

# **Protective Notifications**

**Guidance on Section 811A (*Transactions to avoid liability to tax: surcharge, interest and protective notification*) of the Taxes Consolidation Act 1997 (as amended).**

**Revenue Commissioners**  
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## 1. Introduction and Disclaimer

The questions and answers that follow are intended to assist taxpayers in deciding whether to make a **Protective Notification**, in relation to a transaction, under section 811A (*Transactions to avoid liability to tax: surcharge, interest and protective notification*) of the Taxes Consolidation Act 1997. Section 811A was inserted by section 126 of the Finance Act 2006 and amended by section 140 of the Finance Act 2008. Section 811A is a companion section to the general anti-avoidance section - section 811 (*Transactions to avoid liability to tax*) - of the Taxes Consolidation Act 1997 and is to be construed together with section 811.

*While every effort has been made to ensure that the answers that follow accurately reflect the relevant provisions of the Taxes Consolidation Act 1997, the text that follows is for guidance only and does not purport to be a definitive legal interpretation of those provisions.*

## 2. What are Protective Notifications?

Protective Notifications are notifications made to Revenue in a prescribed form – **Form PN1** – in relation to transactions undertaken by the taxpayer. The Protective Notification mechanism is designed to provide a safe haven for those who intend to undertake a transaction which may be found to be a tax avoidance transaction. The making of a valid Protective Notification by a taxpayer will provide certain benefits to taxpayers who undertake transactions which are found to be tax avoidance transactions under section 811 of the Taxes Consolidation Act 1997.

## 3. What are the benefits of making a Protective Notification?

The making of a Protective Notification in respect of a transaction-

- protects the taxpayer from any possibility of having to pay a surcharge and interest in the event of the transaction being found to be a tax avoidance transaction,
- protects the taxpayer from the changes made, by Finance Act 2008, to the provisions governing appeals against a Revenue opinion that a transaction is a tax avoidance transaction under section 811 (please see Question 8), and
- limits the time during which Revenue can form an opinion that a transaction is a tax avoidance transaction to a period of two years from the date of the notification – if a Protective Notification is not made, such an opinion can be formed at any time.

Taxpayers should also be aware that the law requires that *nothing* can be inferred by Revenue from the fact that a taxpayer chooses to make a Protective Notification. The complete assurance afforded by a Protective Notification can be obtained by the taxpayer, when a transaction is undertaken, wholly without prejudice to the taxpayer's view that the transaction should *not* be characterized as a tax avoidance transaction by Revenue.

## 4. Who needs to know about Protective Notifications?

Any taxpayer who-

- has undertaken a transaction,
- wishes to ensure that there is no possibility that a surcharge and interest could become payable in the event of the transaction being found to be a tax avoidance transaction,
- wishes to protect him/herself from the change in the appeal provisions, and
- wishes to limit the time period during which Revenue can form an opinion that a transaction is a tax avoidance transaction under section 811,

needs to know about Protective Notifications.

Advisers in relation to the tax aspects of transactions should ensure that the taxpayers they advise are fully aware of their entitlement to make a Protective Notification and of the benefits of doing so.

## 5. What is a “*transaction*”?

It will be clear from the definition below, quoted from the general anti-avoidance rule set out in section 811, that the term “*transaction*” is given a very broad meaning<sup>1</sup>. That meaning is also applied for the purposes of the Protective Notification provisions under section 811A:

*“transaction” means—*

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

*(ii) 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*

*(iii) any series or combination of the circumstances referred to in paragraphs (i) and (ii),*

*whether entered into or arranged by one person or by 2 or more persons—*

*(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 transaction or in conjunction with any other transaction or transactions.*

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<sup>1</sup> With reference to the mention of transactions outside the State in the definition of “*transaction*” it should be noted that Section 811 is exclusively concerned with avoidance of Irish tax and duties and does not address foreign taxes or duties.

## 6. What transactions can surcharge, interest and the change in the appeal provisions apply to?

The surcharge, interest<sup>2</sup> and change in the appeal provisions can apply to transactions that are found to be tax avoidance transactions in circumstances where a full Protective Notification has not been made. The surcharge, interest and appeal provision changes *cannot* apply where a Protective Notification was made in respect of the transaction. In addition, Revenue, in such instances, are prevented from forming an opinion that a transaction is a tax avoidance transaction under section 811 later than two years from the date of the notification.

