxation

Summary

Section 835AB provides for certain circumstances where payments that are effectively ignored under a worldwide system of taxation (or an effective worldwide system of taxation) referred to as "disregarded payments" shall be treated as included so that a technical hybrid mismatch does not occur where, in substance, one should not.

Details

Disregarded payments ***(1)***

This subsection provides the meaning for "**disregarded payments**" for the purposes of this section. Essentially, where an enterprise is subject to a worldwide system of taxation, in the case of an entity, similar to section 26(1) TCA 1997, or in the case of an individual, similar to section 18, Schedule D (1)(i) and (ii) TCA 1997, certain payments between it and certain connected parties are effectively ignored for the purposes of calculating their taxable income.

For the purposes of this section these ignored payments are referred to as "disregarded payments" and specifically cover;

(a) payments between the head office and a permanent establishment of the entity,

(b) payments between two or more permanent establishments of the entity,

(c) payments between an individual and a permanent establishment of the individual,

(d) payments between two or more permanent establishments of an individual,

(e) where the enterprise is a participator in a hybrid entity, payments between the enterprise and the hybrid entity,

(f) where the enterprise is a participator in two or more hybrid entities, payments between two or more such hybrid entities, or

(g) where the entity is an entity on which a CFC or similar charge is made in respect of two or more hybrid entities, payments between two or more such hybrid entities.

Disregarded payment treated as included in certain circumstances ***(2)***

Where:

the investor or payee are subject to a worldwide system of tax such that certain payments are disregarded payments as defined in subsection (1), ***(a)***

the payer obtains a tax deduction in respect of a payment but the income against which that payment is deducted is treated as a disregarded payment by the payee or investor such that a technical mismatch outcome would arise ***(b)***

then that disregarded payment will be treated as included by the investor or payee so that such a technical mismatch will not arise.

By treating the disregarded payment as included by the investor or payee a mismatch outcome will not arise either because

(i) there is now dual inclusion income i.e. an amount of income is treated as included in both territories to the transaction, or

(ii) the payment does not result in a deduction without inclusion mismatch.

This section shall not apply where: ***(3)***

- the disregarded payments are between: ***(a)***
    - where the enterprise referred to in subsection (1) is an individual, an individual and a permanent establishment of the individual,
    - where the enterprise referred to in subsection (1) is an individual, two or more permanent establishments of the individual,
    - where the enterprise referred to in subsection (1) is a participator in a hybrid entity, the enterprise and the hybrid entity,
    - where the enterprise referred to in subsection (1) is a participator in two or more hybrid entities, two or more such hybrid entities, or
    - where the entity referred to in subsection (1) is an entity on which a CFC or similar charge is made in respect of two or more hybrid entities, two or more such hybrid entities, and
- there is, in substance, a hybrid mismatch, within the meaning of the Directive (EU) 2016/1164 or within the meaning of the term hybrid mismatch when construed in accordance with the reports referred to in section 835Z(2). ***(b)***

Essentially, this is a principle-based test whereby this section shall not apply where there is, in substance, a hybrid mismatch either under the Directive or under the relevant OECD reports set out in section 835Z(2).

Chapter 2
Double deduction

Summary

Chapter 2 sets out the anti-hybrid rules relating to situations giving rise to a double deduction mismatch outcome.

Section 835AC Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

The chapter shall apply -

(a) to a company within the charge to corporation tax, and

(b) to a transaction giving rise to a mismatch outcome between—

i. entities that are associated enterprises,

ii. the head office of an entity and a permanent establishment of that entity, or

iii. two or more permanent establishments of an entity.

Section 835AD – Double deduction mismatch outcome

Summary

This section sets out what is meant by a double deduction mismatch outcome and provides the rule to neutralise such an outcome.

Details

A double deduction mismatch outcome ***(1)***

A double deduction mismatch outcome shall arise where it would be reasonable to consider that a payment will give rise to a tax deduction in two territories and the income against which the tax deduction is taken in one territory is not included in the other territory.

The primary rule

Where the State is the investor territory, the investor shall be denied a tax deduction for so much of the payment which gives rise to the double deduction mismatch outcome. ***(2)(a)***

The defensive rule ***(2)(b)***

Where the State is the payer territory and the double deduction mismatch outcome has not been neutralised in the investor territory, then the payer shall be denied a deduction for so much of the payment which gives rise to a double deduction mismatch outcome.

Chapter 3
Permanent establishments

Summary

This chapter sets out the anti-hybrid rules relating to permanent establishment.

