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PART 33
ANTI-AVOIDANCE

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PART 33
ANTI-AVOIDANCE

CHAPTER 1
Transfer of assets abroad

Overview

This Chapter contains provisions aimed at countering tax avoidance, by individuals resident or ordinarily resident in the State, by means of a transfer of assets so that income becomes payable to persons resident or domiciled abroad.

- ***Section 806*** is designed to counter individuals resident or ordinarily resident in the State avoiding liability to income tax by means of a transfer of assets as a result of which income becomes payable to a person resident or domiciled outside the State.
- ***Sections 807A*** imposes a tax charge on an individual who does not come within the charge imposed by section 806, because that individual was not the transferor of the assets concerned.
- The other sections in the Chapter contain measures needed for the purposes of giving effect to the provisions. Power to obtain necessary information is granted to the Revenue Commissioners in ***section 808***. The chargeability of the income and the application of various elements of the Income Tax Acts are included in ***sections 807***, ***809*** and ***810***. ***Sections 807B*** and ***807C*** contain transitional and apportionment rules that apply in certain circumstances.

806 Charge to income tax on transfer of assets abroad

Summary

This section is designed to counter individuals resident or ordinarily resident in the State avoiding tax by means of a transfer of assets as a result of which income becomes payable to a person who is resident or domiciled outside the State. The income arising abroad is chargeable to tax on the Irish resident where he/ she has the power to enjoy any of the income or any capital sum which is in any way connected with the transfer or with any associated operation.

Details

Definitions and construction

A number of terms used in the section and in ***section 807A*** are defined and these are, broadly, self-explanatory. ***(1)***

A key definition is that of "associated operation" which is defined very broadly in relation to a transfer for the purposes of ***sections 806 and 807A***. It covers any operation, effected by any person, in relation to any transferred assets (or assets representing transferred assets), or to income arising from such assets. It is immaterial whether the associated operation was effected before, after, or at the same time as the transfer.

Any body corporate, incorporated outside the State, is treated as non-resident whether or not it is non-resident. This is to ensure that transactions involving a company which, though resident (that is, managed and controlled) in the State, is incorporated elsewhere, are caught by this measure. ***(2)(a)***

A reference to an individual includes a reference to that individual's spouse or civil partner. ***(2)(b)***

References to assets, which represent other assets, income or accumulated income, include references to shares in, or obligations of, any company or person to whom those assets, that income or those accumulations are transferred. ***(2)(c)***

Income which becomes payable to, or has become income of, a non-resident person under ***section 806(3) or 806(5) or 807A(1)*** includes income arising as a result of the transfer alone, or one or more associated operations alone, or a combination of the transfer and associated operations. ***(2)(d)***

Income which an individual has the power to enjoy under ***section 806(4)*** includes income where the power to enjoy arises as a result of the transfer alone, or one or more associated operations alone, or a combination of the transfer and associated operations. ***(2)(e)***

Purpose of section

The aim of the section is spelt out, that is, the prevention of avoidance of income tax by individuals resident or ordinarily resident in the State by way of transfer of assets. The section applies if, resulting from the transfer or associated operations, income becomes payable to persons resident or domiciled abroad. ***(3)***

Power of resident individual to enjoy income of non-resident/non-domiciled person

Where, arising from the transfer, an Irish resident or ordinarily resident individual has the power to enjoy income of a non-resident or non-domiciled person, the income is deemed to be the income of the Irish individual. ***(4)***

An individual is regarded as having the "power to enjoy" income of a non-resident or non-domiciled person in a variety of situations. This will happen if —

- the income is dealt with by other persons as though it will, at some point of time, enure for the benefit of the individual, ***(6)(a)***
- the receipt or build up of the income adds to the value of assets held by the individual or for the individual's benefit, ***(6)(b)***
- the individual gets, or is entitled to get, any benefit provided out of the income of the non-resident person or from successive associated operations on the income, ***(6)(c)***
- the individual has the power to get the beneficial enjoyment of the income, or ***(6)(d)***
- the individual is able to control, in any manner whatever, the application of the income. ***(6)(e)***

The "power to enjoy" must be acquired "by means of" (***subsection (3)***) the transfer of assets or associated operations, but the transfer need not be effected by the individual who acquires the power to enjoy the income. If any person transfers assets to a non-resident in such circumstances that an individual resident or ordinarily resident in the State acquires the power to enjoy the income, then the section comes into operation.

The section is not confined to cases where the individual acquires the power to enjoy the income of the person to whom the assets are transferred. It is sufficient that by means of the transfer (alone or in conjunction with associated operations) the individual acquires the power to enjoy any income of any person resident or domiciled out of the State. Thus if A, an individual resident or ordinarily resident in the State, transfers assets to B resident or domiciled in, say, Switzerland and, if by means of that transfer, A acquires the power to enjoy any income of C, resident in Spain, then that income of C will be deemed to form part of the total income of A.

Subsection (6) applies where the individual has power to enjoy any income of the non-resident or non-domiciled person; the individual need not have power to enjoy the whole of the income of that person, or even the whole of the income of that person which derives from the transferred assets.

In determining whether an individual has power to enjoy income within the meaning of the section, regard must be had to the substantial result and effect of the transfer and any associated operations. All the benefits which may at any time accrue to the individual as a result of the transfer and any associated operations are to be taken into account irrespective of the nature and form of the benefits. ***(7)***

These measures apply irrespective of when the transfer or associated operations took place (i.e. regardless whether the individual was resident or ordinarily resident in the State when the transfer was made) or whether the avoidance of tax was the purpose or one of the purposes for which the transfer was made. ***(5A)***

Receipt of a capital sum

The term "capital sum" is defined to mean — ***(5)(a)***

- any sum paid or payable by way of loan or repayment of a loan, and
- any sum paid or payable other than as income but excluding any payment for full consideration.

Liability is also imposed where (whether before or after any transfer of assets by an individual resident or ordinarily resident in the State) an Irish ordinarily resident individual receives, or is entitled to receive, any capital sum which is in any way connected with the transfer or an associated operation. In such a case, any income which has become the income of a person resident or domiciled abroad is deemed to be the Irish individual's income. ***(5)(b)***

Any sum which a third party receives or is entitled to receive at the direction of another person or by virtue of the assignment by that person of his or her right to receive it is treated as a sum which the person receives or is entitled to receive. ***(5)(c)***

Exemption – transactions up to 1 February 2007

Immunity from the charging provisions of the section is available where it is shown to the satisfaction of the Revenue Commissioners that the transfer of assets was not made for tax avoidance purposes or that it was a genuine commercial transaction. ***(8)***

(In these guidance notes, the test in ***section 806(8)*** is referred to as the "old" anti-avoidance purpose test, to distinguish it from the "new" test in ***section 806(10)***, introduced by the ***Finance Act 2007***. ***Section 806(8)*** is subject to ***section 807B*** (also inserted by the ***Finance Act 2007***), which deals with transitional issues and sets out which tests are to apply in different circumstances.)

Appeals

A right of appeal against a decision of the Revenue Commissioners is provided in relation to: ***(9)***

- the purpose of the transfer – under the "old" anti-avoidance purpose test in ***section 806(8)*** or the "new" anti-avoidance purpose test in ***section 806(10)***,

- the transition rules in ***section 807B***, and

- the apportionment provisions in ***section 807C***.

Exemption – transactions on or after 1 February 2007

A new test, providing for exemption from the transfer of assets provisions, was introduced in ***Finance Act 2007***. The revised exemption test aims to ensure that all relevant factors are taken into account in deciding whether an exemption is due. Under the new test, the condition for exemption is that the individual must broadly show that it would not be reasonable to conclude, from all the circumstances of the case, that any of the transactions had a tax avoidance purpose. ***(10)***

The following terms used in the subsection are defined: ***(10)(a)***

"commercial transaction" does not include a transaction which is not made on the arm's length terms that would apply between independent persons (as defined), or would not have been made between independent persons acting at arm's length.

"independent persons" are persons not connected with each other, under the rules laid down in ***section 10*** of the Taxes Consolidation Act.

"relevant transaction" means the transfer and any associated operations.

An exemption from the transfer of assets income tax charge is provided where the individual satisfies Revenue that the condition in ***subparagraph (i)*** is met, or in a case where ***paragraph (i)*** is not met, that the condition in ***subparagraph (ii)*** is met. This provision is subject to the transitional arrangements in ***section 807B***. ***(10)(b)***

- The condition in ***subparagraph (i)*** is that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that avoiding liability to tax was the purpose, or one of the purposes, for which the relevant transactions (or any of them were effected). This condition is concerned, therefore, with cases where the transactions had no tax avoidance purpose whatsoever.

- The condition in ***subparagraph (ii)*** is that all the relevant transactions are genuine commercial transactions and that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the transactions (or any of them) were designed more than incidentally for the purpose of avoiding liability to taxation. This condition is concerned, therefore, with cases where it is accepted that there was some element of tax avoidance (so the condition in ***subparagraph (i)*** cannot be met), but the transactions were all genuine and any tax avoidance was no more than an incidental part of the design.

The intentions and purposes of any person who (whether or not for payment) designs or effects any of the transactions, or gives advice in relation to any of the transactions, are to be taken into account in determining the purpose for which any of the transactions was effected. In other words, the intentions of advisors are to be considered in determining whether it is reasonable to conclude that there was an avoidance purpose. ***(10)(c)***

A transaction is a commercial transaction only if it is made in the course of a trade or business, or with a view to setting up or commencing a trade or business, and in either case for the purposes of that trade or business. ***(10)(d)***

Making/managing investments is not "commercial" in the context of ***paragraph (d)***, except to the extent that the persons by whom and for whom the activity is carried on are independent persons dealing at arm's length. ***(10)(e)***

Exemption – EEA residents

The following definitions apply for the purposes of the subsection: ***(11)(a)***

"non-resident person" means a person resident or domiciled outside of the State as referred to in subsection (3) or (5);

"relevant Member State" means a state, other that the State, which is a Member State of the EU or not being such a Member State, which is a contracting party to the EEA Agreement;

"relevant transaction" means the transfer and any associated operations.

An exemption from the transfer of assets income tax charge is provided where the non-resident person to whom the income accrues is resident in a relevant Member State and the individual satisfies the Revenue Commissioners that the income arose due to genuine economic activity carried on in that relevant Member State. ***(11)(b)***

807 Deductions and reliefs in relation to income chargeable to income tax under *section 806*

Summary

Tax chargeable by virtue of ***section 806*** is charged under Case IV of Schedule D. The normal allowances and reliefs are granted in charging the income in question. A double charge on any income or benefit caught by ***section 806*** will not arise.

Details

Tax chargeable under ***section 806*** is charged under Case IV of Schedule D. ***(1)***

The same deductions and reliefs are to be allowed to the individual as if the income deemed to be his/hers by ***section 806*** had actually been received. ***(2)***

A double charge will not arise on the income caught by ***section 806*** if income deemed to be the income of the taxpayer is subsequently received by the individual as income. ***(3)***

Provision is made for the assessment of any benefit – as distinct from income – within ***section 806(6)(c)*** for the year of assessment in which the benefit is received. Any benefit derived directly or indirectly from income which has already been charged to tax is excluded from such assessment. ***(4)***

If an individual receiving income directly would not be chargeable to income tax in respect thereof by virtue of his or her domicile, then any income deemed to be that individual's by virtue of this section is not chargeable to income tax. In relation to income arising on or after 1 January 2016 this subsection was repealed by FA 2015. ***(5)***

807A Liability of non-transferors

Summary

This section applies to impose a tax charge on an individual who does not come within the charge imposed by ***section 806***, because that individual was not the transferor of the assets concerned.

Details

This section applies where, as a result of a transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a non-resident person or to a person not domiciled in the State, and an individual who is resident or ordinarily resident in the State, who is not liable to tax under ***section 806*** as the transferor, receives a benefit out of those assets. The section applies irrespective of when the transfer or associated operations took place. ***(1) & (8)***

The value of the benefit, up to the amount of "relevant income" of years of assessment up to an including the year the benefit is received, is treated as income of the resident, or as the case may be, ordinarily resident, individual for all tax purposes for that year and charged to income tax under Case IV of Schedule D. ***(2) & (4)***

Relevant income

Relevant income of a year of assessment is any income arising in that year to a non-resident or non-domiciled person and which, by virtue of the transfer or associated operations, can directly or indirectly be used to provide a benefit for the resident, or as the case may be, ordinarily resident individual or to enable a benefit to be provided to that individual. The section applies, however, only to relevant income arising on or after 11 February 1999. ***(3) & (8)***

Non-domiciled persons

If, by virtue of domicile, the individual concerned would not have been liable to income tax if he or she had received the income of the non-resident, or as the case may be, non-domiciled, person directly, then no charge to income tax arises under this section. In relation to income arising on or after 1 January 2016 this subsection was repealed by FA 2015. ***(5)***

Interaction with CGT and avoidance of double taxation

Where the benefit received by the individual is in the form of a capital payment from an offshore settlement which cannot be matched with relevant income of the year of receipt or an earlier year, and in consequence of the capital payment the individual is assessable to capital gains tax under ***section 579A*** or ***579F***, then, to avoid double taxation, the individual is treated in a subsequent year as having been assessed on an amount of income benefit equal to the amount of gain on which he or she was assessed to capital gains tax. ***(5)***

Exemption and Appeals

The section does not apply if the Revenue Commissioners are satisfied the transfer of assets and associated operations (if any) were not effected for tax avoidance purposes or that they were bona fide commercial transactions [under the old or the new rules, as appropriate – see notes on ***sections 806(8) and 806(10)***]. A person aggrieved by a decision of the Revenue Commissioners in this regard has a right of appeal to the Appeal Commissioners. The section does not apply if the Revenue Commissioners are satisfied that the non-resident person to whom the income accrues is resident in the EEA and the income is arising due to real economic activity in that EEA state. ***(6)***

807B Certain transitional arrangements in relation to transfer of assets abroad

Summary

This section determines whether the anti-avoidance purpose test for exemption in a particular case is to be done under the "old" rules in ***section 806(8)*** or under the "new" rules in ***section 806(10)***. The section also provides for cases where there are transactions before and after 1 February 2007 (the date the new rules came into effect):

For the purposes of ***section 806***, the new rules only apply to income arising on or after 1 February 2007. For the purposes of ***section 807A***, the new rules apply to benefits received on or after 1 February 2007, with transitional rules for benefits received in 2007; however, income arising before 1 February 2007 can count as relevant income in relation to a benefit received on or after that date.

