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PART 8 COMPANIES CAPITAL DUTY

Overview

This Part concerns stamp duty which is imposed on certain transactions (see *section 116*) of capital companies (see *section 114*). The duty is generally known as companies capital duty and is referred to as such in this book. Imposition of the duty is provided for in Council Directive 69/355/EEC of 17 July, 1969 (OJ No L249, 3/10/1969), as amended by Council Directives 73/79/EEC and 73/80/EEC of 9 April, 1973 (OJ No L103, 18/4/1973), 74/553/EEC of 7 November, 1974 (OJ No L303, 13/11/1974) and 85/303/EEC of 10 June, 1985 (OJ No L156, 15/6/1985). **Companies capital duty has been abolished in respect of transactions taking place on or after 7 December 2005.**

General information on companies capital duty is contained in leaflet CCD 1.

Section 114 Interpretation (*Part 8*)

“capital company”, “Member State”, “registrar”, “stamp duty”, “statement”, “third country” and “transaction” are self-explanatory. The Isle of Man, Channel Islands and Gibraltar do not come within the definition of “Member State”.

Section 115 Restriction of application (*Part 8*)

Certain capital companies are exempt from the charge to companies capital duty i.e.

- collective investment undertakings to which Council Directive 85/611/EEC of 20 December, 1985, and any Directive amending that Directive¹ apply,
- investment companies to which Part XIII of the Companies Act, 1990, relates, and
- investment limited partnerships within the meaning of section 3 of the Investment Limited Partnerships Act, 1994.

If a company loses its status as a collective investment undertaking or as an investment company or as an investment limited partnership, within the above meanings, then companies capital duty is chargeable on any chargeable transactions which take place after the status is lost. If the company loses its status with retrospective effect companies capital duty is chargeable on all chargeable transactions which took place after the date on which it lost its status (i.e. the retrospective date).

Section 116 Charge of stamp duty

The transactions which are liable to companies capital duty fall into 3 main groups i.e. (I)

- the formation of a capital company including the conversion into a capital company of a non-capital company (e.g. unlimited company, building society),
- increasing the issued share capital² or assets³ of a capital company, and

¹ Council Directive 86/611/EEC (OJ No L375 of 31 December, 1985) has been amended by Council Directive 88/220/EEC of 22 March, 1988 (OJ No L100, 19/4/1988) and European Parliament and Council Directive 95/26/EEC of 29 June, 1995 (OJ No L168, 18/7/1995).

- transferring to the State either the effective centre of management or the registered office of a capital company. *Subsections (1)(e)* and *(f)* deal with companies whose effective centre of management and registered office are both outside the European Community. If either is transferred to the State the transfer is a transaction giving rise to companies capital duty. *Subsections (1)(g)* and *(h)* deal with transfers to the State from another Member State of the effective centre of management or registered office of a capital company which is not considered to be a capital company in that other Member State. If either is transferred to the State the transfer is a transaction giving rise to companies capital duty.

Only the chargeable transactions of a capital company⁴— (2)

- with or resulting with an effective centre of management in the State, or
- with or resulting with a registered office in the State where the effective centre of management is in a third country,

are liable to companies capital duty.

“Effective centre of management” is not defined but essentially it means the location of the day to day running of the company. The registered office is the address of the company as listed on the register of companies in the Companies Registration Office.

The charge to companies capital duty does not extend to—

- unlimited companies (*section 114* (“capital company”)) and contributions by unlimited partners (*section 118(2)(b)*),
- the companies listed in *sections 115* and *120* (relief may also be available under *section 119*),
- shares allotted by a capital company where the effective centre of management of that company is in another Member State (*subsection (2)*),
- a capitalisation of profits or reserves i.e. a bonus or scrip issue (*subsection (1)(c)*),
- shares issued following a redemption of shares (see section 64(4)⁵ and (5) and section 65(6) and (7) of the Companies Act, 1963, and section 208(c) and (d) of the Companies Act, 1990),
- the issue of treasury shares (section 209(5) of the Companies Act, 1990),

² The issued share capital must be increased by the contribution of assets e.g. cash, shares, land.

³ The assets must be in return for rights similar to those normally attaching to shares e.g. voting rights, rights to dividends.