Section 835AE – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

The chapter shall apply -

(a) to an entity that is within the charge to foreign tax or corporation tax, and

(b) to a transaction giving rise to a mismatch outcome between—

i. entities that are associated enterprises,

ii. the head office of an entity and a permanent establishment of that entity, or

iii. two or more permanent establishments of an entity.

Section 835AF – Disregarded permanent establishment

Summary

This section provides the meaning for a "disregarded permanent establishment".

Details

Disregarded permanent establishment ***(1)***

A disregarded permanent establishment is a presence in a territory –

- which the head office territory treats as a permanent establishment, ***(a)***
- such that some or all of its profits or gains are not taken into account for the purposes of tax in the head office territory, and ***(b)***
- its profits or gains – ***(c)***

i. are not charged to tax under section 25 where the territory in which the permanent establishment is established is the State, and

ii. are not charged to tax, under a similar provision, where the territory in which the permanent establishment is established is not the State

essentially, some or all of the profits or gains of the permanent establishment go untaxed.

As this section requires the anti-hybrid rules to be applied to foreign corporate structures the terms "domestic tax" and "foreign tax" need to be modified and specifically defined for the purposes of this section. ***(2)***

'**domestic tax**' means a tax chargeable on profits or gains, in the head office territory, that is similar to income tax, corporation tax (including a charge under Part 35B) or capital gains tax;

'**foreign tax**' means a tax chargeable on profits or gains, in the permanent establishment territory, that is similar to income tax, corporation tax (including a charge under Part 35B) or capital gains tax.

Section 835AG – Permanent establishment deduction without inclusion mismatch outcome

Summary

This section sets out what is meant by a permanent establishment deduction without inclusion mismatch outcome and provides the rules to neutralise such an outcome.

Details

Permanent establishment deduction without inclusion mismatch outcome

A permanent establishment deduction without inclusion mismatch outcome shall arise where – ***(1)***

- there is a tax deduction in the payer territory and a corresponding amount is not included in the payee territory, and ***(a)***
- the reason why the income is not included in the payee territory is because; ***(b)***
  - (i) the payment is being made to a disregarded permanent establishment,
  - (ii) payments are allocated differently between the head office and a permanent establishment of that entity, or between two or more permanent establishments of an entity, or
  - (iii) the payment is a disregarded payment under the laws of the payee territory.

Dual inclusion income

A mismatch outcome shall not arise under subsection (1)(b)(iii) (where the payment is a disregarded payment under the laws of the payee territory) where the payment is deductible against an amount of income that is included in both the payer territory and the payee territory. ***(2)***

The rule(s) for neutralising the permanent establishment deduction without inclusion mismatch outcome.

The primary rule. ***(3)(a)***

Where the State is the payer territory, notwithstanding any other provision of the Tax Acts and the Capital Gains Tax Acts, the payer shall be denied a tax deduction for the

payment, to the extent a corresponding amount has not been included for the purposes of foreign tax;

The defensive rule ***(3)(b)***

Where the mismatch outcome arises where a payment is made to a disregarded permanent establishment, where -

(i) the State is the payee territory,

(ii) the disregarded permanent establishment is as defined in Article 5 of the Model Tax Convention on Income and Capital, published by the Organisation for Economic Co-operation and Development, as it read on 21 November 2017, and

(iii) a deduction has not been denied in the payer territory

then notwithstanding section 25, the profits and gains of the disregarded permanent establishment shall be charged to corporation tax as if the business carried on in the State by the disregarded permanent establishment was carried on by a company resident in the State.

Chapter 4
Financial instruments

Summary

This chapter sets out the anti-hybrid rules relating to differences in the characterisation of a financial instrument or a payment under a financial instrument.

Section 835AH – Interpretation

Summary

The section provides the meaning for certain terms for the purposes of this chapter.

Details

Definitions ***(1)***

'**financial instrument**' includes—

(a) securities, within the meaning of section 135(8) (Distributions; supplemental) ,

(b) shares in a company and similar ownership rights (not being securities) in entities other than a company,

(c) futures, options, swaps, derivatives and similar instruments that give rise to a financing return,

(d) an arrangement where it is reasonable to consider that the arrangement is equivalent to an arrangement for the lending of money, or money's worth, at interest, and

(e) hybrid transfers;

'**hybrid transfer**' means an arrangement to transfer a financial instrument where the underlying return on that instrument is treated, for tax purposes, as derived by more than one of the parties to the arrangement;

'**financial trader**' means an enterprise that has entered into a financial instrument as part of a business which involves regularly buying and selling financial instruments on that enterprise's own account;