Details

The following definitions are used in the section: ***(1)***

"new transaction" means a relevant transaction (i.e. a transfer and any associated operation) that is effected on or after the relevant date (i.e. 1 February 2007).

"old transaction" means a relevant transaction that is effected before the relevant date.

"relevant date" means 1 February 2007, which is the date of publication of Finance Bill 2007.

"relevant transaction" means the transfer and any associated operation, as defined in ***section 806(10)***.

The rules as to which anti-avoidance purpose test should apply are as follows: ***(2)***

- ***Section 806(8)*** is the appropriate test if all the relevant transactions are old (i.e. effected before 1.2.2007).
- ***Section 806(10)*** is the appropriate test if all the relevant transactions are new (i.e. effected after 1.2.2007).
- ***Section 807B(3)*** applies where there are both old and new transactions (i.e. mixed transactions).

Where the old transactions have failed the old anti-avoidance test in ***section 806(8)*** or the new transactions have failed the new anti-avoidance test in ***section 806(10)***, then the transfer of assets rules apply apart from any exemptions (because the anti-avoidance test has been failed) but subject to certain modifications if the reason for the failure of the test was due only to the fact that the new test was failed. ***(3)(a)***

The modifications to the application of the transfer of assets provisions that are to apply in relation to mixed (old and new) transactions, when only the new (post 1.2.2007) anti-avoidance test is failed are as follows: ***(3)(b)***

For the purposes of ***section 806***, income arising before 1 February 2007 does not count as income of the non-resident person, and

For the purposes of ***section 807A***, two adjustments are applied:

- Firstly, where an individual gets a benefit in 2007 or a later year of assessment, the process of determining relevant income for years up to and including that year of assessment must take account of relevant income that arose before 1 February 2007, as well as after.
- Secondly, where an individual receives a benefit in 2007, any part of the benefit that (on a time apportionment basis) he/she was able to enjoy before 1 February 2007 is not to be taken into account.

807C Supplementary provisions in relation to section 806 – apportionment in certain cases

Summmary

The purpose of this section is to protect individuals from a tax charge under section 806 in certain circumstances. It broadly provides that, where the chargeable income is attributable partly to earlier commercial transactions that qualified for exemption, and partly to later transactions that do not qualify for exemption, tax is only charged on the income attributable to the later transactions involving tax avoidance. Where the section applies, the ***section 806*** charge is reduced so that it effectively applies only to the amount of income that Revenue Commissioners consider to be attributable to associated operations not meeting the relevant exemption test. The income attributable to the transactions not involving avoidance is not charged.

Details

Definitions used in the section are as follows: ***(1)***

"appropriate exemption" means an exemption from the transfer of assets provisions arising from the fact that the transfer and associated operations passed the "commercial test" (under the old or the new rules).

"exempt year of assessment" means one of the exempt years since the transfer [see ***subsection (2)*** below] where:

- there is no earlier year where the individual is liable under ***section 806***, or
- there is no earlier year where the individual would have been liable under ***section 806*** if he/she had any deemed income under ***section 806***.

"relevant transactions" means the transfer and associated operations

The section applies where an individual is liable under ***section 806*** and ***(2)***

- he or she is liable because the "new" commercial test is failed,
- since the transfer of assets, there have been one or more years where the individual,
- was not liable under ***section 806*** because he or she was exempt, or
- would not have been liable under ***section 806*** if he/she had any deemed income in the year.

In other words, the individual is exempt because of an exemption, not because of a lack of income in that year.

The income that gives rise to the liability is attributable partly to transactions that were exempt (because they passed the commercial test) in the last exempt year of assessment and partly to associated operations that were taxable.

Where the conditions in ***subsection (2)*** are met, Revenue can apportion so that the charge will only apply to the associated operations that did not meet the exemption criteria. ***(3)***

An indicative list of matters that Revenue may take into account in arriving at a just and reasonable apportionment is provided. ***(4)***

808 Power to obtain information

Summary

The Revenue Commissioners – or an officer appointed by them – are empowered by this section to obtain particulars that they think are necessary in order to implement ***sections 806***, ***807***, ***807A, 807B, 807C*** and ***809***. There is special provision to ensure that solicitors may be required to furnish only certain specified and limited information, mainly, names and addresses. It is also provided that the section does not impose on any bank the obligation to furnish particulars of ordinary banking transactions between bank and customer, unless the bank is acting on behalf of the customer in transactions connected with certain avoidance operations.

Details

Definitions

The terms "settlement" and "settlor" are defined by reference to ***section 10***. ***(1)***

Information

The Revenue Commissioners or an officer appointed by them may by notice in writing require any person to furnish within such time (not being less than 28 days) such particulars as they think necessary for the purposes of ***sections 806***, ***807***, ***807A, 807B, 807C*** and ***809***. ***(2)***

The information which must be provided by a person on request includes details under the 3 areas specified in this subsection. These are — ***(3)***

- transactions in which the person is acting or has acted on behalf of others;
- transactions which the Revenue Commissioners (or an appointed officer) regard as relevant even though the person to whom the notice is given considers there is no liability to tax under ***section 806***, ***807***, ***807A, 807B, 807C*** or ***809*** ;
- whether the person has taken part, and if so what part, in such transactions.

Solicitors

A solicitor is not to be deemed to have taken part in a transaction merely because of giving professional advice to a client. Otherwise, the solicitor might be caught under ***subsection (3)(c)***, which requires a person to give particulars of transactions in which he/she had taken part. It also limits the information which a solicitor may be required to furnish (unless with the consent of the client) as follows — ***(4) & (5)***

- in relation to the transfer of an asset, by an individual resident or ordinarily resident in the State, to certain foreign companies (that is, companies which, if resident in the State, would be close companies within the meaning of ***sections 430*** and ***431***), the names and addresses of the transferor, the transferee and persons concerned in the associated operation;
- where the solicitor is concerned with the formation or management of such a company, the name and address of the company; and
- the names and addresses of a settlor and any non-resident or non-domiciled person who obtains income from such a settlement which the solicitor was involved in creating or executing.

Essentially, therefore, a solicitor cannot be required, except with the client's consent, to supply more than the names and addresses of all persons involved in the transactions.

Banks

The section does not impose any obligation on a bank to supply information about ordinary banking transactions between banker and customer carried out in the ordinary course of banking business, unless the bank has acted or is acting on behalf of the customer in connection with the formation or management of a closely held company resident or incorporated outside the State or in connection with the creation or execution of trusts or settlements by virtue of which income becomes payable to a person resident or domiciled outside the State. ***(6)***

809 Saver

This section secures that the various provisions of the Income Tax Acts as specified in the section (which exempt from tax certain interest and dividends arising to non-residents) do not operate to exempt income deemed under ***section 806*** or ***807A*** to be income of an individual resident or ordinarily resident in the State.

The intention is to ensure that these exemptions in favour of non-residents will not, in a case where securities are transferred abroad to a non-resident and the income arising from them is channelled back to the Irish resident in a purported non-taxable form, operate to defeat the purpose of the anti-avoidance provisions, which is to tax this income in the hands of the Irish resident. Since the scheme of the provisions is to deem the income arising to the non-resident (which the Irish resident has the power to enjoy) to be income of the Irish resident, there might, but for this provision, be a possible argument that the income, deemed to be the income of the Irish resident, should be regarded as having the exemption from tax which it had in the hands of the non-resident transferee.

810 Application of Income Tax Acts

This section applies the provisions of the Income Tax Acts relating to the charge, assessment, collection and recovery of tax to any tax chargeable as a result of ***section 806*** or ***807A***. It ensures that the provisions relating to appeals also apply.

CHAPTER 2
Miscellaneous

Overview

The provisions contained in this Chapter counter various arrangements undertaken for the avoidance of taxation. The measures include a general anti-avoidance provision (***section 811***), surcharge, interest and protective notification (***section 811A***), provisions to tax deemed income from transfers of rights to receive interest from stocks and shares (***section 812***) and on sales of certain securities ("bond washing") (***section 815***), measures to tax transactions related to loans or credit (***section 813***), transactions in certificates of deposit and assignable deposits (***section 814***) and shares issued in place of dividends (***section 816***), a provision to deal with schemes designed to avoid tax under Schedule F (***section 817***), a provision to restrict relief for payments of interest (***section 817A***) and a provision for the treatment of interest in certain circumstances (***section 817B***).

811 Transactions to avoid liability to tax

Summary

This is a ***general anti-avoidance measure*** that applies to transactions which were commenced on or before 23 October 2014. It is intended to defeat the effects of transactions which have little or no commercial reality but are intended primarily to avoid or reduce a tax charge or to artificially create a tax deduction or tax refund. The taxes covered by ***section 811*** are income tax, corporation tax, capital gains tax, value-added tax, capital acquisitions tax, stamp duty and universal social charge.

The Revenue Commissioners (or a nominated officer) can form an opinion that a transaction is a ***tax avoidance transaction*** and give notice to that effect to each person affected by the opinion. The notice describes the transaction, the tax which is intended to be avoided or the refund which is intended to be generated by the transaction and the steps which the Revenue Commissioners propose to take in order to ensure that the tax is not avoided or refunded. The person receiving a notice has 30 days after the date of the notice to contest the Revenue Commissioners' opinion through the tax appeal procedures.

If their opinion is not appealed, or is upheld on appeal, the Revenue Commissioners are empowered to take the steps described by them in the notice in order to defeat the tax avoidance scheme. If their opinion is not upheld on appeal, they are not entitled to take any further action.

Genuine business transactions, even if carried out in a manner intended to attract the minimum amount of tax, are not to be regarded as tax avoidance transactions. Neither is the legitimate use of a tax relief to be regarded as a tax avoidance transaction. In determining that a transaction is a genuine commercial transaction or the legitimate use of a tax relief, the Revenue Commissioners (and, on appeal, the Appeal Commissioners and the High Court) can have regard to the ***substance of a transaction***, and of related transactions, so as to get behind the mere form of the transaction.

The section applies to all transactions carried out wholly or partly on or after 25 January, 1989 and to transactions carried out before that date which affect tax liabilities arising after that date.

Details

Definitions and construction

Various expressions are defined; some of these are self-explanatory. ***(1)(a)***

"the Acts" applies the section to income tax, corporation tax, capital gains tax, value-added tax, capital acquisitions tax, stamp duty and universal social charge.

"notice of opinion" is the notice given by the Revenue Commissioners to the persons concerned, where they consider a transaction is a tax avoidance transaction.

"tax", as defined, covers not only the avoidance of the taxes imposed by the Acts but also the avoidance of any interest or penalties payable under the Acts.

"tax advantage" is, essentially, the effect which the would-be tax avoider is trying to achieve through a tax avoidance scheme. It includes reducing the amount of tax payable, avoiding the payment altogether, deferring the payment, generating a refund or payment of tax to the tax avoider and increasing the amount of a refund or other amount payable to the tax avoider.

The reference to "potential or prospective" amounts is to deal with situations where the tax avoidance transaction is carried out now but the benefit of the transaction will not arise until a future date. An example of this would be the artificial creation of a loss which will be used to reduce future gains. The reference to "a transaction where another transaction would not have been undertaken, etc" is intended to defeat arguments to the effect that there is no tax loss (and, accordingly, no tax avoidance) because if the avoidance transaction had not been undertaken, an alternative transaction would not have been undertaken.

"tax consequences" are, in effect, the things which must be done to set the purported effects of the tax avoidance scheme aside and ensure that the "correct" tax is paid. Where the Revenue Commissioners' opinion that a transaction is a tax avoidance transaction is not contested or is upheld on appeal, they are entitled to make the necessary adjustments to ensure that tax is not avoided.

"transaction" describes the actions and activities which can be considered to be transactions for the purposes of identifying a tax avoidance transaction. The definition is cast in very broad terms in an attempt to cover all types of tax avoidance schemes and devices, including schemes involving collusion between different parties, schemes which involve the use of foreign tax havens and transactions which take place as part of a larger transaction in order to avoid the tax arising on that larger transaction (for example, where a genuine sale of a property takes place but a scheme is inserted as part of the sale transactions in order to avoid capital gains tax on the sale proceeds).