Section 811A(7) applies the surcharge and interest (to the tax that taxpayers must pay) and the revised appeal provisions to

- a tax avoidance transaction undertaken wholly or partly on or after 19 February 2008 *and*
- where the tax avoidance transaction was undertaken wholly before 19 February 2008, if it had the effect or would have had the effect had it succeeded, of
  - reducing liabilities arising from a transaction undertaken on or after 19 February 2008, or
  - causing a repayment that would have first become due on or after 19 February 2008.

The two-year time-limit on Revenue forming an opinion that a transaction is a tax avoidance transaction under section 811 is applied to the above transactions by section 811A(7), in situations where a Protective Notification has been made in respect of the transactions.

## 7. When is a transaction a tax avoidance transaction?

For a transaction to be a tax avoidance transaction, the Revenue Commissioners must first issue a notice to the taxpayer of their opinion to that effect. That opinion, that a transaction is a tax avoidance transaction, will only become final and conclusive if and when:

- the taxpayer has not appealed against the opinion in the time allowed or
- the taxpayer appeals, in circumstances where a Protective Notification has been made, and the Appeal Commissioners or the Courts do not find that the transaction is not a tax avoidance transaction – although in upholding Revenue’s opinion they may amend the specification of the avoidance involved or
- the taxpayer appeals, in circumstances where a Protective Notification has *not* been made, and the Appeal Commissioners or the Courts find that there were

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<sup>2</sup>The surcharge and interest relevant to Protective Notifications is surcharge and interest under Section 811A of the Taxes Consolidation Act 1997.

grounds on which the transaction specified in the Revenue notice of opinion could reasonably be considered to be a tax avoidance transaction; or

- having appealed Revenue's opinion, the taxpayer subsequently withdraws the appeal or comes to an agreement with Revenue that the transaction is a tax avoidance transaction.

#### **8. What criteria are Revenue required to use in forming an opinion that a transaction is a tax avoidance transaction?**

Revenue is required to have regard to

- the results of the transaction,
- its use as a means of achieving those results, and
- any other means by which the results or any part of the results could have been achieved.

The comparison of routes, that could have been chosen to achieve the results of a transaction, is the principal guide to the purpose of the route chosen:

*For example, in undertaking a business transaction, a taxpayer is not obliged to choose the most tax-costly route from routes A, B and C. Route B may involve the acquisition of a business asset with tax-deductible interest on borrowings whereas route A would involve a purchase with own funds. Although Route B involves a tax saving there would not normally be a tax avoidance transaction involved. If route C is a circuitous route that appears to have been primarily arranged for tax purposes, then it may be a tax avoidance transaction even though, as with routes A and B, a business asset is acquired.*

In addition to clarifying that the most tax-costly route is not required, the legislation recognizes that the tax code provides opportunities (in reliefs, allowances or other abatements) to mitigate tax as an incentive to specific choices. Availing of such opportunities will not involve a tax avoidance transaction so long as there is no misuse or abuse involved.

Revenue is also required to have regard to the substance of transactions as well as their form and to consider a transaction in the context of related or connected transactions.

The provisions of the law (**subsections (2) and (3) of section 811 of the Taxes Consolidation Act 1997**) that set out the meaning of "tax avoidance transaction" govern the forming of an opinion by Revenue that a transaction is a tax avoidance transaction. These provisions also apply to the Appeal Commissioners and the Courts in hearing appeals or cases stated in relation to such an opinion in circumstances where a Protective Notification has been made.

**9. What criteria are the Appeal Commissioners and the Courts required to use in determining an appeal or a case stated in relation to a Revenue notice of opinion that a transaction is a tax avoidance transaction, if no protective notification has been made?**

Where a taxpayer chooses not to make a Protective Notification, any appeal, or case stated, in relation to a Revenue notice of opinion under section 811 that a transaction is a tax avoidance transaction must be determined by the Appeal Commissioners and, in turn, by the Courts on the basis of whether there were grounds on which the transaction specified in the Revenue notice of opinion could reasonably be considered to be a tax avoidance transaction.