⁴ A company limited by guarantee (with or without share capital) is a capital company. If the only undertaking by the members of the company is an undertaking to contribute assets on a winding-up no chargeable transaction takes place until the winding-up of the company. If, however, assets are contributed during the lifetime of the company in return for shares or rights, companies capital duty is chargeable in accordance with *section 117*.

⁵ Section 64 (as amended by section 119 of the Finance Act, 1990), though repealed by section 220 of the Companies Act, 1990, continues to apply to redeemable preference shares issued by a limited company prior to 1 July, 1991.

- the issue of loan or debenture stock⁶ (*subsection (1)(c)*),
- a gift of cash with no strings attached (*subsections (1)(c) and (d)*).

Furthermore, it is the practice of the Revenue Commissioners not to charge companies capital duty when a private unlimited company is being converted into a public unlimited company. Under Irish company law such a conversion must be effected in 2 stages i.e. from private unlimited to public limited and from public limited to public unlimited. The technicality of having to become, albeit for an instant, a limited company is ignored in such cases provided the public limited company registers as a public unlimited company on the same day as the public limited company is registered and that the public limited company conducts no activities - commercial, legal or otherwise - other than those necessary for registration as a public unlimited company.

Section 117 Statement to be charged with stamp duty

Summary

This section sets out the charge to companies capital duty and the manner in which particulars are to be supplied to enable the amount of duty to be determined.

Details

When a chargeable transaction (see *section 116*) takes place prior to 7 December (1) 2005, a statement of the assets, liabilities and expenses referred to in *section 118* is to be delivered to the Registrar of Companies.

When a statement is required to be delivered the forms⁷ to be used are—

- A1, when a capital company is being formed,
- B5, when shares are being allotted in a capital company *or* assets are being contributed as a result of a share conversion *or* assets are being contributed in return for rights (e.g. voting rights) *or* when a loan is being capitalised (i.e. when shares are issued in repayment of a loan),
- 25B, when a company which is not a capital company is being converted into a capital company e.g. when a company is being converted from unlimited to limited status,
- LP1 and LP3, when a limited partnership is being formed,
- LP2 and LP4, when there is an increase in the capital contribution of a limited partnership.

⁶ If the stock is convertible into shares then companies capital duty is chargeable on conversion (*section 116(c)*).

⁷ Forms A1, LP1, LP2, LP3 and LP4 are all Company Registration Office (CRO) forms. Form B5 is a joint CRO/Revenue form. Form 25B is a Revenue form.

Forms A1 (together with the Memorandum and Articles of Association), LP1 and LP3 and LP2 and LP4 are submitted direct to the Companies Registration Office (CRO), together with any companies capital duty payable - the CRO, subsequently, remit the companies capital duty payment to the Revenue Commissioners. Forms B5 and 25B are submitted direct to the Revenue Commissioners together with any companies capital duty payable and, in the case of the form B5, the CRO filing fee of €12⁸ - the Revenue Commissioners subsequently forward pages 1 and 2 of the form B5 together with the fee to the CRO. The original form 25B is returned after stamping to the company for forwarding by the company to the CRO.

Additional requirements have to be satisfied when the consideration for shares being allotted is not cash viz.

- the contract for sale or, where the contract has not been reduced to writing, form 52 (a CRO form), must be lodged with the Revenue Commissioners⁹, and
- if the non-cash consideration comprises—
 - shares in an unquoted company,
 - the adjudication reference number in a case where a completed form SD 4 was submitted (*section 20*), or
 - a completed form CCD 4 together with a copy of the company's latest audited accounts,must be submitted in addition to form B5 or form 25B,
 - land and buildings, a valuation of the property must be submitted in addition to form B5 or form 25B.

Where relief from companies capital duty is sought on the basis that the shares being issued are in replacement for shares previously redeemed (see commentary on *section 116*) a copy of form 28 must be submitted to the Revenue Commissioners in addition to the form B5. Form 28 is a CRO form on which details of the redemption are filed.

Where the chargeable transaction is the formation of a capital company the statement must be delivered before—

- incorporation, in the case of a capital company to be incorporated under the Companies Act, 1963, and (I)(a)
- registration, in the case of a capital company to be formed under the Limited Partnerships Act, 1907.