In order to tackle the problem of artificial tax avoidance schemes, the section contains a number of directions to the Revenue Commissioners requiring them to have regard to matters which traditionally have not been taken into account by the Courts in construing tax statutes. These include looking at the ***substance of a transaction*** and not just its form and having regard to ***the intention of a tax statute***. This provision secures that the Appeal Commissioners and the High Court are also required to have regard to these matters in determining an appeal. ***(1)(b)***

For the purposes of this section or ***section 811A*** any appeal by a taxpayer against a notice of opinion by the Revenue Commissioners under ***section 811(7)*** will be deemed to be finally determined when — ***(1)(c)***

(i) there is written agreement between the taxpayer and Revenue that the opinion is either to stand or be amended in a particular way,

(ii) (I) where the agreement was not in writing, a confirmation in writing is made as to the terms of the agreement either by the taxpayer to Revenue or vice versa, as appropriate, and

(II) 21 days have elapsed since the confirmation without challenge by the recipient, or

(iii) the taxpayer gives notice in writing to Revenue that they do not intend to proceed with an appeal against the Revenue opinion.

Tax avoidance transactions

The term "tax avoidance transaction" is defined. Essentially, the Revenue Commissioners are allowed to look at a transaction by reference to what it brought about and how it went about doing so. If necessary, they can also look at alternative ways of achieving the outcome of the transaction. If having done this, they consider that the transaction effectively had little or no commercial purpose and was entered into primarily for tax avoidance purposes, they can form the opinion that the transaction is a tax avoidance transaction. ***(2)***

The measure does, however, contain an element of comfort and reassurance for business people and for persons claiming tax reliefs. Carrying out genuine business transactions in a manner which attracts the minimum tax charge does not constitute tax avoidance. The test is that the transaction must be a genuine business transaction carried out with a view to the realisation of profit and not primarily for tax avoidance. Likewise, claiming a tax relief in such manner as not to constitute an abuse of the relief is not tax avoidance. In determining whether the transaction is a genuine business transaction or is not an abuse of the tax relief, the Revenue Commissioners must have regard to the substance of the transaction and any related transactions, and not just to the form of the transaction. This is necessary so as to get behind the facade of transactions and see their true purpose. ***(3)***

Revenue opinion that a transaction is a tax avoidance transaction

The Revenue Commissioners may, at any time, form the opinion that a transaction is a tax avoidance transaction, calculate the tax being avoided by the transaction, determine what they consider would be necessary to be done to undo the transaction and give whatever relief they feel might be necessary as a result of their actions in undoing the tax avoidance. ***(4)***

The Revenue Commissioners are empowered to do such acts and make such adjustments ***(5)(a)*** as are necessary to undo a tax avoidance scheme. However, these acts and adjustments cannot be carried out until the opinion of the Revenue Commissioners that the transaction is a tax avoidance transaction becomes final and conclusive (that is, the opinion is not contested or is upheld on appeal). In addition, the acts and adjustments must have been specified or described in a notice of opinion or must have formed part of the determination of an appeal.

In taking action to undo a tax avoidance scheme the Revenue Commissioners are empowered to — ***(5)(b)***

- allow or disallow a tax deduction,
- allocate reliefs, income, etc among taxpayers, and
- recharacterise the nature of payments, etc made.

This is to ensure that tax is paid by reference to the real nature of events and that artificially contrived situations are dismantled.

The Revenue Commissioners must give relief where their actions could result in double taxation. ***(5)(c)***

The terms of this anti-avoidance measure require the Revenue Commissioners to outline their proposed actions in a notice to the taxpayer. The taxpayer can then appeal against the actions described in the notice. At the time of the hearing of the appeal, however, the actions will not have taken place. Where the actions described by the Revenue Commissioners in the notice of opinion are upheld on appeal, a second right of appeal will not arise when the actions, which have already been sanctioned under the appeal process, take place. ***(5)(d)***

The opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive if — ***(5)(e)***

- the notice of opinion is not appealed (or none of the notices of opinion, if more than one was issued, is appealed) within the time specified (30 days from the date of the notice), or
- when all appeals against a notice or notices of opinion have been finally determined without it, or them, being determined to the effect that that the Revenue Commissioners were not justified in considering the transaction to be a tax avoidance transaction.

Provision is made to ensure that once a notice of opinion becomes final and conclusive, then the normal 4 year time-limits which apply to the raising of assessments under various tax heads will not apply. ***(5A)***

The following terms, used in this subsection, are defined: ***(5A)(a)***

"assessment" includes a first assessment, an additional assessment, an additional first assessment and an estimate or estimation. These various references are to recognise the different words used to describe what is essentially an assessment under all of the Acts to which section 811 applies.

"amendment" , in relation to an assessment, includes an adjustment, an alteration or a correction of assessment and is included for the same reason as that pertaining to the definition of "assessment".

Where an opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, has become final and conclusive under section 811, then in order to give effect to that section, any time limit provided for in Part 41 or Part 41A of the TCA 1997 or in any other provision of the Acts on the making or amendment of an assessment or ***(5A)(b)*** on the requirement etc. on a person to pay the tax

(i) shall not apply, and

(ii) shall not affect the recovery or collection of that tax.

The normal 4 year time limit which might otherwise apply to such assessments and collection procedures will not, therefore, apply. This subsection applies to any assessment or amendment of an assessment which is made on or after 28 February 2012, in respect of any notice of opinion which has become final and conclusive.

Each person affected by an opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction will get a notice describing — ***(6)***

- the transaction which the Revenue Commissioners consider is a tax avoidance transaction,
- the amount of tax which the person is attempting to avoid or the repayment of tax the person is attempting to obtain through the transaction,
- the steps which the Revenue Commissioners propose to take to prevent the avoidance, etc, and
- any relief from double taxation which the Revenue Commissioners propose to give.

Appeals

There is a right of appeal against the Revenue Commissioners' opinion that a transaction is a tax avoidance transaction. Essentially, a taxpayer can appeal against — ***(7)***

- the opinion itself on the grounds that the transaction is not a tax avoidance transaction,
- the amount of tax which the Revenue Commissioners say the taxpayer is attempting to avoid or the repayment the taxpayer is attempting to obtain,
- the actions which the Revenue Commissioners propose to take to counter the tax avoidance, or
- the amount of the relief from double taxation which it is proposed to give.

The appeal must be made by notice in writing to the Appeal Commissioners within 30 days after the date of the notice of opinion. The taxpayer can appeal on the basis of facts not known to the Revenue Commissioners when they formed their opinion.

The appellant may appeal on more than one of the grounds set out above but may not cite any grounds other than those.

The normal appeal processes apply to an appeal made against the Revenue Commissioners' opinion. On appeal, the Appeal Commissioners are entitled to review all the facts and obtain whatever information or evidence they require. However, in the course of the appeal, arguments are confined to the grounds of appeal listed previously. ***(8)***

As the nature of the notice of opinion is concerned with things which it is proposed to do, the conduct of the appeal will be somewhat unusual and will not conform to normal procedures where a person is appealing against something already done by the Revenue Commissioners. Accordingly, guidelines are set out as to how the appeals against notices of opinion are to be determined. An appeal against the Revenue Commissioners' opinion is to be determined by the Appeal Commissioners by them — ***(9)***

- agreeing wholly with the opinion and determining that all of the transaction is a tax avoidance transaction,
- agreeing with part of the opinion and determining that only a part of the transaction is a tax avoidance transaction,
- agreeing wholly or partly with the opinion and determining that some or all of the

transaction is or are a tax avoidance transaction subject to such adjustments as they think necessary, or

- rejecting the opinion altogether so that the transaction cannot be regarded as a tax avoidance transaction.

The same guidelines apply to the extent necessary, to the deciding of a point of law by the High Court.

Amendments to notice of opinion

The Revenue Commissioners may amend, add to or withdraw anything contained in a notice of opinion by giving notice of the amendment, etc to each person affected by it. However, the Revenue Commissioners may not set aside a determination of the Appeal Commissioners or the courts which has become final and conclusive. ***(10)***

Secrecy and confidentiality

Provision is included to enable the Revenue Commissioners to deal with tax avoidance schemes involving 2 or more persons. The normal rules on secrecy and confidentiality are relaxed to the extent necessary to enable the Revenue Commissioners to give notices to each person, make the appropriate adjustments in their tax affairs to undo the tax avoidance, deal with appeals involving more than one person and do any other necessary acts. ***(11)***

Delegation

The Revenue Commissioners may nominate any of their officers to carry out their functions under the section. ***(12)***

Application

The section applies to transactions carried out wholly or partly on or after 25 January, 1989. It also applies to a transaction carried out wholly before that date where the transaction is used to reduce a tax charge first arising by reason of activities carried out or events taking place on or after that date or to create a repayment which could only arise on or after that date. For example, if a transaction is used before the date to create an artificial loss which is carried forward to reduce a gain arising after the date, the section will apply to the transaction. ***(13)***

This section does not apply to a transaction which was commenced after 23 October 2014. The section does not need to apply to transactions after that date because it is being replaced in its entirety by section 811C. ***(14)***

811A Transactions to avoid liability to tax: surcharge, interest and protective notification

Summary

This section ensures that, where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction which was commenced on or before 23 October 2014 becomes final, interest and a 20% surcharge will be payable on the tax that the taxpayer unsuccessfully attempted to avoid paying. The section also provides that, by making a protective notification to Revenue in respect of a transaction within 90 days of beginning a transaction, the taxpayer can, on a wholly non-prejudicial basis, obtain protection from the possibility of such interest or surcharge arising in the event of Revenue successfully challenging the transaction. In addition, where a full protective notification has been made, the time period within which Revenue must form an opinion that a transaction is a tax avoidance transaction under ***section 811*** is limited to a period of two years from the date of the notification. An opinion under ***section 811*** can otherwise be formed at any time.

Details

Provision is made to ensure that — ***(1)***

(a) refunds by a taxpayer of tax repayments received on foot of avoidance will be treated as additional tax payable for the purposes of the surcharge,

(b) the date on which Revenue's opinion that a transaction is tax avoidance, will be treated as becoming final, will be —

  (i) 31 days after the notice of opinion, where no appeal under ***section 811(7)*** is made, or

  (ii) the date upon which all appeals against an opinion are dismissed,

  and

(c) this section is to be construed together with ***section 811***.

The general four year restrictions relating to the raising of assessments, the making of enquiries or the taking of actions by an inspector provided for in ***section 959Z, 959AA or 959AB*** (which gives primacy to these provisions over any other provisions of the Tax Acts, except where otherwise expressly provided) shall not be construed as preventing Revenue from making any enquiry or taking any action at any time in relation to ***section 811*** or ***section 811A***. This copper-fastens the provisions of ***section 811(4)(a)*** which provides for Revenue forming an opinion that a transaction is a tax avoidance transaction at any time, and allows Revenue to make enquiries about a transaction contained in a tax return or referred to in a protective notification at any time. ***(1A)***

Where a "valid" protective notification from or on behalf of a person of full details of a transaction has been received, Revenue may not form the opinion that the transaction is a tax avoidance transaction under the provisions of ***subsections (2)*** and ***(4)*** of ***section 811*** after a period of 2 years from receipt of the protective notification, so long as it is received on or before the relevant date. The two year restriction on the formation of an opinion shall not prevent Revenue from making an enquiry in relation to a transaction under ***section 811*** or ***811A*** at any time. ***(1B)***

Where Revenue's opinion that a transaction is avoidance becomes final (i.e. if there is no appeal or the appeal is withdrawn by the taxpayer, if the taxpayer and Revenue come to an agreement, or if the appeal is finally determined by the Appeal Commissioners or the Courts against the taxpayer) — ***(2)***

(a) a 20% surcharge will apply to the tax becoming payable, and

(b) interest will be applied by reference to when that tax would have been payable if there had been no avoidance.

This section, as amended by the Finance Act 2014, provides an opportunity to persons who had engaged in tax avoidance to come forward to Revenue, before 30 June 2015, and settle their affairs in such a way that no surcharge will apply and any interest payable will be capped at 80% of the interest otherwise so payable. To do this, they must make a qualifying avoidance disclosure. A qualifying avoidance disclosure, must be in writing, must contain full details of the transaction and must be signed. It must also be accompanied by full payment of the tax and any interest due. ***(2A)***

This settlement opportunity is available to persons who had entered into a transaction and either the Revenue Commissioners had formed the opinion that the transaction was a tax avoidance transaction or the Revenue Commissioners could have successfully challenged the transaction by forming an opinion under section 811 that it was a tax avoidance transaction.

Neither a surcharge nor interest will apply where a "protective notification", giving full ***(3)(a)*** details of the transaction has been received by the Revenue Commissioners by the relevant date (set out in ***paragraph (c)***).

Where a "protective notification" has been received it will be treated as being made — ***(3)(b)***

(i) solely to prevent the imposition of the surcharge and interest , and

(ii) without prejudice to whether the transaction is a tax avoidance transaction or not.

The dates by which "protective notifications" have to be received, are set out. ***(3)(c)***

If the transaction (or any part of it) was undertaken on or after 19 February 2008 then the relevant date is the later of — ***(3)(c)(i)***

(I) 90 days after the transaction commenced, or

(II) 19 May 2008.

