The UK ORIP tax charge – Where are we now?

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On 6 April 2019, the UK’s far-reaching tax regime on offshore receipts in respect of intangible property (ORIP) came into effect (with anti-avoidance provisions applying to arrangements made on or after 29 October 2018). The rules can impose UK tax liabilities on non-UK resident companies with no UK activities, based on a tenuous connection to UK sales by connected or unconnected persons. When the regime was first introduced, the UK government recognised that this broad-based legislation had flaws that would require correction. Drafts amending regulations and guidance have now been published for public comment, but these have done little to narrow the potential scope of the rules and leave a number of questions unanswered.

Background

The ORIP regime, which was introduced by Finance Act 2019, imposes UK income tax (currently at 20%) on amounts received by certain non-UK resident persons in respect of the enjoyment or exercise of rights in respect of intangible property (IP), where those amounts relate to the sale of goods or services in the UK. The concept of IP is very widely defined and broadly includes all property except tangible assets, land, financial assets and shares.

The ORIP regime aims to reduce the potential for large multinationals to gain an unfair competitive advantage by holding their IP in low-tax, offshore jurisdictions, thereby levelling the playing field for businesses operating in the UK market.
When the rules were enacted, there was widespread concern over the breadth of the rules and a lack of clarity around certain aspects of the regime, in particular the application of the anti-avoidance provisions. On 24 May 2019, the government released, for public comment (until 19 July 2019), draft regulations to amend the existing legislation, along with an explanatory memorandum and draft guidance. The key proposed amendments and their implications are discussed below.

**Proposed amendments to the scope of the ORIP rules**

**Entities no longer protected from ORIP – changes to the definition of residence**

One of the exemptions from the ORIP rules applies where the non-UK resident person is resident in a full treaty territory, i.e. a jurisdiction with which the UK has a double taxation agreement (DTA) which contains a non-discrimination article. The draft regulations seek to further extend the scope of the ORIP rules by amending the definition of residence, as described below.

First, under the enacted rules, a person is not considered to be a resident under the relevant DTA if that person is liable to tax only in respect of income from sources in that territory, or capital situated there. The draft regulations extend this concept by also deeming persons to be non-resident if they are subject to tax on foreign source income or foreign situated capital only when remitted or received in their jurisdiction of residence. However, the draft guidance notes that treaty relief may still be available to the company under the applicable DTA under general principles, which may prevent a charge under the ORIP rules.

Second, a person is not considered to be a resident under the relevant DTA for the purposes of these rules if the person is expressly excluded from obtaining relief under the applicable DTA. For example, even though Barbados is a full treaty territory, a Barbados International Business Company is an entity specifically excluded under the UK/Barbados DTA and is, therefore, not treated as a resident of Barbados for the purposes of the ORIP rules.

**Additional jurisdictions may be taken out of ORIP**

The draft regulations propose to introduce an exemption for companies which are resident in specified jurisdictions with which the UK does not have a DTA, or which are otherwise not full treaty territories. These jurisdictions (to be specified in regulations), are expected to be those that do not pose a risk to the statutory purpose of the legislation and are in the scope of the ORIP charge simply because they do not currently have an appropriate DTA with the UK. HMRC will have the power to add or remove specified jurisdictions from these regulations.

**Change in the HMRC list of full treaty territories**

Additionally, HMRC has updated its published list of jurisdictions which it regards as full treaty territories. Notably, jurisdictions that are not regarded as states (e.g. the Channel Islands, Hong Kong and the Isle of Man) are not considered full treaty territories – even where the DTA contains a non-discrimination clause.

**Proposed amendments affecting the computation of the ORIP charge**

The ORIP charge is imposed on the person receiving, or entitled to receive, UK-derived amounts arising in the tax year. Broadly, UK-derived amounts are the income or capital amounts (from the IP) that a person derives, directly or indirectly, from UK sales. While the draft guidance emphasises that UK-derived amounts is a broad concept, the draft regulations contain some welcome changes to the computation of the ORIP charge.

**UK resellers excluded**

First, the draft regulations propose to modify the definition of UK sales to look through UK resellers so that the sale to a UK reseller is not a UK sale for the purposes of the rules. A reseller is defined broadly as a person who acquires and resells goods or services without making any change to the item being sold itself (unless incidental). A further clarification to UK sales is that the term will only include online advertising services to the extent the advertising targets persons in the UK (although further guidance in this regard would be welcome).

**Certain UK sales disregarded**

Second, the draft regulations propose to amend the legislation so that UK sales made by third parties will be...
disregarded where the IP makes an *insignificant* contribution to the UK sales. HMRC lists in the draft guidance various non-exhaustive factors which would indicate that the IP is not insignificant to the UK sales.

This exclusion does not apply to related party arrangements. It is unclear what possible policy reason would justify this distinction; perhaps the government simply felt that extending the exclusion to related persons would be too ripe for abuse.

**Removing double counting**

Third, the draft regulations propose to mitigate double taxation by introducing an exemption in circumstances where an ORIP charge arises to more than one company within the same group in respect of the same underlying IP.

While the above measure is welcome, it would also be appropriate for the measure to be extended to third-party arrangements derived from the same underlying IP.

**Key takeaways**

The draft regulations propose some welcome changes to the far-reaching scope of the ORIP rules, and the draft guidance and explanatory memorandum provide further clarification on the intended operation of the ORIP regime.

However, the work is far from over. There is still a lot of uncertainty on various aspects of the rules, in particular on the application of the targeted anti-avoidance rule (TAAR) to group restructurings to transfer offshore IP to the UK or a full treaty territory. While the draft regulations do not seek to amend the TAAR provisions, the draft guidance attempts (some might say unsuccessfully) to clarify the application of the TAAR by providing a list of non-exhaustive factors in which HMRC will consider in assessing whether such transfer falls foul of the TAAR. These factors include where the transferee does not have substantial operations in its jurisdiction or the substantive economic activity underlying the IP is performed elsewhere. However, the draft guidance does not provide clarity on what constitutes *substantial* for this purpose.

Further, while the draft regulations seek to address double taxation by switching off any UK withholding tax on an amount to which an ORIP charge applies, there is a still lack of clarity as to the interaction between the ORIP rules and other regimes of the UK tax code which may seek to impose UK tax on the same income (such as diverted profits or the proposed digital services tax regime).

Please contact the authors if you have any questions concerning the above.

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