In every other case the statement must be delivered to the Registrar within 30 days (I)(b)

⁸ This fee does not apply to companies registered on the External Register in the CRO.

⁹ Section 58 of the Companies Act, 1963, provides that in the case of shares allotted as fully or partly paid up shares in a limited company otherwise than in cash, a return of the allotments (form B5) together with a duly stamped contract of sale or for services or other consideration in respect of which that allotment was made or, if that contract has not been reduced to writing, particulars of the contract (form 52) must be delivered to the registrar. Under section 58(2) form 52 is deemed to be an instrument for stamp duty purposes and is stampable as if it were a contract. Most contracts for sale or forms 52 do not attract stamp duty under *section 31* because the assets comprising the consideration (e.g. non-bearer shares, land and buildings) are specifically excluded from the charge to duty under that section. However, contracts or forms 52 relating to other assets such as book debts, goodwill, etc., are chargeable to duty under that section.

after the date of the chargeable transaction.

The statement is chargeable with duty at the rate of 0.5% for transactions effected prior to 7 December 2005, (1% for transactions effected prior to 2 December 2004) subject to a minimum charge of €1. (1)

The amount chargeable is determined in accordance with *section 118*.

When substantial assets are being transferred on the formation of a capital company it may take some time to arrive at a valuation of those assets. In such circumstances a provisional assessment may be made by the Revenue Commissioners. This enables the statement to be stamped and incorporation or registration of the capital company to proceed. Provision is made for a refund of any excess duty paid - but see also *section 159A* as regards the time limit for making a refund claim and *section 159B* as regards interest that may be payable on such refunds. (2)(b)

If too little is paid then the additional duty due is payable and treated as duty in arrear. The rate of interest chargeable on any additional duty which arises in connection with the formation of a capital company by virtue of the fact that the initial assessment (*subsection (2)(b)(i)*) was only a provisional one is 0.0219 per cent per day (see *section 159D*). (4)

In the case of a chargeable transaction other than the formation of a capital company interest is payable at the rate of 0.0219 per cent for each day (see *section 159D*) for which the duty remains unpaid after the expiration of the period of one month from the date of the chargeable transaction. (3)

The interest is chargeable and recoverable in the same manner as if it were part of the duty. Section 1089 of the Taxes Consolidation Act, 1997, provides that interest payable under this subsection is payable without deduction of income tax and not allowable in computing any income, profits or losses for any of the purposes of the Income Tax Acts and the Corporation Tax Acts.

The Registrar of Companies may not incorporate or register a capital company until the statement is duly stamped or in the case of a capital company to which *section 120* applies the statement has been adjudicated (see *section 20*). (5)

Section 118 Amount on which stamp duty chargeable

Summary

Companies capital duty is charged on the net value of the assets contributed to the capital company on its formation or on an increase in its issued share capital or on an increase in its assets. In the less usual transactions which are, in effect, situations where an existing company, whether Irish or foreign, or a building society becomes a capital company the value for companies capital duty is the value of the assets of such company or society.

However, there is a floor below which the value for duty may *not* fall, namely, the nominal value of the shares in question.

Details

The amount which is chargeable to companies capital duty where the chargeable transaction is— (1)(a)

- the formation of a capital company,

- an increase in the issued share capital of a capital company by the contribution of assets of any kind other than an increase in capital through capitalisation of profits or of reserves, whether temporary or permanent reserves, but including the conversion of loan stock of a capital company into share capital, or
- an increase in the assets of a capital company by the contribution of assets of any kind in consideration, not of shares in the capital or assets of the company, but of rights of the same kind as those of members of the company such as voting rights, a share in the profits or a share in the surplus on liquidation,

is the actual value at the date of the transaction of the assets of any kind contributed or to be contributed in connection with the chargeable transaction by the members of the capital company after deducting—

- the liabilities attaching to such assets and assumed by the capital company (for example, a mortgage charged on the premises), and
- the expenses incurred by the capital company in connection with such contribution.

Example 1

A decides to form a company. €2 is contributed to the company in return for the issue of 2 x €1 shares. Companies capital duty of €1 is payable.