Where a transaction is undertaken wholly before 19 February 2008 and the tax advantage arises by virtue of one or more transactions carried out on or after 19 February 2008, then the relevant date is 90 days after the date on which those latter transactions commenced. ***(3)(c)(ii)***

Where a transaction is undertaken wholly on or before 19 February 2008 and gives rise to a refund that could first have become so refundable on a date on or after 19 February 2008, the relevant date is 90 days after that date. ***(3)(c)(iii)***

Notwithstanding ***paragraph (a)***, interest will apply to any unpaid tax with effect from the date from which the Revenue opinion (that the transaction is a tax avoidance transaction) becomes final and conclusive. ***(3)(d)***

For the purpose of charging interest, Revenue must specify in its notice of opinion under ***section 811*** the date or dates from which tax would have been due and payable if there had been no attempted avoidance. ***(4)(a)***

The taxpayer is entitled to appeal against the specification by Revenue of the date or dates referred to in ***paragraph (a)***. ***(4)(b)***

The surcharge is payable when the Revenue opinion becomes final and interest is charged from that date in respect of any delay in payment. ***(5)***

The protective notification is required to be delivered in a prescribed form, to the Revenue office specified on the form. The notification must contain full details of the transaction, full reference to relevant tax law, and details of how that tax law is considered to apply to the transaction. ***(6)(a)***

The use of the "expression of doubt" procedure will not be regarded as representing a protective notification. Protective notifications do not involve or imply any doubt on the part of the taxpayer. They are a provision of information to Revenue to protect against any possibility of surcharge and interest, and to protect against the application of the changed appeal provisions. ***(6)(b)***

The taxpayer has the right to appeal in the event of Revenue contending that a full and timely notification was not made. ***(6)(c)***

The Revenue Commissioners may nominate any of their officers to carry out their functions under the section. ***(6A)***

This section applies to transactions wholly or partly undertaken on or after 19 February 2008 and to transactions wholly undertaken before that date where they have the effect of reducing liabilities or causing repayments after that date, unless a protective notification had been made before 19 February 2008 under the provisions of ***section 811A*** as they applied prior to that date. ***(7)***

This section does not apply to a transaction which was commenced after 23 October ***(8)***

2014. The section does not need to apply to transactions after that date because it is being replaced in its entirety by section 811D.

811B Tax treatment of loans from employee benefit schemes

Summary

This section is aimed at countering schemes wherein employers, instead of paying salary or bonus, place funds in trusts or other arrangements (generally offshore) and where, under such schemes, trustees of that trust provide cash, benefits or assets usually in the form of long-term loans, to directors and employees. The loans are generally rolled over ‘ad infinitum’ and are never actually repaid.

Payments (including a loan or the loan of an asset) to an employee, former employee or prospective employee or director out of a trust that is provided, or funded, by a person (including a company) who is that employee’s employer (or subsequently becomes that employee’s employer) are deemed to be income within the charge to Income Tax and Universal Social Charge.

As a balancing aspect, if a loan, which has been taxed by virtue of this measure, is wholly or partially repaid, the Income Tax and Universal Social Charge attributable to the amount repaid will be refunded. The offset or repayment of Income Tax and Universal Social Charge due to the individual is the difference between the original amount paid and the amount of Income Tax and Universal Social Charge that would have been payable had the normal benefit-in-kind rules applied.

As regards loans, loans of assets or benefits provided before 13 February 2013 where such amounts have not been repaid, the measure imposes a charge to Income Tax and Universal Social Charge for each year of assessment that the loan remains outstanding or the employee continues to have use of the asset. The annual amount chargeable is an amount calculated as if the benefit-in-kind provisions apply.

This section shall not apply as regards schemes that are approved by the Revenue Commissioners such as Approved Profit Sharing Schemes, Employee Share Ownership Trusts or Occupational Pension Schemes.

Details

Definitions

‘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; ***(1)***

‘employee’ includes an office holder and any person who is an employee within the definition of ‘employee’ in section 983 of the Taxes Consolidation Act 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 Taxes Consolidation Act 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 Taxes Consolidation Act 1997 which details benefit-in-kind provisions.

Clarifications

- the meaning of connected person is as defined in section 10 of the Taxes Consolidation Act 1997. ***(2)(a)***
- the loan of, or the provision of the use of, an asset is deemed to be a loan equal to the value of the asset at the time such an asset is provided, and ***(2)(b)***
- this section does not apply to a loan, the use of an asset or the provision of any benefit in respect of which the "normal" benefit-in-kind charging provisions of sections 118, 118A, 121, 121A or 122 apply. ***(2)(c)***

The charge

This subsection imposes a charge to tax under Case IV of Schedule D (where a charge does not currently exist) on an employee or former employee of an amount equal to the value of a loan, or the loan of or the provision of the use of an asset or the provision of a benefit to that employee or former employee, or to a person connected with that employee or former employee, from a benefit scheme that is directly or indirectly funded by that individual's employer or former employer or by a person connected with such an employer or former employer. This charge to tax only applies to individuals who hold or held offices or employments the income from which is within the charge to income tax in the State. ***(3)***

The charge to tax under Case IV of Schedule D is also imposed on an individual, though not an employee or director at the time of receipt of the loan, or the loan of, or the provision of the use of an asset or the provision of a benefit, who subsequently becomes a director or employee. The charge to tax will apply for the tax year in which the individual becomes an employee and is restricted to individuals who take up offices or employments where the income is within the charge to income tax in the State. ***(4)***

Payments, benefits or assets received prior to an individual becoming an office holder or employee are excluded but only where such payments, benefits or assets are within the charge to tax in a state with which this State has a Double Taxation Treaty.

Date of application of the provision

The charge to tax under Case IV of Schedule D in subsections (3) and (4) is confined to events occurring on or after 13 February 2013. ***(5)***

Loans wholly or partially repaid

Where a loan which has been taxed by virtue of this measure, is wholly or partially repaid, the Income Tax and Universal Social Charge attributable to the amount repaid will be refunded. An offset or repayment of tax may be made, on receipt of a claim in writing from the taxpayer of the difference between; ***(6)(a)***

(a) the original tax paid by virtue of subsection (3) or (4); and

(b) the tax that would have been payable had the normal benefit-in-kind provisions applied.

The relevance of restricting the repayment or offset by the amount of the tax that would have been payable had the normal benefit-in-kind provisions applied is that the tax would in any event, have been payable by the individual if he or she had not entered into the tax avoidance scheme in the first place.

The relief in subsection (6)(a) will not be granted if a loan is simply paid off by, or replaced by, another loan directly or indirectly from the employer or former employer or ***(6)(b)*** from a benefit scheme funded directly or indirectly by the employer or former employer.

Any claim for the offset or repayment provided for in this section shall be made in writing within 4 years from the end of the year of assessment in which the loan, or part of the loan, is repaid or the use of the benefit or asset ceases. ***(6)(c)***

Charge in respect of transactions before 13 February 2013

Where before 13 February 2013 an individual, who holds or held an office or employment the income from which is within the charge to tax in the State, obtained a loan or the loan of, or the provision of the use of, an asset from a benefit scheme and continues to have that loan/use after 13 February 2013, a charge to tax is imposed (for a year of assessment that the money is outstanding or the individual has the loan of or the provision of the use of the asset) of an amount equal to; ***(7)(a)***

- the interest that would be payable on the loan had the notional benefit-in-kind rate of interest (13.5% for the 2013 tax year) applied, or ***(7)(b)***
- the amount chargeable had the normal BIK charging provisions contained in sections 118, 118A, 119,121, 121A or 122 applied in respect of the loan of or the provision of use of the asset. ***(7)(c)***

Schemes approved by Revenue

This section shall not apply as regards schemes that are approved by the Revenue Commissioners such as Approved Profit Sharing Schemes, Employee Share Ownership Trusts or Occupational Pension Schemes. ***(8)***

811C Transactions to avoid liability to tax

Summary

This is a ***general anti-avoidance measure*** that applies to transactions that are commenced after 23 October 2014. This section supersedes ***section 811*** from that date and is intended to defeat the effects of transactions which have little or no commercial reality but are intended primarily to avoid or reduce a tax charge or to artificially create a tax deduction or tax refund. The taxes covered by this section are income tax, corporation tax, capital gains tax, value-added tax, capital acquisitions tax, stamp duty and the universal social charge.

The section denies any person the benefit of a tax advantage created through the use of a tax avoidance transaction. If a person claims that benefit, contrary to the section, then a Revenue officer can withdraw or deny that tax advantage and that can be done through the making or amending of an assessment. The normal appeal and collection rules apply to an assessment made or amended pursuant to this section.

Genuine business transactions, even if carried out in a manner intended to attract the minimum amount of tax, are not to be regarded as tax avoidance transactions. Neither is the legitimate use of a tax relief to be regarded as a tax avoidance transaction.

Details

Definitions and construction

Various expressions are defined; some of these are self-explanatory. ***(1)(a)***

“the Acts” applies the section to income tax, corporation tax, capital gains tax, value-added tax, capital acquisitions tax, stamp duty and the universal social charge.

“assessment” includes any assessment, including any amended assessment, correcting assessment and any estimate or estimation. These various references are to recognise the different words used to describe what is essentially an assessment under all of the Acts to which section 811 applies.

“tax”, as defined, covers not only the avoidance of the taxes imposed by the Acts but also the avoidance of any interest payable under the Acts.

“tax advantage” is, essentially, the effect which the would-be tax avoider is trying to achieve through a tax avoidance scheme. It includes reducing the amount of tax payable, avoiding the payment altogether, deferring the payment, generating a refund or payment of tax to the tax avoider or increasing the amount of a refund or other amount payable to the tax avoider.

The reference to “potential or prospective” amounts is to deal with situations where the tax avoidance transaction is carried out now but the benefit of the transaction will not arise until a future date. An example of this would be the artificial creation of a loss which will be used to reduce future gains. The reference to “a transaction where another transaction would not have been undertaken, etc” is intended to defeat arguments to the effect that there is no tax loss (and, accordingly, no tax avoidance) because if the avoidance transaction had not been undertaken, an alternative transaction would not have been undertaken.

“transaction” describes the actions and activities which can be considered to be transactions for the purposes of identifying a tax avoidance transaction. The definition is cast in very broad terms in an attempt to cover all types of tax avoidance schemes and devices, including schemes involving collusion between different parties, schemes which involve the use of foreign tax havens and transactions which take place as part of a larger transaction in order to avoid the tax arising on that larger transaction (for example, where a genuine sale of a property takes place but a scheme is inserted as part of the sale transactions in order to avoid capital gains tax on the sale proceeds).

This subsection provides that section 811C and section 811D apply, notwithstanding any other provision of the Acts. ***(1)(b)***

Tax avoidance transactions

The term “tax avoidance transaction” is defined. Essentially, one must first consider the substance of the transaction and any related transactions, and not just the form of the transaction. This is necessary so as to get behind the facade of transactions and see their true purpose. One must also consider a transaction by reference to what it brought about and how it went about doing so and to alternative ways of achieving the outcome of the transaction. If having done this, it would be reasonable to consider that the transaction effectively had little or no commercial purpose and was entered into primarily for tax avoidance purposes, then the transaction is a tax avoidance transaction. ***(2)(a)***

The measure does, however, contain comfort and reassurance for business people and for persons claiming tax reliefs. Carrying out genuine business transactions in a manner which attracts the minimum tax charge does not constitute tax avoidance. The test is that the transaction must be a genuine business transaction carried out with a view to the realisation of profit and not primarily for tax avoidance. Likewise, claiming a tax relief in such manner as not to constitute an abuse of the relief is not tax avoidance. ***(2)(b)***

Withdrawing or denying the tax advantage

This subsection provides that a person is not entitled to claim the benefit of any tax advantage that arises from a tax avoidance transaction. ***(3)***

Revenue withdrawing or denying a tax advantage claimed, contrary to subsection (3)

Where, notwithstanding subsection (3), a person has by filing a tax return or in some way sought to claim the benefit of a tax advantage, then a Revenue officer may at any ***(4)(a)*** time withdraw or deny that tax advantage.

In order to withdraw or deny that tax advantage, the Revenue officer ***(4)(b) & (c)***

- may make or amend an assessment,
- allow or disallow in whole or in part any credit, deduction or other amount which is relevant in computing tax payable,
- allocate or deny any credit, deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof, or
- recharacterise, for tax purposes, the nature of any payment or other amount.

This is to ensure that tax is paid by reference to the real nature of events and that artificially contrived situations are dismantled.

The Revenue Commissioners must give relief where their actions could result in double taxation. ***(4)(d)***

Alternative assessments

An alternative assessment is an assessment made pursuant to a provision of the Acts other than ***section 811C*** and which challenges the tax avoidance under that other provision of the Acts. ***(5)(a)***

A Revenue officer who is withdrawing or denying a tax advantage pursuant to ***section 811C(4)***, can also raise alternative assessments. This specifically allows Revenue to challenge a transaction under ***section 811C(4)*** and other provisions of the Acts at the same time. ***(5)(b)***

A taxpayer may not use the fact that an assessment was made pursuant to section 811C as grounds for appeal against an assessment made pursuant to another provision of the Acts. Equally, a taxpayer may not use the fact that an assessment has made pursuant to another provision of the Acts as grounds for an appeal against an assessment made pursuant to ***section 811C***. ***(5)(c)***

Where Revenue is challenging a transaction under both ***section 811C*** and other provisions of the Acts simultaneously, then only one assessment will ultimately become final and conclusive. ***(5)(d)***

Time limits

Except in cases where a protective notification is made under ***section 811D***, nothing in the Acts prevents a Revenue officer from, in relation to this section and ***section 811D*** at any time, ***(6)***

- making any enquiry,
- taking any action,
- making or amending an assessment, or
- collecting or recovering any amount of tax relating to a tax advantage.