'**on-market hybrid transfer**' means a hybrid transfer—

(a) that a financial trader enters into in the ordinary course of its trade, which includes the business of buying and selling financial instruments, and

(b) the financial trader treats all amounts received in connection with the transferred financial instrument concerned as trading income;

'**financing return'**, in relation to a financial instrument, includes—

(a) dividends and manufactured payments,

(b) interest, including any discounts or amounts which would be treated as interest under Part 8A (Specified Financial Transaction (Islamic Financing)) , notwithstanding that no election is made under section 267U,

(c) the amount of payments that are equivalent to interest under an arrangement described at paragraph (d) of the definition of "financial instrument"

(d) the underlying return referred to in the definition of 'hybrid transfer';

'**manufactured payment**' has the same meaning as it has in Chapter 3 of Part 28 (Stock Borrowing and Repurchase Agreement).

Conditions where a corresponding amount relating to a payment under a financial instrument shall not be regarded as included in the payee territory for the purposes of this chapter.

A corresponding amount shall not be regarded as included where the amount that is charged to foreign tax in the payee territory is reduced by reference to the way the payment under the financial instrument is characterised under those laws, and ***(2)(a)***

A corresponding amount relating to a payment under a financial instrument shall not be treated as included unless— ***(2)(b)***

(i) the corresponding amount is included in a tax period which commences within twelve months of the end of the payer's tax period, or

(ii) it would be reasonable to consider that—

I. the corresponding amount will be included in a tax period subsequent to the payers tax period, and

II. the terms applicable to the payment are those that would apply to a transaction made at arm's length.

Section 835AI – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

This chapter shall apply -

(a) to a company which is within the charge to domestic tax, and

(b) to a transaction that gives rise to a mismatch outcome between—

i. entities that are associated enterprises,

ii. the head office of an entity and a permanent establishment of that entity, or

iii. two or more permanent establishments of an entity,

other than where that transaction is an on-market hybrid transfer.

Section 835AJ – Financial instrument deduction without inclusion mismatch outcome

Summary

This section sets out what is meant by a financial instrument deduction without inclusion mismatch outcome and provides the rules to neutralise such an outcome.

Details

Financial instrument deduction without inclusion mismatch outcome ***(1)***

A financial instrument deduction without inclusion mismatch outcome shall arise in respect of a payment where –

- there is a tax deduction in the payer territory without a corresponding amount being included in the payee territory, and ***(a)***
- the reason why a corresponding amount is not included in the payee territory is due to differences in the characterisation of— ***(b)***
  - (i) a financial instrument, or
  - (ii) payments made under a financial instrument

for the purposes of tax.

The rule(s) for neutralising the financial instrument deduction without inclusion mismatch outcome.

The primary rule ***(2)(a)***

Where the State is the payer territory, the payer shall be denied a tax deduction for the payment, to the extent a corresponding amount has not been included for the purposes of foreign tax;

The defensive rule ***(2)(b)***

Where

(i) the State is the payee territory and

(ii) the mismatch outcome has not been neutralised in the payer territory, then –

(I) where the income is not included because of any provision of the Tax Acts or the Capital Gains Tax Acts, then the specific part of that provision shall be disapplied in calculating the payee's taxable income, and

(II) in any other case, the payee shall be charged to tax under Case IV of Schedule D, in respect of the amount deducted by the payer, and this amount shall be taxed in the period which commences within twelve months of the end of the payer's tax period in which the deduction occurred.

Chapter 5
Hybrid entities

Summary

This sets out the anti-hybrid rules relating to hybrid entities.

Section 835AK – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

(1) This chapter shall apply to a transaction that gives rise to a mismatch outcome between—

(a) entities that are associated enterprises,

(b) the head office of an entity and a permanent establishment of that entity, or

(c) two or more permanent establishments of an entity.

(2) Section 835AL (**Payment to hybrid entity deduction without inclusion mismatch outcome**) applies to a company which is within the charge to corporation tax.

(3) Section 835AM (**Payment by hybrid entity deduction without inclusion mismatch outcome**) applies to a company which is within the charge to foreign tax or corporation tax.

Section 835AL – Payment to hybrid entity deduction without inclusion mismatch outcome

Summary

This section sets out what is meant by a payment to hybrid entity deduction without inclusion mismatch outcome and provides the rule to neutralise such an outcome.

Details

Payment to hybrid entity deduction without inclusion mismatch outcome ***(1)***

Subject to subsection (1A), a payment to hybrid entity deduction without inclusion mismatch outcome shall arise in respect of a payment where it would be reasonable to consider that –

- there is a deduction in the payer territory without a corresponding amount being included in the payee territory, and ***(a)***
- the reason why the income is not included in the payee territory is because of differences in the way payments to a hybrid entity are allocated between— ***(b)***
  - (i) the territory in which the hybrid entity is established, and
  - (ii) the territory in which the participator concerned is established.

