

Tax Treatment of Employee Benefit Schemes

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1. Introduction

Section 811B of the Taxes Consolidation Act (TCA) 1997 is an anti-avoidance measure designed to combat schemes whereby an employer places funds in trusts or other arrangements (generally offshore) and where, under such schemes, payments/loans, benefits or assets are provided to a director or employee or to an individual connected to a director or employee. Where loans are involved, they are generally rolled over and not repaid.

Section 811B imposes a charge to Income Tax (where not otherwise chargeable):

- (a) in the case of both a current or former director or employee, on the amount of such payment/loan, the cost of providing (or the value of) such benefit, or the value of the asset,
- (b) in the case of an individual, though not a director or employee at the time of receipt of the payment/loan, benefit or asset, who subsequently becomes a director or employee, on the amount of such payment/loan, the cost of providing (or the value of) such benefit, or the value of the asset, and
- (c) in the case of both a current or former director or employee, on an amount calculated as if the benefit-in-kind provisions apply as regards a loan or use of an asset provided before the 13 February 2013, where such loan remains outstanding or the director or employee continues to have the loan of, or use of, the asset.

In the case of (a) and (b) above, section 811B as a balancing provision also provides relief where a loan, which has been taxed by virtue of this section, is repaid. The offset or repayment of Income Tax due to the individual is the difference between the original amount paid and the amount of Income Tax that would have been payable had the normal benefit-in-kind provisions applied.

It should be noted that the loan of, or the provision of the use of, an asset is deemed to be a loan of an amount equal to the value of the asset at the time such loan is made, or such asset is provided.

Where a charge to tax is imposed by section 811B then, by virtue of the provisions of paragraph (b) of the Table in section 531AM (1) of the TCA 1997, a charge to Universal Social Charge is imposed.

2. Definitions

A 'benefit scheme' is defined as "a trust, scheme or other arrangement and includes any settlement, disposition, covenant, agreement, transfer of money or transfer of other property or of any right to money or of any right to other property".

'Employee' includes an office holder and any person who is an employee within the definition of 'employee' in section 983 of the TCA 1997 (i.e. an employee for the purposes of the PAYE system).

‘Employer’ includes any person connected with an employer and any person who is an employer within the definition of ‘employer’ in section 983 of the TCA 1997 (i.e. an employer for the purposes of the PAYE system) or connected with such an employer.

‘Loan’ means any loan, advance or any form of credit.

‘Specified rate’ means the rate specified in paragraph (iii) of the definition of ‘the specified rate’ in section 122 of the TCA 1997 (13.5% for the tax year 2013 and subsequent tax years).

Connected person is defined in section 10 of the TCA 1997.

3. Employee or former employee

Under section 811B (3), a charge to tax under Case IV of Schedule D (where a charge does not otherwise exist) is imposed on an employee or former employee in certain circumstances. The charge is an amount equal to the amount of a payment/loan, or the cost of providing (or the value of) a benefit, or the value of an asset provided to an employee or former employee, or person connected with that employee or former employee, from a benefit scheme that is directly or indirectly made available by the employer or former employer of the employee or former employee, or by a person connected with such an employer or former employer. This charge only applies to income from offices or employments which are within the charge to Income Tax in the State.

4. Future Employee

Under section 811B (4), a charge to tax under Case IV of Schedule D (where a charge does not otherwise exist) is imposed, in certain circumstances, on an individual for the tax year in which the individual becomes an employee. The charge is an amount equal to the value of a payment/loan, or the cost of providing (or the value of) a benefit, or the value of an asset provided to that individual, or person connected with that individual, from a benefit scheme that is directly or indirectly “provided” by that individual’s employer or former employer or by a person connected with such an employer or former employer. This charge applies to individuals who take up an office or employment where the income from such office or employment is within the charge to Income Tax in the State.

This charge to tax does not include payments/loans, benefits or assets received prior to an individual becoming an office holder or employee where such payments/loans, benefits or assets are within the charge to tax in a state with which Ireland has a Double Taxation Treaty.