Secrecy and confidentiality

Provision is included to enable the Revenue Commissioners to deal with tax avoidance schemes involving 2 or more persons. The normal rules on secrecy and confidentiality are relaxed to the extent necessary to enable the Revenue Commissioners to perform any duties required under this section, make the appropriate adjustments in their tax affairs to undo the tax avoidance, deal with appeals involving more than one person and do any other necessary acts. ***(7)***

Application

This section applies to a transaction which is commenced after 23 October 2014. ***(8)***

811D Transactions to avoid liability to tax: surcharge, interest and protective notification

Summary

This section ensures that, where a transaction is a tax avoidance transaction, a 30% surcharge will be payable on the tax that the taxpayer unsuccessfully attempted to avoid paying. This surcharge is reduced if, having entered into a tax avoidance transaction, the taxpayer subsequently makes a full disclosure in relation to the transaction and pays the tax and any interest due at any point before an appeal is heard by the Appeal Commissioners in relation to the withdrawal or denial of the tax advantage sought. The section also provides that, by making a protective notification to Revenue in respect of a transaction within 90 days of beginning a transaction, the taxpayer can, on a wholly non-prejudicial basis, obtain protection from interest, up to the point that Revenue determines a transaction was a tax avoidance transaction, and from a surcharge. In addition, where a protective notification has been made, the time period within which Revenue can challenge a transaction on the basis that it is a tax avoidance transaction under ***section 811C*** is limited to the standard period for enquiries and assessments for that tax. A tax advantage can, absent a protective notification, be withdrawn or denied under ***section 811C*** at any time.

Details

Definitions and construction

Various expressions are defined; some of these are self-explanatory. ***(1)***

"disclosable transaction" is defined as having the meaning assigned to it by the Mandatory Disclosure regime (in ***Chapter 3 of Part 33***), except where certain provisions of that regime have not been complied with by a promoter of a scheme. Essentially, where a taxpayer entered into a transaction without realising it was a disclosable transaction and then co-operates fully with Revenue by giving full details of the scheme and such other information about the promotion of the scheme as Revenue may reasonably require in order to pursue the promoter for penalties, then the transaction will not be treated as a disclosable transaction for the purposes of this section.

"protective notification" is defined as a notification in the form prescribed for that purpose sent by a taxpayer, or an agent on their behalf, to Revenue providing certain information about a transaction within 90 days of commencing the transaction. The information relates to how the transaction works and why the taxpayer believes section 811C does not apply. In addition, any documentation relating to the transaction must be provided. If the documentation cannot be provided because it is not yet executed, then it must be provided within 30 days of execution. ***(1) & (2)***

An expression of doubt is specifically not treated as the making a protective notification and will afford a taxpayer no protection.

A protective notification cannot be made in respect of a disclosable transaction.

"qualifying avoidance disclosure" is a disclosure of complete information in relation to a transaction that would be challenged under ***section 811C*** or one of the Specific Anti-Avoidance (SAAR) provisions listed in ***Schedule 33***. A qualifying avoidance disclosure must be in writing, must contain full details of the transaction and must be signed. It must be accompanied by full payment of the tax and any interest due. ***(1)***

"specific anti-avoidance provision" means:

Section 381B

Section 381C
Section 546A
Section 590
Section 806
Section 807A
Section 811B
Section 812
Section 813
Section 814
Section 815
Section 816
Section 817
Section 817A
Section 817B
Section 817C

The surcharge

Where a person submits a tax return and claims the benefit of a tax advantage which would have arisen but for ***section 811C*** or one of the SAARs listed in ***Schedule 33***, then that person is liable to a surcharge of 30% of the amount of the tax advantage. The surcharge is not a penalty, and does not result in publication, but it is collected using all of the mechanics of the penalty regime as set out in ***Chapter 3A of Part 47***. ***(3)(a)***

A surcharge will not arise where the taxpayer had either carelessly or deliberately filed an incorrect return in such a way as to give rise to a penalty for filing an incorrect return. ***(3)(b)***

Making a protective notification

This subsection sets out the benefits of filing a protective notification. If a taxpayer has filed a protective notification, or if one is filed on that taxpayer's behalf, then: ***(4)(a)***

- the provisions of section 811C that allow Revenue carry out enquiries or make assessments outside of the normal time limits for so doing are dis-applied,
- if the transaction is found to be a tax avoidance transaction, the surcharge does not apply, and
- if the transaction is found to be a tax avoidance transaction, the tax is due one month after the date of the assessment in which Revenue withdraws or denies the tax advantage. This mirrors the timeframe for payment of tax in cases where a valid expression of doubt is made.

If Revenue carries out enquiries or makes or amends an assessment outside of the normal time frames, and the taxpayer believes that Revenue is precluded from so doing because a valid protective notification was made, then the taxpayer may ask the Appeal Commissioners to determine whether or not Revenue was so precluded. ***(4)(b)***

Reduction in surcharge

A taxpayer who makes a qualifying disclosure can avail of a reduced surcharge. The extent to which the surcharge is reduced depends on a number of factors. ***(5)***

Where the transaction is not a disclosable transaction, the possible stages at which a qualifying avoidance disclosure is made and the associated surcharge are: ***(a)***

- Prior to Revenue commencing any inquiry and within 24 months of the end of the chargeable period in which the transaction commenced: No surcharge.

- Prior to Revenue withdrawing a tax advantage under ***section 811C*** or a SAAR: 3%

- Where the taxpayer agrees with Revenue's assessment which withdraws or denies the tax advantage: 5%.

- Where the case is settled before an appeal is heard: 10%.

Where the transaction is a disclosable transaction, the possible stages at which a qualifying avoidance disclosure is made and the associated surcharge are: ***(b)***

- Prior to Revenue commencing any inquiry and within 24 months of the end of the chargeable period in which the transaction commenced: 3%.

- Prior to Revenue withdrawing a tax advantage under ***section 811C*** or a SAAR: 6%

- Where the taxpayer agrees with Revenue's assessment which withdraws or denies the tax advantage: 10%.

- Where the case is settled before an appeal is heard: 20%.

In all other cases the surcharge will be 30%.

(6)

Where a "protective notification" has been received it will be treated as being made —

(i) solely to prevent the imposition of the surcharge and to reduce the interest applicable, and

(ii) without prejudice to whether the transaction is a tax avoidance transaction or not.

Commencement

This section only applies to transactions which were commenced after 23 October 2014. ***(7)***

812 Taxation of income deemed to arise from transfers of right to receive interest from securities

Summary

Where a person who owns securities sells or transfers the right to receive interest or dividends on the securities while retaining ownership of the securities, that person is to be charged to tax in respect of that income.

Details

Definitions

"interest" includes dividends and annuities, while "securities" includes stocks and shares of all kinds. ***(1)***

The charge to tax

Where an owner of securities sells or transfers the right to receive interest on them but does not sell or transfer the securities themselves, the following rules apply — ***(2)***

- the interest is deemed to be income of the owner or, as appropriate, the beneficial owner;
- where the proceeds of the sale of public revenue dividends or foreign dividends have not had tax deducted at source, the owner or beneficial owner is chargeable to tax on the interest under Case IV of Schedule D with credit given for any tax shown to have been borne by that interest;
- the owner may, instead of being charged under Case IV of Schedule D, be charged under Case III of that Schedule on the basis of amounts remitted to the State if the interest would have been taxed on the remittance basis;

- the provisions of the Tax Acts relating to deduction of tax from interest are not affected by this subsection.

As regards corporation tax — ***(3)***

- the provisions of ***subsection (2)(c)*** apply but without the credit for tax borne, and
- the remittance basis (***subsection (2)(d)***) does not apply.

Information

The Revenue Commissioners may, by written notice to any person, ask for particulars of securities owned by that person to establish whether tax had been paid on the interest arising from those securities or whether the sale proceeds had been charged to tax under Schedule C or Schedule D. ***(4)***

Occasions when this section does not apply

This section does not apply to deem the owner or beneficiary of the interest chargeable to tax on that interest if: ***(5)***

- the interest would not have been chargeable to tax in the State had it been received by the owner or beneficiary at any point between the sale or transfer of the right to receive the interest and the actual payment of the interest. ***(a)***
- the owner or beneficiary is carrying on a trade or profession, or a business the profits of which are computed using the Case I rules (e.g. a '***section 110*** company', a Case III trade etc.) and the profits from the sale of the right to receive the interest is taken into account in computing the profits of that trade / profession / business. ***(b)***

813 Taxation of transactions associated with loans or credit

Summary

This section is intended to counteract arrangements under which credit might be given in consideration for what would be, in substance but not in form, interest with the aim of reducing the tax liability of the debtor. This might be done, for example, by drawing up an annuity agreement in consideration of a loan under which the equivalent of interest could be paid. This anti-avoidance measure was needed following the imposition of restrictions on the amount of interest which could be deducted for tax purposes by an individual.

Details

Application

The section operates in the case of any arrangement for the lending of money or the giving of credit and in the case of any transaction facilitating such an arrangement. ***(1)***

The section applies whether the parties to the relevant transactions are lender and borrower or persons connected with either of them. It applies, for example, where credit is given in consideration of an annuity payable by the borrower or his/her spouse to the lender or his/her spouse. ***(2)***

Certain payments treated as annual interest

An annuity or other annual payment (not being interest) chargeable under Schedule D and payment of which is provided for under a transaction to which the section applies is treated for the purposes of the Tax Acts as if it were annual interest. ***(3)***

The charge to tax

Where securities or other income-bearing assets are transferred in consideration of a loan, etc on the terms that they or equivalent assets will or may be returned later, the original owner is to be charged under Case IV of Schedule D on an amount equal to any income arising from the assets before the loan is repaid. For example, money is advanced by a bank to a borrower and securities are transferred to the bank, the income on which is payable to the bank during the period of the loan. The borrower does not therefore pay interest on the loan. Such a device is countered by imposing a tax charge on the borrower in respect of a sum equal to the interest on the securities which goes to the bank. ***(4)***

A similar rule is applied where, in consideration of a loan, etc, the owner of any property agrees to assign, waive or forgo income from the property without transferring the property itself. The provision would affect, for example, share option schemes under which money was advanced to employees of a company to buy shares in it on the terms that, until the loan was paid off, they would assign their dividend rights to trustees nominated by the company or alternatively forgo any dividends. ***(5)***

The previous subsection is adapted to cover a scheme whereby shares purchased on credit carry no, or restricted, rights to income while the purchase price is outstanding. ***(6)***

In the case of income payable under deduction of tax (for example, dividends), the gross amount is to be taken into account for the purposes of ***subsection (5)***. ***(7)***

814 Taxation of income deemed to arise from transactions in certificates of deposit and assignable deposits

Summary

This is an anti-avoidance measure to ensure that gains on the disposal of certificates of deposit (and other assignable deposits) is within the charge to income tax.

Details

Definitions

"assignable deposit" is a deposit of money, in any currency, which may or may not carry interest on repayment and which may be assigned by the depositor, with or without interest, to some other person. ***(1)***

"certificate of deposit" is a document issued by a bank which relates to money (in any currency) certifying that a deposit has been made with the bank which is repayable to the bearer or to order, with or without interest, and this right to repayment being transferable.

Application

The section applies to any right — ***(2)***

- to receive money which is stated in a certificate of deposit, or
- to receive money being a right arising from an assignable deposit.

The charge to tax

Unless taxed on the recipient as a trading receipt, a charge to tax under Case IV of Schedule D applies to any profit from the disposal of a right to which the section applies where this right was acquired by the person after 3 April, 1974. ***(3)***

Where the right was acquired on or before 3 April, 1974 and disposed of after that date, ***(4)*** the gain is divided and only the part referable to the period after that date is charged to tax.

If a loss on the disposal of a right is sustained, this may be set off or carried forward against the interest on the certificate of deposit on which the person is chargeable to tax. ***(5)***

The inclusion by a life assurance company of a gain on the disposal of a certificate of deposit in the notional Case 1 computation made for the purposes of management expenses relief under ***section 707*** will not prevent a charge on that gain under Case IV of Schedule D being imposed under ***subsections (3)*** and ***(4)***. ***(6)***

815 Taxation of income deemed to arise on certain sales of securities

Summary

This section counters a practice known as "bond washing" whereby securities are sold before the payment of interest so that the interest accrues to the holder as a capital gain rather than as income. The person selling the securities is liable for tax in respect of the interest which is deemed to have accrued on a day to day basis up to the date of sale. This provision does not apply in certain circumstances including, if the security has been held by the same owner for a continuous period of at least 2 years, or where the seller is a dealer in securities the profits of whose trade are assessed to tax under Case I of Schedule D.

Details

Definitions

"owner" is defined so as to cover the beneficial holder of securities where such securities are registered in the name of a nominee. ***(1)***

"securities" includes —

- assets which are not chargeable assets for capital gains tax purposes by virtue of ***section 607*** (government and certain other securities), and
- stocks, bonds and obligations of any government, corporation, company or other body corporate,

but does not include company shares.