A payment to a hybrid entity deduction without inclusion mismatch outcome shall not arise under subsection (1) where the participator concerned is an entity that is exempt from tax in the territory in which it is established. ***(1A)***

The primary rule ***(2)***

Where the State is the payer territory the payer shall be denied a deduction for so much of the payment which gives rise to a deduction without inclusion mismatch outcome.

Section 835AM – Payment by hybrid entity deduction without inclusion mismatch outcome

Summary

This section sets out what is meant by a payment by hybrid entity deduction without inclusion mismatch outcome and provides the rules to neutralise such an outcome.

Details

Payment by hybrid entity deduction without inclusion mismatch outcome ***(1)***

A payment by hybrid entity deduction without inclusion mismatch outcome shall arise where –

- there is a tax deduction in respect of a payment in the payer territory without a corresponding amount being included in the payee territory, and ***(a)***
- the reason why the amount is not included in the payee territory is because the payment is ignored under the laws of the payee territory. ***(b)***

Dual inclusion income ***(2)***

A mismatch outcome shall not arise under this section where the payment is deductible by the payer against income that is also included in the payee territory.

The rule(s) for neutralising the payment by a hybrid entity deduction without inclusion mismatch outcome. ***(3)***

The primary rule ***(3)(a)***

Where the State is the payer territory, the payer shall be denied a tax deduction to the extent a corresponding amount is not included for the purposes of foreign tax.

The defensive rule ***(3)(b)***

Where

(a) the State is the payee territory and

(b) the mismatch outcome has not been neutralised in the payer territory, then –

i. where the income is not included because of any provision of the Tax Acts or the Capital Gains Tax Acts, then the specific part of that provision shall be disapplied in calculating the payee's taxable income, and

ii. in any other case, the payee shall be charged to tax under Case IV of Schedule D, in respect of the amount deducted by the payer, and this amount shall be taxed in the period which commences within twelve months of the end of the payer's tax period in which the deduction occurred.

Chapter 6
Withholding tax

Summary

This chapter sets out the rule for dealing with a withholding tax mismatch outcome. A withholding tax mismatch outcome arises where the transfer of a financial instrument is designed to produce relief for withholding tax to more than one of the parties involved in the transaction.

Section 835AN – Application of chapter

Summary

This section provides that the chapter shall apply to an entity which is within the charge to corporation tax.

Section 835AO – Withholding tax mismatch outcome

Summary

This section sets out what is meant by withholding tax mismatch outcome and provides the rule to neutralise such an outcome.

Details

Withholding tax mismatch outcome ***(1)***

A withholding tax mismatch outcome shall arise where—

(a) an entity enters into a hybrid transfer (as defined in Chapter 4), and

(b) it is reasonable to consider that the purpose of the hybrid transfer is to secure relief for more than one party to the hybrid transfer in respect of an amount of withholding tax.

The rule for neutralising a withholding tax mismatch outcome ***(2)***

A withholding tax mismatch outcome shall, notwithstanding anything in Schedule 24 to the contrary, be neutralised by reducing the withholding tax relief available by the following fraction—

A/B

where—

A is the taxable profit from the hybrid transfer arising to the entity, and

B is the gross income of the entity under the hybrid transfer.

Chapter 7
Tax residency mismatch

Summary

This chapter sets out the anti-hybrid rules relating to tax residency mismatches. Tax residency mismatches arise where an entity is tax resident in more than one territory and can therefore obtain a tax deduction in respect of the same payment in more than one territory.

Section 835AP – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

The chapter shall apply to a company which is within the charge to—

(a) corporation tax, because it is tax resident in the State under the laws of the State, and

(b) foreign tax in a territory other than the State, because it is regarded as tax resident in that territory under the tax laws of that territory.

Section 835AQ – Tax residency double deduction mismatch outcome

Summary

This section sets out what is meant by tax residency double deduction mismatch outcome and provides the rule to neutralise such an outcome.

Details

Tax residency double deduction mismatch outcome ***(1)***

A tax residency double deduction mismatch outcome shall arise

where—

(a) a company has obtained a tax deduction in respect of the same payment in the State and in another territory but the income against which the tax deduction is taken is not included in the two territories, and

(b) the mismatch is because the company is tax resident in the State and in the other territory.