5. Commencement Date

The charge to tax outlined in paragraphs 3 and 4 above is confined to “events” occurring on or after the 13 February 2013 (the date of the publication of Finance Bill 2013).

6. What happens if a loan is repaid?

The tax avoidance schemes at which this section is aimed are generally premised on a loan not being repaid or a benefit/loaned asset not being returned. However, as there is always a possibility that a loan might be repaid, or the benefit/loaned asset returned and, therefore where it is repaid or returned, relief is provided for under section 811B (6).

This anti-avoidance measure applies only where the normal benefit-in-kind provisions do not apply. Therefore, where all of the tax due under subsection (3) or (4) of section 811B has been paid and an individual -

- (a) repays all or part of a loan, or
- (b) ceases, for a period of 12 months, to have the use of an asset or benefit,

then an offset or repayment of tax is due to the individual, subject to the making of a written claim.

Where the loan has been repaid in full or the use of the asset or benefit has ceased, the amount of the offset/repayment is the difference between -

- (a) the original tax paid, and
- (b) the tax that would have been payable had the normal benefit-in-kind provisions applied.

Where the loan has been part repaid, the amount of the offset/repayment is the difference between -

- (a) the amount of the tax paid as is attributable to the amount of the loan repaid, and
- (b) the tax that would have been payable had the normal benefit-in-kind provisions applied.

The relief will not be granted if a loan is simply repaid by the individual out of a payment (including a loan) or transfer of an asset to the individual or a connected person from a benefit scheme directly or indirectly funded by the individual's employer or former employer or where the loan is replaced by another loan that is directly or indirectly made available by the individual's employer or former employer.

7. Arrangements entered into before 13 February 2013

Under section 811B(7), a further charge to Income Tax is imposed in certain circumstances where, before 13 February 2013 (the date of publication of Finance Bill 2013), an employee, former employee or a person connected with an employee or former employee obtained a loan or loan of (or the provision of the use of) an asset from a benefit scheme. The charge applies where the individual continues to have the loan of (or the provision of the use of) the asset or the loan remains outstanding after 13 February 2013. This charge only applies to income from offices or employments which are within the charge to Income Tax in the State.

In the case of an interest free loan provided to an individual before 13 February 2013 which is still outstanding, a charge to tax is imposed (for each year of assessment that the loan is outstanding) on an amount equal to the interest that would have been payable on that loan had the notional benefit-in-kind rate of interest (13.5% for the 2013 tax year) applied. If interest is paid on the loan, the charge is imposed on an amount equal to the interest charged at the notional benefit-in-kind rate less any interest actually paid.

Interest is not treated, for this purpose, as paid if it is merely added to the outstanding balance or paid out of a further loan or advance from a benefit scheme or the employer.

In the case of a loan of (or the provision of the use of) an asset which is still outstanding, a charge to tax is imposed on an amount equal to the amount that would be chargeable had sections 118, 118A, 119, 121, 121A or 122 of the TCA 1997 applied for the year of assessment.

8. Application of the measure

Section 811B is an anti-avoidance provision which is not designed to be applied to bona fide commercial transactions which do not have as their main purpose (or one of their main purposes), the avoidance of tax. It only applies where an individual receives a payment/loan, benefit or asset which is not otherwise chargeable to Income Tax. Section 811B:

- a) does not apply to Revenue approved share schemes (Approved Profit Sharing Schemes, Approved Savings Related Share Option Schemes and Approved Share Option Schemes) as provided for in Part 17 or to pension schemes as provided for in Part 30 of the TCA 1997.
- b) does not apply to a payment/loan, the use of an asset or the provision of a benefit in respect of which the “normal” benefit-in-kind charging provisions of sections 118, 118A, 121, 121A or 122 of the TCA 1997 apply.
- c) does not affect the current tax treatment applied to other share schemes, including:
 - unapproved Share Option Schemes,
 - clog schemes (schemes which provide shares with various restrictions to employees/directors), and
 - Restricted Stock Units.