The charge to tax

Where the owner of a security sells or transfers the security and interest on it is receivable by someone other than that owner, interest is deemed to have accrued to that owner on a day to day basis from the date the owner acquired the security and the owner is charged to tax under Case IV of Schedule D on that interest up to the date of disposal of the security or if later, the date of receipt of the consideration for the disposal. ***(2)(a)***

Depending on the period for which a person holds the security, the person may have actually received interest payments on it which are chargeable to tax in the normal way. The deemed interest will be reduced to reflect this. ***(2)(b)***

If the owner arranges to re-acquire a security subsequent to its disposal, the charge will be based on the interest deemed to have accrued up to the next interest date following the sale. ***(2)(c)***

If the owner subsequently re-sells the security, interest chargeable in respect of that subsequent resale will be deemed to have arisen only from that next interest date, that is, the date up to which the owner was last charged to tax; by not going back, in this instance, to the date of reacquisition, a double charge to tax is avoided. ***(2)(d)***

Exclusions from the charge to tax

There are a number of exclusions from the charge imposed by this section on an owner in respect of a gain arising on a sale or transfer of a security. The charge does not apply — ***(3)***

- where the security has been held for a continuous period of 2 years by the same owner; personal representatives are entitled to take into account the period the deceased held a security in calculating the 2 year period,
- where the seller of the security is a dealer in securities, so that the proceeds of the disposal are taken into account in calculating the profits of the dealing trade (such profits are chargeable under Case I of Schedule D in the normal way),
- where the owner is an undertaking for collective investment (as described in ***section 738***) and any gain or loss accruing is a chargeable gain or an allowable loss,
- where the sale is between spouses or civil partners who, for income tax purposes, are treated as living together, or
- where the interest payment on the security is treated as a distribution under the Corporation Tax Acts.

Buy back or reacquisition of securities

The meaning of buying back or re-acquiring a security in ***subsection (2)(c)*** is expanded to include buying back or re-acquiring a similar security and it is indicated how securities are to be regarded as similar. This is an anti-avoidance provision to forestall any attempt to avoid the increased charge under ***subsection (2)(c)*** by buying a similar instead of the same security. ***(4)***

Last in, first out rule

In a case where securities of the same class are bought at different times, the "last in, first out" principle is applied, so that a sale is treated as deriving from the latest purchase (this is relevant in determining the period of 2 years referred to in ***subsection (3)(a)***). ***(5)(a)***

Securities of same class

Securities are to be regarded as being of the same class where they entitle their owners to identical rights against the issuer of the securities. ***(5)(b)***

Information

To enable an inspector to measure any charge arising on deemed income under this section, the inspector may call for disclosure of relevant information and this may be requested from the person who issues a security and an agent of such a person as well as from the owner of the security. ***(6)***

816 Taxation of shares issued in place of cash dividends

Summary

This section sets out the tax treatment of dividends on shares (scrip dividends) issued in place of cash dividends, at the option of the shareholder.

Details

A number of self-explanatory definitions are set out. ***(1)***

When a shareholder in a company receives a scrip dividend, an amount equal to the amount that he or she would have received if he or she had opted to receive a cash ***(2)*** dividend in place of the scrip dividend is treated in the following way —

- if the company is resident outside the State, the shareholder is taxed on the amount as income under Case III of Schedule D;
- if the company is a resident quoted company, the amount is treated as a distribution made by the company;
- if the company is resident in the State and not quoted, the amount is taxed under Case IV of Schedule D.

By applying ***section 152***, an Irish resident quoted company issuing a scrip dividend must furnish the recipient with a statement in writing showing the amount that is treated as a distribution, the period to which it relates and, in the case of scrip dividends issued before 6 April 1999, the tax credit attaching to the distribution. ***(3)***

Scrip dividends, whether received under a deliberate exercise of an option or otherwise, are also covered by this section. ***(4)***

817 Schemes to avoid liability to tax under Schedule F

Summary

This section counteracts a variety of schemes and arrangements which enabled the profits of closely held companies, which were available to be paid out as dividends, to be transferred to the companies' shareholders in a form which produced greatly reduced liabilities to tax. Essentially, the objective of all the schemes was to enable shareholders to extract profits from a company free of income tax by means of a disposal of shares without reducing their ownership of the company.

The schemes converted what was, in effect, a distribution of profits to shareholders into the proceeds of a disposal of shares by the shareholder. The income tax which would otherwise have been charged was converted to a much reduced charge to capital gains tax.

The continued undiluted ownership of the companies in question by the same shareholders, on the completion of these schemes, demonstrated the essential tax avoidance nature of the arrangements.

This section charges the net proceeds of disposals of shares to income tax where there is no genuine disposal of ownership of a business. Bona fide disposals of shares, which are not part of an arrangement to avoid tax, are specifically excluded from the provisions of the section.

Details

Definitions and construction

Certain terms used in the section are defined and these are self-explanatory. It should be noted, however, that the term "shares" is given a wide meaning so that the section includes all disposals of interests in a company as part of schemes or arrangements for avoidance of income tax under Schedule F. ***(1)(a)***

The provisions of the Capital Gains Tax Acts are adopted for determining whether there has been a disposal of shares. It is also clarified that a part disposal of shares (which is treated as a disposal for the purposes of the Capital Gains Tax Acts) is a disposal of shares for the purposes of the section. ***(1)(b)(i)***

[In some schemes to avoid income tax chargeable under Schedule F a profitable trade is transferred from one company A to another company B. Company A's shareholders receive shares in company B in proportion to their holdings of shares in company A. Cash and other liquid assets are retained in company A which is then liquidated. The ***(1)(b)(ii)*** transfer of the trade from company A to company B is normally treated as giving rise to a part disposal of company A shares by company A's shareholders. This is because value has passed out of those shares and into the shares in company B. The normal treatment ignores the part disposals of company A shares by company A's shareholders who are treated as having acquired the company B shares at the time they acquired the company A shares and for the cost of acquisition of the company A shares.]

This "roll-over" treatment in the case of reconstructions involving pro-rata share issues is not given under capital gains tax legislation in cases involving tax avoidance. The provisions of that legislation in so far as they deny a roll-over treatment in respect of disposals of shares in reconstructions undertaken for the purpose of tax avoidance complement the provisions of this section. However, as that capital gains tax measure could also be construed as casting doubt on whether a transfer of a trade from one company to another was to be treated as resulting in a disposal or part disposal of the first company's shares, any such construction is prevented and it is confirmed that the reconstruction is to be treated as giving rise to a disposal or part disposal which may be a disposal to which this section applies. ***(1)(c)***

Provisions of the corporation tax law are adopted for the purposes of specifying the circumstances in which the interest of a shareholder in a trade or business will not be treated as significantly reduced following a disposal of shares or the carrying out of a scheme or arrangement of which the disposal is a part.

A comparison is to be made of the shareholder's interest in the specified trade (through any company) at any time before the disposal and at any time after the disposal. The times by reference to which the comparison of interest is to be made are not defined beyond the requirement that one be before the disposal of shares and the other after the disposal. This is to prevent temporary reductions of interests being arranged in order to get around the section.

The comparison is to be made between the shareholder's percentage shareholdings and percentage entitlements to profits and assets of the company carrying on the specified business at the time before and the time after the disposal. The shareholder's interest in the specified business may be through different companies at the times when the comparison is made.

The first percentages to be compared are the percentages of ordinary shareholdings in the company carrying on the specified business beneficially owned by the shareholder.

The second percentages to be compared are the percentages of a full distribution of profits by the company carrying on the specified business to which the shareholder would be entitled.

The third percentages to be compared are the percentages of assets available for distribution on a notional winding up (at the times by reference to which the comparison is to be made) to which the shareholder would be beneficially entitled.

If there is no significant reduction of interest by reference to either the first, or the second, or the third pair of percentages to be compared, the shareholder will not be treated as having significantly reduced his/her interest in the specified business.

Following a disposal of shares in a close company by a shareholder, any interest which that shareholder has in the trade or business carried on by the company — ***(1)(ca)***

- is deemed to include any such interest held by persons connected with the shareholder, but only where that results in the shareholder's interest not being "significantly reduced". (This effectively narrows the circumstances in which the shareholding of connected persons is included. A genuine disposal of a shareholder's interest, without any change in a connected persons interest, is not ***(1)(ca)(i)*** caught by this provision.),

- notwithstanding ***paragraph (c)***, is deemed not to have been "significantly reduced" where the following two conditions are met — ***(1)(ca)(ii)***
  - the business of the close company is predominantly a holding company, and
  - the interest the shareholder subsequently has in the business activities previously carried on by the subsidiary companies in the group has not "significantly reduced".

    This means that the shareholder's control over all the activities of the group is not "significantly reduced" despite the sale of shares in or the liquidation of the holding company,
- notwithstanding ***paragraph (c)***, is deemed not to have been "significantly reduced" where the gain realised, or the proceeds in either or both money or money's worth received, by the shareholder from the disposal of a company is wholly or mainly attributable to payments or other transfers of value to it from any other company which is controlled by the shareholder, whether directly or together with persons connected with him or her, and ***(1)(ca)(iii)***
- is deemed not to have been "significantly reduced" where —
  - there would be no "significant reduction" if shares held by a trust, of which the shareholder is a beneficiary or could be a beneficiary, were treated as in the beneficial ownership of the shareholder, ***(1)(ca)(iv)***
  - the acquisition of the shares by the trust was directly or indirectly related to a disposal of such shares by the shareholder, and
  - the shares were acquired by the trustees with the direct or indirect financial assistance of a company or companies controlled by the shareholder or by the shareholder and persons connected with him or her.

The value of any amount received in money's worth is to be taken as the market value of the money's worth at the time of receipt. ***(1)(d)***

For the purposes of this section the holding of money by a company is deemed to be a business carried on by the company regardless of how that money was contributed to or acquired by the company. ***(1)(e)***

Purpose of section

A broad statement of the purpose of the section is made. It is intended to counteract schemes to avoid income tax under Schedule F which a close company either undertakes or takes part in. The avoidance is summarised as the extraction of value from a company without making a payment of a dividend or other distribution, for the purposes of avoiding the income tax charge under Schedule F on such dividends. ***(2)***

Application

The circumstances in which the section applies are specified. If a shareholder disposes of shares ("shares" in the context of this section is given a very wide meaning – see above) in a company without diminishing his/her ownership of the business carried on by the company at the time of the disposal, the section applies to the disposal. There must be such a disposal of shares for the section to apply to the disposal. ***(3)***

Although there must be such a disposal of shares for the section to apply, the section does not automatically apply if there is such a disposal. The section does not apply automatically to a disposal of shares within the terms of this subsection because the subsection is made subject to ***subsection (7)***. [***Subsection (7)*** requires that the section does not apply to a disposal if it can be shown that the disposal is not part of an arrangement to avoid tax. Accordingly, disposals of shares for purposes which do not include tax avoidance are excluded from the scope of the section whether or not they result in a significant reduction of the interest of the shareholder in the business carried on by the company.]

The charge to tax as a distribution in respect of proceeds of share disposals

The proceeds of a disposal of shares to which the section applies or the net proceeds, as the case may be, are treated as a distribution made by the company to the shareholder disposing of the shares. The distribution is treated as made by the company at the time of the disposal of the shares by the shareholder. The effect of treating the proceeds of the disposal as a distribution is to deny the advantage sought by way of schemes which would replace straightforward dividend payments by capital receipts which are not chargeable to income tax. The capital receipts are made chargeable to income tax in the same way as a dividend would be. ***(4)***

Limit to amount treated as distribution

The essence of the definition of "capital receipt" is that the proceeds of a disposal of shares is not considered a capital receipt in so far as those proceeds are simply more shares in a company carrying on the "specified business" (which produced the distributable profits in the first place). If a shareholder has merely swapped one form of share ownership of a business for another he/she is not treated as having received a "capital receipt" for the purposes of ***subsection (5)***. ***(5)(a)***

There is a limit to the amount which may be treated as a distribution received by a shareholder by virtue of the section at any time. The limit at any time is the total value of "capital receipts" received by the shareholder at that time as a result of the disposal of shares to which the section applies or as a result of a scheme or arrangement of which the disposal of shares is a part. Accordingly, a shareholder cannot be treated as having received a distribution under the section if he/she has merely exchanged one form of share ownership of the specified business for another. ***(5)(b)***

What is implied by the preceding provisions of the section is put beyond doubt, that is, that so much of the distribution under ***subsection (4)***, as does not exceed the limit by reference to capital receipts set by this subsection, is treated as having been received by the shareholder. Furthermore, irrespective of the date on which the shareholder receives the capital receipt which results in the shareholder being treated as having received a distribution or part of a distribution, that distribution is treated as made at the time the disposal of shares was made by the shareholder. ***(5)(c)***

Interest

Interest is only chargeable on income tax referable to a distribution under this section from the date of the capital receipt which gives rise to the charge. ***(5)(d)***

Exclusions

Finally, it is provided that although a disposal of shares would otherwise come within the terms of ***subsection (3)***, that is, the disposal does not significantly reduce the shareholder's interest in the specified business, the section does not apply to the disposal if the shareholder demonstrates that it was for a bona fide commercial purpose. This complements ***subsection (2)*** in so far as it ensures that disposals of shares will only result in a charge to income tax by virtue of this section where they are part of a scheme or arrangement to avoid income tax under Schedule F. ***(7)***

817A Restriction of relief for payments of interest

This section provides that interest will not qualify for tax relief under ***Part 8*** if a scheme has been put in place and the sole or main benefit of the scheme is to obtain a reduction in tax liability. It goes on to provide that, in determining the benefits which arise from the scheme, account is to be taken of any surrender of tax relief to a fellow-group company of the borrowing company under the group relief provisions.