The rule for neutralising a tax residency double deduction mismatch outcome ***(2)***

Where the other territory–

(a) is a Member State, with which the government has a Double Tax Agreement by virtue of section 826(1) (DTA), and under that DTA the company is tax resident in that Member State,

(b) is not a Member State, and under the DTA with that other territory—

(i) the company is not tax resident in the State, or

(ii) the company is tax resident in the State but the double deduction mismatch outcome has not been neutralised in the other territory, or

(c) is not a territory referred to in paragraph (a) or (b),

then notwithstanding any other provision of the Acts, the mismatch outcome shall be neutralised by the company being denied a tax deduction for so much of the payment as corresponds to the double deduction mismatch outcome which has not been neutralised in another territory.

Where the tax residence of a company must be determined by mutual agreement ***(3)***

Where the tax residence of a company must be determined by mutual agreement between the competent authorities of both territories which are party to a DTA, then any adjustment to the return, filed pursuant to section 959I (obligation to make a return), required to give effect to subsection (2) shall be made without unreasonable delay upon that agreement, notwithstanding any time limits in Part 41A (Assessing Rules Including Rules for Self-Assessment).

Chapter 8
Imported mismatch outcomes

Summary

This chapter sets out the anti-hybrid rules relating to imported mismatch outcomes. Imported mismatch outcomes arise where an Irish company does not enter into a hybrid transaction itself but funds, either directly or indirectly, a mismatch outcome through a transaction or series of transaction. Essentially, an imported mismatch outcome arises where an Irish company makes a payment and that payment is used, directly or indirectly, to fund expenditure involving a hybrid mismatch outside the State.

Section 835AR – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

This section provides that the chapter shall apply to

(a) a company which is within the charge to domestic tax, and

(b) a mismatch outcome which arises through a transaction or series of transactions

(i) between—

(I) entities that are associated enterprises,

(II) the head office of an entity and a permanent establishment of that entity, or

(III) two or more permanent establishments of an entity, and

(ii) the company established in the State makes a payment to a payee established in a state that is not a Member State.

Section 835AS – Imported mismatch outcome

Summary

This section sets out what is meant by imported mismatch outcome and provides the rule to neutralise such an outcome.

Details

Imported mismatch outcome ***(1)***

An imported mismatch outcome shall arise where it would be reasonable to consider that—

a company, within the charge to domestic tax, enters into a transaction, or series of transactions, involving a mismatch outcome where a payment by that company directly or indirectly funds the mismatch outcome, and ***(a)***

the mismatch outcome has not been neutralised in another territory. ***(b)***

The rule for neutralising an imported mismatch outcome

An imported mismatch outcome shall be neutralised by the company being denied a tax deduction for so much of the payment as corresponds to the mismatch outcome which has not been neutralised in another territory. ***(2)***

As this chapter requires the anti-hybrid rules to be applied to transactions between other territories the terms "domestic tax" and "foreign tax" need to be modified accordingly. ***(3)***

'**domestic tax**' means a tax chargeable on profits or gains, under the laws of a territory in which an entity is established, that is similar to income tax, corporation tax (including a charge under Part 35B) or capital gains tax;

'**foreign tax**' means a tax chargeable on profits or gains, under the laws of a territory in which the entity is not established, that is similar to income tax, corporation tax (including a charge under Part 35B) and capital gains tax.

Chapter 9
Structured arrangements

Summary

The chapter sets out the anti-hybrid rules relating to structured arrangements. Essentially a structured arrangement is an arrangement where a hybrid mismatch outcome has been priced into the terms or the arrangement is designed to produce a hybrid mismatch outcome. An arrangement will not be a structured arrangement where the taxpayer or an associated enterprise of the taxpayer could not reasonably have been aware of the hybrid mismatch and did not share in the value of the tax benefit arising from the hybrid mismatch.

A structured arrangement is not confined to transactions between associated enterprises.

Section 835AT – Application of chapter

Summary

This section sets out the entities and transaction(s) to which this chapter applies.

Details

This section applies to a company which is within the charge to domestic tax. ***(1)***

Notwithstanding the application sections 835AC, 835AE, 835AH and 835AK of the other chapters in this Part, this Chapter shall apply where a mismatch outcome arises under a structured arrangement. Essentially, this section applies the anti-hybrid rules to certain transactions irrespective of whether the parties to the transaction meet the associated enterprise test. ***(2)***

Section 835AU – Structured arrangements

Summary

This section sets out what is meant by structured arrangement and provides the rule to neutralise such an outcome.