Example 2

B Ltd allots 100,000 x €1 shares at a premium of 50 cent per share. As the consideration for the shares is €150,000 companies capital duty of €750 is payable.

Example 3

C is a limited partner who contributed €10,000 on the formation of the limited partnership. Companies capital duty was paid at the time. C subsequently contributed a further €20,000 to the partnership. Companies capital duty of €100 is also payable on that further contribution.

In every other case the duty is charged on the value at the date of the transaction of the assets of any kind of the capital company less its liabilities on that date and the expenses incurred by the company in connection with the transaction. (1)(b)

Example

Company A converts from unlimited status to limited status. The value of the assets of the company on the date of conversion is €469,500. Companies capital duty of €2,347 is payable.

If, in this example, company A had incurred expenses (say) of €13,500 in relation to its conversion then companies capital duty would only have been chargeable on €456,000 (i.e. €469,500 - €13,500).

However, the minimum chargeable amount is the nominal value of the shares in question e.g. where shares are issued at less than par value by virtue of the payment of an authorised commission companies capital duty is chargeable on the par value. (2)(a)

The application of the duty for all practical purposes is restricted to limited companies (2)(b) (see definition of a “capital company” in *section 114*) and in the case of a partnership only those assets which were contributed by limited partners are within the charge.

Section 119 Reconstructions or amalgamations of capital companies

Summary

Companies capital duty is not payable in the case of certain reconstructions and amalgamations¹⁰. (1)

Details

A reduced rate of zero per cent applies to transactions whereby an existing company or a company which is in the process of being formed (the acquiring company) acquires either—

- the whole or part of the undertaking of another capital company (the target company), or
- share capital of another company (the target company).

Where share capital is being acquired the acquiring company must own, after the transaction but not necessarily as a result of the transaction, at least 75% of the issued share capital of the target company. While the acquiring company may previously have acquired shares in the target company, it is only the transaction which brings the shareholding of the acquiring company to 75% or over of the issued share capital of the target company (and any subsequent qualifying transactions) which is entitled to the relief provided for in this section. (1), (2)

Example

A Ltd acquired 95% of the shares in B Ltd in 4 separate transactions as follows:

Transaction

- (1) On 1 February, 1999, A Ltd purchased 30% of the shares in B Ltd for cash.
- (2) On 15 March, 1999, it acquired a further 20% of the shares in consideration of the shares in A Ltd.
- (3) On 1 May, 1999, it acquired a further 30% also in consideration of shares in A Ltd.
- (4) On 10 May, 2001, it acquired 15% of the shares in B Ltd in consideration of shares in A Ltd.

Companies capital duty is chargeable on transactions (1) and (2). The zero rate of duty applies to transaction (3) because after transaction (3) A Ltd holds over 75% of the shares in B Ltd. The zero rate of duty will also apply to any transactions subsequent to transaction (3) where the consideration is the issue of shares.

The consideration for the acquisition must consist of— (3)

- the issue of shares in the acquiring company,

¹⁰ The terms of the relief, which were originally set out in Council Directive 73/79/EEC, are continued by virtue of Article 1(2) of Council Directive 85/303/EEC.

- the transfer to or discharge by the acquiring company of liabilities of the target company, or
- cash provided the cash element does not exceed 10% of the nominal value of the shares in the acquiring company which are comprised in the consideration.

Example

A Ltd (the acquiring company) holds 25% of the issued share capital of B Ltd (the target company). A Ltd acquires a further 60% of the issued share capital of B Ltd, the consideration being the issue of 100,000 x €1 shares in A Ltd and the payment of €5,000 in cash by A Ltd.

Following the acquisition A Ltd holds 85% of the issued share capital of B Ltd. As the cash payment amounts to 5% of the nominal value of the shares issued it does not prejudice the claim for relief.

Shares in the acquiring company must be issued— (3)

- where the whole or part of the undertaking of the target company is being acquired, either—
 - to the target company itself, or
 - to the shareholders of the target company, and
- where shares in the target company are being acquired, to the shareholders of the target company in exchange for shares held by them in the target company.

The relief will be clawed back in 2 situations i.e. (4)

- if the acquiring company disposes of any of the shares within a period of 5 years from the date of the transaction in respect of which relief was granted, or
- if the acquiring company does not retain at least 75% of the issued share capital of the target company and all the shares which it held following that transaction for a period of 5 years from the date of the transaction in respect of which relief was granted.