**10. What is the amount of the surcharge and what interest could arise?**

The *surcharge*<sup>3</sup> is 20% of the additional tax that is payable when a transaction is found to be a tax avoidance transaction. [The additional tax, in respect of which the surcharge is payable, is the “*tax advantage*” that the taxpayer sought to obtain in undertaking the tax avoidance transaction.]

If the additional tax is the taxpayer’s own tax such as income tax, corporation tax, capital gains tax, capital acquisitions tax or stamp duty the rounded annualised rate of *interest* is effectively 10% per annum.

If the additional tax is VAT or employer’s PAYE income tax the rounded annualised rate of interest will be 12%.

The interest will be calculated back to the date when the tax would originally have been due if there had been no attempt at avoiding the liability concerned. Where, on foot of the tax avoidance transaction, a repayment of tax or a payment of a tax credit was made to the taxpayer, interest will be calculated back to the date when that repayment or payment was made.

It takes time to investigate a transaction; to form, and give notice of, the opinion that the transaction is a tax avoidance transaction; and to complete the appeal process leading (if that is the outcome) to that opinion becoming final and conclusive. As a result, the liability to surcharge and interest – to be added to the payment of the tax liability that the taxpayer has failed to avoid – may represent a substantial percentage of the tax to be paid.

**11. Where a transaction in respect of which a taxpayer has made a Protective Notification is subsequently found to be a tax avoidance transaction, could the taxpayer then be published in the quarterly lists of tax defaulters?**

No. A taxpayer cannot be published in such circumstances.

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<sup>3</sup> The surcharge, calculated as 20% of the amount of tax concerned, is stated to be an “amount” payable rather than tax – although it is to be treated as if it were tax of the type concerned for collection, recovery and other purposes [section 811A(2)(a)]. The surcharge was increased from 10% to 20% in the 2008 Finance Act.

## **12. In respect of what transactions can a Protective Notification be made?**

A Protective Notification can be made in relation to any transaction in respect of which there is a risk that it could be successfully challenged as being a tax avoidance transaction and where, in that event, there would be a liability to the surcharge and interest and exposure to the revised appeal provisions (please see **question 6**).

- Where the taxpayer is uncertain how Revenue might view a transaction only a Protective Notification can provide the assurance that the surcharge and interest will not arise and that the revised appeal provisions will not apply. In addition, a Protective Notification provides the added comfort of limiting the time period during which Revenue can form an opinion under section 811 that a transaction is a tax avoidance transaction
- Taxpayers should note that the law requires that *nothing* can be inferred by Revenue from the taxpayer availing of this assurance: The complete assurance afforded by a Protective Notification can be obtained by the taxpayer, when a transaction is undertaken, wholly without prejudice to the taxpayer's view that the transaction should *not* be characterized as a tax avoidance transaction by Revenue.

## **13. Where a taxpayer is unsure whether a Protective Notification would be advisable, will Revenue offer a view of the transaction in advance of it being undertaken?**

No. Taxpayers can make Protective Notifications, when a transaction is undertaken, *wholly without prejudice* to their view that the transaction concerned should not be characterized by Revenue as a tax avoidance transaction.

## **14. Are taxpayers, or their agents, obliged to make Protective Notifications?**

No. Neither taxpayers nor their agents are obliged to avail of a Protective Notification to protect against surcharge, interest and the revised appeal provisions and to avail of the two year time limit on Revenue forming an opinion that a transaction is a tax avoidance transaction. However, taxpayers may expect that they be made fully aware of their entitlement to make a Protective Notification in advance of entering into a transaction that may result in the transaction concerned being characterized by the Revenue Commissioners as a tax avoidance transaction.

## **15. Are there time limits within which a Protective Notification must be made to be effective?**

Yes. If any part of a transaction is undertaken on or after 19 February 2008, a Protective Notification must be made within 90 days after the transaction began or, if later, by 19 May 2008.

Where the transaction was undertaken wholly before 19 February 2008 and has the effect of-

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- reducing liabilities arising from another transaction that was wholly undertaken on or after 19 February 2008, or
- causing a repayment that first became due on or after 19 February 2008,

then the Protective Notification must be made within 90 days after

- the other (post-19 February 2008) transaction began or
- the repayment first became due,

or, if later, by 19 May 2008

**16. What form is to be used in making a Protective Notification and where can it be obtained ?**

A Form PN1 must be used.