Details

Structured arrangement mismatch outcome

A structured arrangement mismatch outcome shall arise where a company, within the charge to domestic tax, would reasonably be expected to be aware that— ***(1)***

(a) it entered into a structured arrangement,

(b) it shared in the value of the tax benefit resulting from the mismatch outcome, and

(c) the mismatch outcome has not been neutralised in another territory.

The rule for neutralising a structured arrangement mismatch outcome

A structured arrangement mismatch outcome shall be neutralised by the taxpayer being denied a deduction for so much of the payment as corresponds to the mismatch outcome which has not been neutralised in another territory. ***(2)***

As this chapter requires the anti-hybrid rules to be applied to transactions between other territories the terms "domestic tax" and "foreign tax" need to be modified accordingly. ***(3)***

'**domestic tax**' means a tax chargeable on profits or gains, under the laws of a territory in which an entity is established, that is similar to income tax, corporation tax (including a charge under Part 35B) or capital gains tax;

'**foreign tax**' means a tax chargeable on profits or gains, under the laws of a territory in which the entity is not established, that is similar to income tax, corporation tax (including a charge under Part 35B) and capital gains tax.

Chapter 10
Carry forward

Summary

This chapter sets out the carry forward provisions.

Section 835AV – Carry forward

Summary

This section provides that where a deduction has been denied under this Part the entity may make a claim for the denied amount to be set off against any dual inclusion income in succeeding tax periods and where amounts are carried forward they shall be relieved first against profits or gains of an earlier tax period in advance of profits or gains of a later tax period.

Chapter 10A
Reverse hybrid mismatches

Summary

Chapter 10A provides for the reverse hybrid rule. The purpose of the rule is to address non-taxation where an entity is a reverse hybrid entity. In broad terms, a reverse hybrid entity is an entity that is regarded as tax transparent in the territory in which it is established but as tax opaque by one or more of its investors.

8ection 835AVA - Interpretation (Chapter 10A)

Summary

This section is the interpretation section for the chapter.

Details

Definitions ***(1)***

"collective investment scheme" is defined in section 835AVB.

"relevant ownership interest", in relation to a reverse hybrid entity, is to be construed in accordance with subsection (4).

"relevant participator", in relation to a reverse hybrid entity, means a participator with a relevant ownership interest in the reverse hybrid entity.

"reverse hybrid entity" means a hybrid entity established in the State—

(a) that, for the purposes of the Acts, is not chargeable to tax in respect of its profits or gains, because those profits or gains are treated, or would be so treated but for an insufficiency of profits or gains, as arising or accruing to the participators in the hybrid entity (treated as tax transparent in Ireland), and

(b) some or all of the profits or gains of which are regarded, for the purposes of the tax law of the territory in which a participator in the hybrid entity is established, as arising or accruing to the hybrid entity on its own account (treated as tax opaque in an investor territory).

"**reverse hybrid mismatch outcome**" is defined in section 835AVD.

For the purposes of this chapter**,** "**associated entities**" has the same meaning as 'associated enterprises' as defined in section 835AA, subject to the following modifications – ***(2)***

(i) a reference, in that section, to 'enterprise' shall be construed as a reference to 'entity',

(ii) a reference, in subsection (2) of that section, to '25 per cent' shall be construed as a reference to '50 per cent', and

(iii) two entities shall not be treated as acting together with respect to voting rights, share ownership rights or similar ownership rights solely because they are partners in a partnership.

The **territory** in which a reverse hybrid entity is established shall mean the territory in which the reverse hybrid entity is registered, incorporated or created. ***(3)***

A participator shall have a **relevant ownership interest** in a reverse hybrid entity where— ***(4)***

(a) the participator possesses or is beneficially entitled to or the participator and its associated entities possess or are beneficially entitled to, directly or indirectly, 50 per cent or more of the ownership rights in the reverse hybrid entity,
(b) the participator is, or the participator and its associated entities are, entitled to, directly or indirectly, exercise 50 per cent or more of the voting power in the reverse hybrid entity, or
(c) the participator holds, or the participator and its associated entities hold, directly or indirectly, rights giving rise to an entitlement to 50 per cent or more of the profits of the reverse hybrid entity.

Section 835AVB - Collective investment scheme

Summary

This section provides the meaning of "collective investment scheme".

Details

Definitions ***(1)***

"**beneficial owner**", in relation to an undertaking, is any individual who is a beneficial owner within the meaning of –

(a) the Investment Limited Partnerships Act, 1994, or
(b) the Investment Funds, Companies and Miscellaneous Provisions Act 2005,

and in applying this Chapter to a relevant partnership the beneficial owner of the partnership shall be identified in the same manner as the beneficial owner of an investment limited partnership is identified.