817B Treatment of interest in certain circumstances

This section provides that interest which is received early by a lender is to be taxed when it is received rather than when it accrues. The effect of this is to ensure that the interest will be taxed in the hands of the lender at the same time as tax relief in respect of it is given to the borrower.

817C Restriction on deductibility of certain interest

Summary

This section provides for a restriction in certain circumstances on the deductibility of interest in the case of interest payable by a person to a connected person. The restriction applies where the interest is a trading expense of the person by whom it is payable but is not taken into account as a trading receipt of the person to whom it is payable. Broadly, the section provides that cumulative deductions for loan interest cannot exceed cumulative amounts that are chargeable to tax in respect of the interest in the hands of the connected person. The section does not apply where the recipient of the interest is both non-resident and not under the ultimate control of Irish residents.

Details

Definitions

"chargeable period" and "basis period" have the same meanings as in ***section 817B***. ***(1)***

"relevant date" is defined in relation to a chargeable period as the date on which the basis period for that chargeable period ends.

"relevant liability" is defined as a liability of one person to another.

Circumstances in which the section applies

Subject to the exceptions set out in ***subsection (2A)***, the circumstances in which the section applies are where —

- interest is payable, directly or indirectly, by one person to a connected person [The interest must be interest that, if paid, would be chargeable to tax under Schedule D. Consequently, interest that is Irish sourced is covered by the provision while interest that is not Irish sourced is not. This would be relevant where interest is payable by a non-resident company that has an Irish branch and where some of the interest is attributed as an expense of the Irish branch], ***(2)(a)***
- the interest is an allowable trading expense (or would be so allowable apart from this section), and ***(2)(b)***
- the interest is not taken into account in computing trading income of the connected person or, where the connected company is not chargeable to tax in respect of the interest, the interest would not be so taken into account if that connected person were Irish-resident. ***(2)(c)***

Circumstances in which the section does not apply

The section does not apply to lenders who are not resident in the State and who are not controlled, either directly or indirectly, by persons resident in the State. ***(2A)(a)***

The definition of “control” mirrors the provisions in ***section 172D*** which deals with exemptions from dividend withholding tax for certain non-resident companies which are not under the ultimate control of Irish residents. ***(2A)(b)(i)***

Non-resident companies, which are immediately controlled by Irish residents but ultimately controlled by non-residents are also covered by the exclusion. ***(2A)(b)(ii)***

Restrictions

A restriction is placed on the amount of interest that can be allowed in computing taxable income of the person by whom it is payable. Such interest will not be allowable in computing trading income of a company to the extent that it is greater than an amount determined by the formula A–B. ***(3)***

B is the cumulative interest on the liability concerned that has been allowed in computing trading income of the company (or has otherwise been relieved) for all chargeable periods ***other than*** the current chargeable period.

A is the cumulative interest chargeable on the connected company for all chargeable periods, ***including*** the current chargeable period. It includes interest that would be chargeable but for an exemption under section 198 or under a double taxation treaty.

This ensures against a mismatch between allowable interest and chargeable interest.

Carry forward of unallowed interest

Where interest is not allowable for a chargeable period by virtue of the application of the above restriction it is carried forward to the next chargeable period and treated as being payable in the basis period for that chargeable period. In this way, an interest deduction will not be denied but will be deferred until chargeable interest on the liability “catches up” with allowable interest on it. ***(4)***

Anti-avoidance

The restrictions will also apply if arrangements have been made by a person (person A) under which — ***(5)***

- interest is payable by person A to another person and the section does not apply solely because they are not connected with each other, and
- interest is payable by a person to another person (person C) who is connected with person A and the section does not apply by virtue solely of the fact that person C and the person from whom C receives the interest are not connected.

CHAPTER 3
Mandatory disclosure of certain transactions

Overview

This chapter introduces a new mandatory disclosure regime for certain types of tax avoidance arrangements. The main features of the regime can be summarised as follows:

- Certain persons, normally the promoters of schemes, will be required to provide Revenue with information about schemes and proposals for schemes where a tax advantage is one of the main benefits of the scheme and where it falls within certain specified descriptions.
- Disclosure will be on a non-prejudicial basis, in that schemes disclosed may or may not turn out to be tax avoidance schemes that the Minister for Finance, the Government and the Oireachtas may want to close down. There will be no presumption or inference that a transaction/scheme disclosed under the mandatory

disclosure regime is a tax avoidance transaction. Equally, the fact that a transaction may not come within the disclosure requirements cannot be regarded as an indicator that the scheme is not a tax avoidance transaction.

- In making a disclosure, the promoter will be required to explain how the scheme is intended to work and must do so within tight deadlines i.e. within a very short period of first marketing the scheme or making it available to clients/users.
- For the most part, promoters are likely to be accountants, solicitors, banks and financial institutions, along with small firms of specialist promoters.
- Where the promoter is offshore, the scheme must be disclosed by the client/user.
- Where the scheme is an "in-house" scheme i.e. designed by, say, a company for its own use such that there is no "promoter", the company must disclose the scheme.
- Where legal professionals are involved, they are not required to breach legal professional privilege (LPP), but where a claim to LPP can be maintained the onus for disclosure in such cases falls on the user of the scheme and the legal professional must inform the user of this obligation and must tell Revenue of his/her non-compliance with the disclosure requirement. Where legal professionals do not disclose on the basis of an incorrect or invalid assertion of LPP they may be liable to civil penalties for non-disclosure.
- Taxpayers who enter into disclosable transactions are required to include the Transaction Number on their income tax or corporation tax return, or if no number was assigned to a transaction, to provide Revenue with complete details of the transaction.
- Certain "information seeking" provisions are included to allow Revenue to make, for example, a "pre-disclosure enquiry" where they have reasonable grounds for believing that a person is a promoter of a scheme that may be a disclosable scheme and to follow up on cases of partial disclosure.
- Revenue may also seek information from a "marketer" (i.e. an intermediary) involved in a scheme as to who the actual promoter of the scheme is.
- If a marketer is marketing a scheme which it would be reasonable to believe was a disclosable transaction and for which the marketer has not been given a transaction number, then that marketer must provide Revenue with any information that Revenue could reasonably require in relation to the scheme.
- Promoters are required to inform Revenue, on a regular basis, of whom they have made schemes available to for implementation.
- Penalties are provided for failure to meet the disclosure requirements which are to be imposed by the courts in all cases and, because of the damage that non-disclosure of a scheme could do in terms of loss of tax revenue to the Exchequer, flexibility is given to the courts in terms of the absolute amount of penalty that may be imposed.
- Revenue may make regulations with the consent of the Minister for Finance in relation to various aspects of the Mandatory Disclosure regime.
- Revenue may also seek a determination from the Appeal Commissioners in respect of certain aspects of the disclosure requirements.

817D Interpretation and general (*Chapter 3*)

Summary

This section is concerned with the interpretation of certain terms used in this Chapter.

Details

Definitions

"disclosable transaction" is defined as including any transaction or any proposal for any ***(1)*** transaction (i.e. an existing scheme where offered to a person for implementation on or after the date of passing of the Finance Act 2010 (3 April 2010) or any proposal for a new scheme arising on or after that date) that meets certain "filters" i.e. it must enable, or be expected to enable, a person to obtain a tax advantage; the tax advantage must be the main, or one of the main, benefits of the transaction and it must fall within a specified description (which has the meaning assigned to it by ***section 817DA)***. A transaction is disclosable whether it is a "bespoke" transaction (designed for a particular person) or an "off-the-shelf" transaction (marketed with no specific client in mind).

"marketer" means a person who is not a promoter but who has made a marketing contact in relation to a disclosable transaction. Essentially it means an intermediary or introducer who brings potential clients and promoters together with a view to the clients availing of a marketed scheme.

"marketing contact" is defined as the communication by a person of the general nature of a scheme to another person with a view to that person, or any other person, considering whether to get further details of the scheme or to have it made available for implementation.

"promoter" is defined broadly to include any person, who, in the course of a relevant business, is responsible for the design, marketing, organisation or management of a scheme or who makes a scheme available for implementation by another person.

"relevant business" means a trade, profession, vocation or business which includes the provision of tax services to other persons or which is carried on by a bank (as defined).

"relevant date" means the earliest of three possible dates i.e. the date the promoter has specified information about the scheme and makes a marketing contact, the date on which the promoter makes the transaction available for implementation by another person or the date the promoter first becomes aware of any transaction forming part of the disclosable transaction having been implemented.

"specified date" is defined as, in relation to a promoter meaning the relevant date, and in relation to anyone else, meaning the date the person first enters into the disclosable transaction.

"specified information" is defined in ***subsection (2)***.

"tax advantage" is defined broadly to include any advantage arising from a reduction, deferral or avoidance of any assessment, charge or liability to tax, or any relief from, or refund of tax, or the avoidance of any obligation to deduct or account for tax.

"transaction" is defined broadly to cover all types of arrangements and devices.

The specified information which must be provided includes such information as might reasonably be expected to enable a Revenue officer to understand how a transaction is intended to operate. It includes: ***(2)(a)***

- Details of the obligation created by the Mandatory Disclosure regime under which the information is being provided,
- A summary of the transaction, and if it is known by a name, that name,
- Details of the provisions of the Acts that are relevant to the transaction, and
- Full details of the transaction explaining each element, and setting out how the tax advantage is expected to be obtained.

Specified information, in the context of a promoter, includes the name, address, telephone number and tax reference number of the promoter. ***(2)(b)***

Specified information, in the context of all persons who have a duty to disclose a transaction because there is an offshore promoter or a promoter that is asserting legal professional privilege, or where a marketer is involved, includes the name, address, telephone number and tax reference number of the person and the name, address and telephone number of the promoter.

Specified information, in the context where there is no promoter, includes the name, address, telephone number and tax reference number of the person.

817DA References to 'specified description' – classes of transaction for the purposes of that expression

Summary

A transition is only a disclosable transaction if it falls within certain specified descriptions. This section sets out those specified descriptions.

Details

Any reference to a specified description in ***Chapter 3*** is to be construed as a reference to one of the classes of transactions set out in subsections 2 to 10. ***(1)***

Confidentiality ***(2)***
Transactions where the promoter or person (i.e. the user) would wish, or might reasonably be expected to wish, to keep the transaction or the element of the transaction that gives rise to the tax advantage, confidential from

- Revenue in order to
  - facilitate continued or repeated use,
  - prevent Revenue from using that information to enquire into the transaction or
  - prevent Revenue from using the information to withhold a refund, or
- any other promoter, in order to maintain a competitive advantage.

Fees ***(3)***
Transactions where a promoter obtains or charges, or might reasonably be expected to obtain or charge a person wishing to implement the scheme fees that are to a significant extent attributable to the tax advantage or to any extent contingent upon the tax advantage being secured.

Standardised transactions ***(4)***
Transactions which involve standardised or mainly standardised documentation, the form of which is largely determined by the promoter and which require certain standard transactions or steps to be entered into by the user.

(5)
Tax losses – individuals
Transactions where the main outcome expected is the generation of a loss which an individual uses to reduce an income tax or capital gains tax liability.

Tax losses - corporates ***(6)***
Transactions where a company who otherwise would have had unrelieved losses at the end of an accounting period transfers those losses to another party, who uses those losses to reduce its corporation tax liability.

Employment schemes ***(7)***

Transactions that are expected to result in a reduction or deferral of a liability to employment taxes, by either the employer or the employee or by any other reason of the employee's employment.

Income into capital *(8)*

Transactions where one would expect an income tax liability to arise, but instead a person incurs a less or no liability to income tax and acquires a chargeable asset.

Income into gift *(9)*

Transactions where one would expect an income tax liability to arise, but instead a person incurs a less or no liability to income tax and is deemed to take a gift.

Discretionary trusts *(10)*

Transactions where a party to the transaction is a trustee of a discretionary trust.

817E Duties of promoter

This section sets out the duties of a promoter under the disclosure rules which are to provide the Revenue Commissioners with specified information about a disclosable transaction within 5 working days after the specified date. *(a)*

The promoter also has a duty to provide any person to whom they have made the disclosable transaction available for implementation, or any person who markets the transaction on behalf of the promoter, with a transaction number, within 5 working days of receipt of the transaction number, or if earlier, within 5 working days of making the scheme available. *(b)*

817F Duty of person where promoter is outside the State

This section sets out the duties of a person who enters into a disclosable transaction where the promoter is offshore and there is no promoter in relation to the disclosable transaction in the State. In such cases, the obligation to notify the Revenue Commissioners falls upon any person who enters into any transaction forming part of the disclosable transaction.

817G Duty of person where there is no promoter

This section deals with the situation where there is no promoter and, therefore, no requirement to notify the details of the disclosable transaction under ***section 817E*** (promoter) or ***section 817F*** (user where promoter is outside the State). In such cases, the obligation to notify the Revenue Commissioners lies with any person who enters into any transaction forming part of the disclosable transaction. This section is designed to bring within the disclosure requirements schemes developed, for example, "in-house" by a company for its own use.

817H Duty of person where legal professional privilege claimed

Summary

This section deals with a situation where legal professional privilege (LPP) can be successfully asserted in relation to a promoter. In such cases, the duty to disclose falls on any person who enters into any transaction forming part of the disclosable transaction but the promoter must advise such persons of their obligation to disclose in that regard. The promoter must also advise the Revenue Commissioners that the promoter's duty to disclose is not being complied with because of legal professional privilege.