Example

In the first example in the commentary on this section A Ltd held, after transaction (3), 80% of B Ltd's shares. If A Ltd disposes of any of these shares before 1 May, 2004, the full amount of duty will be payable in respect of the shares acquired in transaction (3). If it sells any of the shares it held after transaction (4) (i.e. any of the then total of 95%) before 10 May, 2006, it will be liable for the duty not paid on transaction (4). This is because the 5-year period runs from the date of the transaction which *last* benefited from the zero rate i.e. after transaction (4) the 5 year period starts afresh for all 95% from 2001.

The reduced rate will also cease to apply if, notwithstanding the retention of all the shares which the acquiring company acquired, it does not retain 75% of the issued share capital of the target company. This could come about if the issued share capital of the target company were increased, thus reducing the acquiring company's 75% stake.

However, the reduced rate will continue to apply in certain circumstances (5)

notwithstanding that the shares were not held for the requisite 5 years i.e. the reduced rate will continue to apply if the shares were transferred in the course of—

- a transaction which took place prior to 7 December 2005 which would of itself qualify for a reduced rate, or a transaction which takes place on or after 7 December 2005 which would of itself qualify for a reduced rate had that transaction taken place prior to 7 December 2005 e.g. another merger whereby the acquiring company itself was taken over, or
- the liquidation of the acquiring company.

In a clawback situation the statement which was delivered in respect of the transaction (6) to which the reduced rate applied will be charged with the stamp duty which would have been charged in the first instance if the relief had not applied to the transaction. The duty will become chargeable on the date the clawback event occurred.

The relief will only apply if the target company has its effective centre of management (7) or its registered office in a Member State. By definition, the acquiring company must have its effective centre of management or registered office in the State. The relief, therefore, applies only where an Irish capital company takes over another Irish capital company or a capital company which is in a Member State.

The relief will also apply to transactions where the entity being acquired is regarded as (8) a capital company in another Member State although it does not qualify as such under the definition of capital company in *section 114*.

Section 120 Exemption for certain companies

This section exempts transactions effected by capital companies whose—

- (a) exclusive business it is to supply public services (such as transport or port facilities or to supply water, gas or electricity) and at least 50% of the issued capital of which is owned by the State or a local authority, or
- (b) objects are exclusively cultural, charitable or educational.

Adjudication is required - see *section 117*.

To enable the Revenue Commissioners to decide whether relief should be granted companies at (a) above must submit details of the type of service provided by them and of the shareholding held by the State or local authority and companies at (b) above must submit details of their status (e.g. from the Revenue Commissioners, Charities Section, Government Buildings, Nenagh, if the company is a charity).

Section 120A Relief in respect of certain payments of stamp duty

This section¹¹ provides relief from companies capital duty for companies that increase their issued share capital within 4 years of a reduction in that capital as a result of losses.

Section 121 Appeals in certain cases

¹¹ Section 120A replicates section 71(6) of the Finance Act, 1973 which was inadvertently omitted from the Stamp Duties Consolidation Act, 1999 when it was enacted on 15 December 1999. The application of section 120A from 15 December 1999 ensures no time lapse arises in the application of the provision.

This section enables a person to appeal if dissatisfied with a decision of the Revenue Commissioners on a question relating to the value of assets charged to duty. In the case of land an aggrieved person may appeal to the Land Values Reference Committee. In all other cases the appeal is heard by the Appeal Commissioners.

In addition to this statutory right of appeal there is also a right to have any decision made by a Revenue officer reviewed by another officer in the Revenue Commissioners who had no previous involvement in the case. Details of the internal review procedures are contained in Statement of Practice SP-GEN/2/99 (Revised January 2005).

Section 122 Recovery of stamp duty and furnishing of information

This section has a two-fold purpose viz.

- to set out who is accountable for the payment of companies capital duty and any interest due on that duty (i.e. it is the capital company itself but where the capital company is not a body corporate the members of the company are made jointly and severally liable for the duty), and
- to enable the Revenue Commissioners to obtain all the information they require for the purpose of the duty.