"collective investment scheme" means a relevant investment undertaking—

(a) that is widely held, and
(b) which holds a diversified portfolio of assets.

"**relevant AIFM**" means an AIFM, within the meaning of the European Union (Alternative Investment Fund Managers) Regulations 2013 (S.I. No. 257 of 2013), authorised under those Regulations.

"**relevant investment undertaking**" means—

(a) a common contractual fund, within the meaning of section 739I,
(b) an investment limited partnership, within the meaning of section 739J, or
(c) a relevant partnership,

but where the undertaking referred to in paragraphs (a) or (b) is an umbrella scheme, within the meaning of section 739B, it shall mean a sub-fund of that undertaking.

"**relevant partnership**" means—

(a) a partnership, or

(b) a limited partnership under the Limited Partnership Act 1907,

the affairs of which are managed by a relevant AIFM and which has been established under the law of the State.

(2) For the purposes of the definition of 'collective investment scheme' in subsection (1), a relevant investment undertaking is widely held where there is no beneficial owner of that undertaking.

(3) This subsection provides the meaning of a **diversified portfolio of assets** for the purposes of determining whether a relevant investment undertaking qualifies as a "collective investment scheme". It provides that, subject to subsection (4), regard shall be had to—

(a) the nature of the assets held by the relevant investment undertaking,
(b) the extent to which the relevant investment undertaking is exposed to the risks and rewards of different classes of assets (whether directly or indirectly),
(c) the number of investments made by the relevant investment undertaking,
(d) the means through which the investment objective of the relevant investment undertaking is to be achieved, as set out in its prospectus, and
(e) where the assets held are derivatives, the assets to which the derivatives give exposure.

(4) This subsection provides that a relevant investment undertaking shall not be determined to hold a diversified portfolio of assets—

(a) in a case in which the undertaking holds securities, where more than 10 per cent of those securities are issued by a single issuer, or
(b) in a case in which the undertaking holds land, unless the undertaking holds 3 or more properties and the market value of each of those properties is less than 40 per cent of the total market value of the properties held.

(5) This subsection provides for a situation where a relevant investment undertaking **temporarily breaches** the conditions in paragraphs (a) (widely held) and (b) (diversified portfolio of assets) of the definition of 'collective investment scheme' in subsection (1). The subsection provides that where a relevant investment undertaking, having satisfied the conditions in paragraphs (a) and (b) of the definition of 'collective investment scheme' in subsection (1), ceases to satisfy one or both of those conditions, the relevant investment undertaking will be treated as satisfying those conditions where it would be reasonable to consider that the failure to satisfy the condition, was temporary, inadvertent and unavoidable at the time the condition ceased to be satisfied, having regard to—

(a) the means through which the investment objective of the relevant investment undertaking is to be achieved, as set out in its prospectus,
(b) the date or dates on which the condition ceased to be satisfied,
(c) the circumstances giving rise to the condition ceasing to be satisfied,
(d) the steps taken, if any, to ensure the condition is satisfied and the date or dates on which it is satisfied, and
(e) the steps taken, if any, to prevent the circumstances, referred to in paragraph (c), reoccurring.

(6) This subsection provides for a situation where, during its **start-up phase**, a relevant investment undertaking does not satisfy the conditions in paragraphs (a) (widely held) and/or (b) (diversified portfolio of assets) of the definition of 'collective investment scheme' in subsection (1). The subsection provides that the investment undertaking will be treated as having satisfied those conditions in the period of 24 months from the date on which the undertaking makes its first investment (in this subsection referred to as the 'relevant period') where it would be reasonable to consider that –

(a) the conditions will be satisfied within the relevant period, and

(b) the failure to satisfy the conditions is temporary and unavoidable, having regard to -

(i) the means through which the investment objective of the relevant investment undertaking is to be achieved, as set out in its prospectus,

(ii) the circumstances giving rise to the conditions not being satisfied, and

(iii) the steps taken, if any, to ensure the conditions will be satisfied.

(7) This subsection provides for a situation where, during its **wind-down phase**, a relevant investment undertaking does not satisfy the conditions in paragraphs (a) (widely held) and/or (b) (diversified portfolio of assets) of the definition of 'collective investment scheme' in subsection (1). The subsection provides that in a case in which a relevant investment undertaking, having satisfied the conditions,

(a) ceases to satisfy one or both of those conditions, and

(b) the failure to satisfy the condition or both of those conditions, as the case may be, is due to the commencement of the winding down of the relevant investment undertaking,

the relevant investment undertaking will be treated as satisfying those conditions in the period of 12 months from the date on which the condition or both of those conditions, as the case may be, first ceased to be satisfied as a result of the winding down.