Copies of the Form can be obtained from the

- Protective Notifications Unit –
  - Telephone 01 - 6470710
  - Fax 01 - 6716668
  - e-mail [pnunit@revenue.ie](mailto:pnunit@revenue.ie)
- Online at [www.revenue.ie](http://www.revenue.ie) under: forms / forms for individuals / forms for businesses.
- Forms and leaflets Lo-Call 1890 306706

**17. Can any form - other than a Form PN1 - be used?**

No. The law requires that a Protective Notification be made in the prescribed form - which is Form PN1.

**18. If full details are provided in an Expression of Doubt will that not be sufficient to prevent any surcharge or interest arising and the revised appeal provisions applying?**

No. The law specifically provides that Expressions of Doubt are not to be treated as equivalent to Protective Notifications.

**19. Where are Protective Notifications to be sent?**

Protective Notifications must be sent to:

**Protective Notifications Unit  
Office of the Revenue Commissioners  
First Floor  
Setanta Centre  
Dublin 2**

The Protective Notification Unit may be contacted at [pnunit@revenue.ie](mailto:pnunit@revenue.ie).

## **20. What information is required by Form PN1?**

Form PN1 requires the following information to be stated:

- Name, Address/Business Address and Tax Reference Number of the person by whom, or on whose behalf, the Protective Notification is being made.
- Name, Address, Telephone Number and, if applicable, Tax Adviser Identification Number (TAIN) of the person to whom enquiries are to be directed (if different from the person making the notification).
- ***Transaction Details*** – full details of the transaction that is the subject of the Protective Notification (including any part of the transaction that has not been undertaken before the Protective Notification is delivered).
- ***Relevant provision of the Acts*** - full reference to the provisions of the Acts that the person, by whom, or on whose behalf, the Protective Notification is made, considers to be relevant to the treatment of the transaction for tax purposes.
- ***How the relevant provisions of the Acts apply to the transaction*** – full details of how, in the opinion of the person by whom, or on whose behalf, the Protective Notification is made, each of the relevant provisions applies, or does not apply, to the transaction.

## **21. Will Revenue acknowledge receipt of all Protective Notifications?**

Yes. Revenue will acknowledge receipt of Forms PN1 promptly.

## **22. Will Revenue express an opinion in response to each Protective Notification, stating whether it considers the transaction concerned to be a tax avoidance transaction?**

No. Taxpayers making Protective Notifications will be doing so

- to prevent any possibility of a surcharge or interest arising,
- to prevent the revised appeal provisions applying
- to avail of the two year time limit on Revenue forming an opinion that the transaction is a tax avoidance transaction, and
- without prejudice to their view – if that is their view - that the transaction should not be characterized by the Revenue Commissioners as a tax avoidance transaction.

The Protective Notification is *not* an invitation or request to Revenue to express an opinion as to whether a transaction is a tax avoidance transaction.

**23. Are taxpayers, in making Protective Notifications, not being asked to admit that they have doubts in relation to a transaction that they have undertaken?**

No. The relevant legislation specifically and emphatically requires that no such inference may be drawn from the fact that a taxpayer had made a Protective Notification in respect of a transaction: Under the law, the *sole* purpose of a taxpayer in making a Protective Notification is to protect against any possibility of surcharge or interest and to prevent the revised appeal provisions applying and they do so *wholly without prejudice* as to whether any opinion, if the Revenue Commissioners were to form such an opinion, that the transaction concerned was a tax avoidance transaction would be correct. In addition, the Protective Notification allows the taxpayer to avail of the two-year time limit on Revenue forming an opinion that a transaction is a tax avoidance transaction.

**24. What if Revenue forms the view that a full and valid Protective Notification has not been made?**

In issuing a Notice of Opinion, that it has formed the view that a transaction is a tax avoidance transaction, Revenue is required by law to specify whether a Protective Notification has been made in respect of the transaction. If Revenue specifies that it does not consider that a Protective Notification has been made, the taxpayer may appeal against that aspect of the Notice of Opinion. Where a comprehensive Protective Notification has been made in good faith disagreements in relation to whether or not a Protective Notification was made are unlikely to arise. Should such a disagreement arise the taxpayer will have full rights of appeal to the Appeal Commissioners and the Courts.