Section 835AVC Application (Chapter 10A)

Summary

The section sets out the application of the chapter.

Details

This chapter shall apply to—

(a) a reverse hybrid entity, other than a collective investment scheme, in which one or more of the participators is a relevant participator, and

(b) a reverse hybrid mismatch outcome.

Section 835AVD Reverse hybrid mismatch outcome

Summary

This section sets out what is meant by a reverse hybrid mismatch outcome and when such a mismatch outcome shall not be regarded as arising. The section also sets out how a reverse hybrid mismatch outcome shall be neutralised and provides for certain operational matters in that regard including how the rule interacts with double tax arrangements.

(1) Subject to subsection (2), a **reverse hybrid mismatch outcome** shall arise where some or all of the profits or gains of a reverse hybrid entity, that are attributable to a relevant participator, are subject to neither domestic nor foreign tax (where the profits or gains attributable to a relevant participator go untaxed).

(2) A reverse hybrid mismatch outcome shall not arise where the relevant participator —

(a) is exempt from tax which generally applies to profits or gains under the laws of the territory in which it is established,
(b) is established in a territory, or part of a territory, that does not impose a foreign tax, or
(c) is established in a territory that does not impose a tax that generally applies to profits or gains derived from payments receivable in that territory by enterprises from sources outside that territory (territorial system of taxation).

(3) Subject to subsections (7) and (8), a reverse hybrid mismatch outcome shall be **neutralised**, notwithstanding any other provision of the Tax Acts and the Capital Gains Tax Acts, by the profits and gains referred to in subsection (1) being charged to corporation tax on the reverse hybrid entity concerned as if the business carried on in the State by the reverse hybrid entity was carried on by a company resident in the State.

(4) This subsection provides the meaning of the term '**unit**' for the purposes of subsection (5). The subsection provides that 'unit' has, as the context requires, the meaning assigned to it in section 739B(1) (broadly any investment by a unit holder), that meaning as modified in accordance with section 739J(1)(b) (meaning partnership interest) or, where this section is applied to a relevant partnership, a 'partnership interest', within the meaning of section 739J.

(5) Where an amount of tax is payable by the reverse hybrid entity under subsection (3), in respect of profits attributable to a relevant participator, the reverse hybrid entity —

(a) is entitled to appropriate or cancel such portion of units of the relevant participator concerned as are required to meet the amount of the tax arising on profits attributable to that participator, and
(b) be acquitted and discharged of such appropriation or cancellation as if the amount of tax had been paid to the participator.

(6) Where a reverse hybrid entity exercises its right under subsection (5)(a)—

(a) the participator concerned shall allow the appropriation or cancellation, as the case may be, and
(b) the appropriation or cancellation, as the case may be, shall take place at the end of the tax period in respect of which the tax arose.

(7) Where a relevant participator is resident in a territory with which Ireland has agreed a **Double Tax Agreement** then any corporation tax being charged on that entity by virtue of subsection (3) shall take account of the provisions of those arrangements.

Essentially, the provisions of the Double Tax Arrangement take priority to the provisions of this Chapter.

The subsection sets out that the provisions of the Tax Acts relating to the calculation, assessment and collection of tax shall apply — ***(8)***

(a) as if the reverse hybrid entity was a company resident in the State for the tax period, and
(b) without prejudice to the generality of paragraph (a), where the reverse hybrid entity—
    (i) is a common contractual fund, all obligations falling on the common contractual fund pursuant to this Part shall be fulfilled on behalf of the common contractual fund by the management company who is authorised to act on behalf, or for the purposes, of the common contractual fund and habitually does so, but the management company shall not be liable in a personal capacity to any tax imposed by this Part on the common contractual fund, and
    (ii) is a partnership, all obligations falling on the partnership pursuant to this part shall be fulfilled by the precedent partner on behalf of the partnership.

Chapter 11
Application of this Part

Section 835AW - Scope of application

Summary

This section provides the application of this Part.

Details

Chapters 1 to 10 shall apply to payments made or arising on or after 1 January 2020. ***(1)***

Chapter 10A shall apply to tax periods commencing on or after 1 January 2022. ***(2)***

Section 835AX – Order of application

Summary

This section sets out the order in which this Part should be applied.

Details

This Part shall apply after all other provisions of the Tax Acts and the Capital Gains Tax Acts but before section 811C and Part 35D. ***(1)***

A mismatch outcome need only be neutralised once under this Part. ***(2)***