Details

Where a promoter does not comply with the provisions of ***section 817E*** (duty of promoter to disclose) because of the "exemption" provided by ***section 817J*** (dealing with legal professional privilege), the duty to disclose falls on any person who enters *(1)* into any transaction forming part of the disclosable transaction i.e. the scheme user.

The promoter claiming legal professional privilege must advise clients to whom the scheme has been made available for implementation of their obligation to disclose. ***(2)***

A promoter claiming legal professional privilege must advise the Revenue Commissioners, within the specified period, that the promoter's duty to disclose is not being complied with because of legal professional privilege. ***(3)***

817HA Duties of person who obtains tax advantage

Summary

This section deals with the duties of a person who obtains, or seeks to obtain, a tax advantage from a disclosable transaction. That person is a chargeable person and must file a Form 11 or Form CT1 for each year in which the transaction is entered into or in which a tax advantage is obtained or sought, and that person must include the transaction number on that Form 11 or Form CT1, as appropriate.

Details

Every person who obtains, or seeks to obtain, a tax advantage from a disclosable transaction is a chargeable person, within the meaning of Part 41A. This means that they must file a tax return and pay any preliminary tax required. ***(1)***

A person who enters into a disclosable transaction must provide any other person who seeks to obtain a tax advantage (e.g. an employer must provide an employee) with the transaction number so that that person can comply with their obligations under ***subsection (3)***. ***(2)***

A person who obtains, or seeks to obtain, a tax advantage from a disclosable transaction must include the transaction number on the Form 11 or Form CT1 (as appropriate) that that person is required to file under Part 41A, for each year in which that person enters into a transaction that is part of the disclosable transaction and for each year that they obtain, or seek to obtain, a tax advantage. ***(3)***

A person who was not provided with a transaction number, either because the transaction was not assigned a number or because the transaction was not disclosed, will be deemed to have complied with the obligation to include the transaction number under ***subsection (3)*** if they instead provide Revenue with the specified information in relation to the transaction. ***(4)***

817HB Duties of Revenue Commissioners

Summary

This section deals with the duties of Revenue in relation to disclosures. Revenue must, within 90 days, determine whether or not the transaction is a disclosable transaction. If the transaction is disclosable, Revenue must assign a unique transaction number to the transaction to the person who disclosed the transaction.

Details

Within 90 days of receipt of a disclosure, Revenue will either determine that the transaction was not a disclosable transaction or assign a unique transaction number to that transaction. Revenue must notify the person who made the disclosure of either the determination or the unique number. ***(1)***

If Revenue request supplemental information in relation to the disclosure, then the 90 ***(2)*** day period within which the duties in ***subsection (1)*** must be complied with starts on the day all of that supplemental information is received.

A person who obtains, or seeks to obtain, a tax advantage from a disclosable transaction must include the transaction number on the Form 11 or Form CT1 (as appropriate) that that person is required to file under Part 41A, for each year in which that person enters into a transaction that is part of the disclosable transaction and for each year that they obtain, or seek to obtain, a tax advantage. ***(3)***

A person who was not provided with a transaction number, either because the transaction was not assigned a number or because the transaction was not disclosed, will be deemed to have complied with the obligation to include the transaction number under ***subsection (3)*** if they instead provide Revenue with the specified information in relation to the transaction. ***(4)***

817I Pre-disclosure enquiry

Summary

This section allows the Revenue Commissioners to make a "pre-disclosure enquiry" of certain persons, by way of a written notice, where they have reasonable grounds for believing that the person is the promoter of a transaction that may be a disclosable transaction or is the user of, for example, an in-house scheme that may be a disclosable transaction. If the person is of the view that the transaction is not a disclosable transaction the person is required to provide reasons for that opinion and must demonstrate, based on the requirements of the legislation and the regulations, why that view is held. In that regard, it is not sufficient that the person has an opinion from a solicitor or barrister or other professional to the effect that the transaction is not a disclosable transaction.

Details

The Revenue Commissioners may make a "pre-disclosure enquiry" of a person by way of a written notice, where they have reasonable grounds for believing that the person is the promoter of a transaction that may be a disclosable transaction or is the user of an in-house scheme that may be a disclosable transaction. The notice requires the person to state whether in the person's opinion the transaction is a disclosable transaction and, if not, the reasons for that opinion. ***(1)***

Any notice issued by Revenue under this section shall specify the transaction in respect of which the person's views are sought. This is designed to give reassurance that Revenue cannot simply go on a "fishing exercise" without some basis for seeking the information. ***(2)***

If a person is of the view that the transaction is not a disclosable transaction following the receipt of a notice under this section, the person is required to provide reasons for that opinion and must demonstrate, based on the requirements of the legislation and the regulations, why that view is held. In particular, if the person asserts that the transaction or scheme does not fall within any of the specified descriptions, sufficient information must be provided to allow Revenue to confirm the assertion. ***(3)***

It is not sufficient for the purpose of this section that the person has an opinion from a solicitor, or barrister or other professional (i.e. an accountant or member of the Irish Taxation Institute) to the effect that the transaction is not a disclosable transaction. In other words it is insufficient for a reply to a notice to simply say that the person has a professional opinion to the effect that the transaction is not a disclosable transaction – s/he is required to demonstrate by reference to the various legislative requirements and ***(4)*** tests that the transaction is not disclosable. For example, if a person was to assert that the obtaining of the tax advantage was not a main benefit arising from the scheme the reply would have to identify the various benefits and how they had been measured relative to the tax advantage.

Any notice issued under this section has to be complied with within the period specified in the notice, which shall not be less than 21 days or such longer period as may be agreed by Revenue. ***(5)***

817J Legal professional privilege

This section provides that nothing in ***Chapter 3*** requires a promoter to disclose to the Revenue Commissioners any privileged information which is information with respect to which a claim to legal professional privilege could be maintained by that promoter in legal proceedings.

817K Supplemental information

Summary

This section allows the Revenue Commissioners, where they have reasonable grounds for believing that a person has not disclosed all of the specified information, to issue a notice requiring that information to be disclosed by the person and to seek such other information about, or documents relating to, a disclosable transaction as they may reasonably require in support of, or in explanation of, the specified information already provided by a person.

Details

This section allows the Revenue Commissioners, where they have reasonable grounds for believing that a person has not disclosed all of the specified information, to issue a notice requiring that information to be disclosed by the person. ***(1)***

The Revenue Commissioners may seek such other information about, or documents relating to, a disclosable transaction as they may reasonably require in support of, or in explanation of, the specified information already provided by a person. ***(2)***

Any notice issued under this section has to be complied with within the period specified in the notice, which shall not be less than 21 days or such longer period as may be agreed by Revenue. ***(3)***

817L Duty of marketer to disclose

Summary

This section allows the Revenue Commissioners, where they have reason to believe that a person is a "marketer" (i.e. a person who is not a promoter in their own right but who has acted to bring clients/users and a promoter together) to require the marketer to provide the Revenue Commissioners with the name, address and, where known, the tax reference number of each person who has provided the marketer with information in relation to the transaction. This section also creates an obligation on the marketer to provide certain information to Revenue if the marketer is marketing what it would be reasonable to consider, from the information available, was a disclosable transaction for which the marketer has not been provided with a transaction number.

Details

Where the Revenue Commissioners have reason to believe that a person is a "marketer" ***(1)*** in relation to a transaction they may, by notice in writing, require that person to provide Revenue with the name, address and, where known, the tax reference number of each person who has provided the marketer with information in relation to the transaction. This is designed to require a marketer, in such circumstances, to divulge who the promoter is as the promoter will have given the marketer information on the scheme. It also covers the situation where the marketer has received information on the scheme from, say, another marketer.

Any notice issued by Revenue under this section shall specify the transaction to which it relates. ***(2)***

Any notice issued under this section has to be complied with within the period specified in the notice, which shall not be less than 21 days or such longer period as may be agreed by Revenue. ***(3)***

If a marketer is marking a transaction which it would be reasonable to consider was a disclosable transaction but for which the marketer has not been provided with a transaction number, then within 30 days of first marketing that transaction, the marketer must provide Revenue with the name and address of the promoter, details of the transaction and any other materials used in marketing the transaction. The marketer is not required to provide the specified information as marketers may not have the level of detailed knowledge of the transaction required to provide the specified information. Any disclosure by a marketer under this section is wholly without prejudice as to whether or not a transaction is a disclosable transaction. ***(4)***

817M Duty of promoter to provide client list

This section requires a promoter to provide the Revenue Commissioners, at regular intervals (set out in the regulations), with information on persons to whom a disclosable transaction has been made available for implementation. This list is known as the client list and the list has to be specific to each disclosable transaction made available. The timing of the initial provision of this client list will, by definition, be linked to when a scheme is made available to clients for implementation and so could not be provided at the time the transaction is disclosed to Revenue where that disclosure date (i.e. relevant date) is the date of a marketing contact. The promoter will be expected to continue to provide Revenue with updated client lists at quarterly intervals after the initial list is made available so that usage of a scheme/transaction can be monitored. The identification details of clients need not be provided to Revenue where at the time the client list has to be furnished, the promoter is satisfied that the client has not implemented the transaction. However, the details must be furnished subsequently when the client has, in fact, implemented the transaction.

817N Supplemental matters

Summary

This section contains a number of supplemental provisions. It provides that a disclosure under the mandatory disclosure regime is made in a totally non-judgemental way and no inference can be drawn from the fact that a transaction is disclosed that it is, or may be, a tax avoidance transaction. It also makes clear that a disclosure does not constitute a Protective Notification under ***section 811D*** and that nothing in ***Chapter 3*** may interfere with the Revenue Commissioners right to make any enquiry or take any action under ***section 811C*** (the general anti-avoidance section) or ***section 811D*** (the Protective Notification section).

Details

Where a promoter discloses a scheme to Revenue and provides a list of clients to whom the scheme has been made available for implementation, the provision of the information on the scheme shall, as respects any person included on the list, be treated as being made without prejudice as to whether an opinion that the transaction concerned was a tax avoidance transaction, within the meaning of ***section 811C*** (the general anti-avoidance provision). In other words a disclosure under ***Chapter 3*** is made in a totally non-judgemental way and no inference can be drawn from the fact that a transaction is disclosed that it is or may be a tax avoidance transaction. ***(1)***

Where a person who is a scheme user is required to disclose information on the scheme to Revenue, the provision of that information shall be treated as being made without prejudice as to whether an opinion that the transaction concerned was a tax avoidance transaction, within the meaning of ***section 811C*** (the general anti-avoidance provision). In other words a disclosure under ***Chapter 3*** is made in a totally non-judgemental way and no inference can be drawn from the fact that a transaction is disclosed that it is or may be a tax avoidance transaction. ***(2)***

Where a person (i.e. a user) provides Revenue with specified information on a disclosable transaction under the provisions of this Chapter, it shall not be regarded as being, or as being the equivalent of, a Protective Notification under ***section 811A or 811D***. In other words, to obtain the protection that a Protective Notification provides as respects interest and a surcharge etc. a person must make a specific Protective Notification under the provisions of ***section 811A*** or ***811D***. ***(3)***

Provision is made to ensure that nothing in ***Chapter 3*** may interfere with Revenue's right to make any enquiry or take any action under ***section 811*** or ***811C*** (the general anti-avoidance section), or ***section 811A*** or ***811D***(the Protective Notification section). ***(4)***

817O Penalties

Summary

This section provides for penalties to apply where a person fails to comply with obligations under ***Chapter 3*** and the regulations made under it. Flexibility is given to the Courts in terms of the absolute amount of penalty that may be imposed and the provision is also designed to allow the Courts, in determining the amount of a penalty, to take account of the fee income that the promoter is likely to have received from the scheme or the tax advantage the user of the scheme sought to obtain.

Details

A penalty will apply where a person fails to comply with certain obligations under ***Chapter 3.*** ***(1)(a), (b) & (c)***

In relation to certain specified "lesser" failures the penalty is to be an initial amount of up to €4,000 and where the failure continues after that penalty is imposed, to a further penalty of €100 per day for every day that the failure continues.

In relation to certain specified "greater" failures the penalty is to be a flexible initial penalty of up to €500 per day during the "initial period" as defined in ***subsection (2)*** and where the failure continues after that penalty is imposed, to a further penalty of €500 per day for every day that the failure continues.

In relation to a failure to include a Transaction Number on a tax return, the penalty is €5,000.

The "initial period" is defined as being essentially the period commencing on the day after the end of the period within which a promoter or person was obliged to provide specified information to Revenue on the disclosable transaction and ending on the day an application is made to the relevant court seeking the imposition of the penalty. ***(2)***

Revenue shall bypass the normal penalty procedures contained in ***section 1077B***, and apply directly to the relevant court for the court to determine if a person named in the application has failed to comply with an obligation set out in ***subsection (1)(a), (b) or (c)***. ***(3)(a)***

The "relevant court" means the District, Circuit or High Court as appropriate. ***(3)(b)***

A copy of the application to the Court made under ***subsection (3)*** shall be issued to the person named in it. ***(4)***

The relevant court shall decide if the person referred to in the application is liable to the penalty and the amount of that penalty having regard to the requirements of ***subsection (6)***. ***(5)***

In determining the amount of the penalty to be applied the court shall have regard to the following – ***(6)(a) & (b)***

- in the case of a promoter, to the amount of the fees received or likely to be received in connection with the disclosable transaction, and
- in any other case, to the amount of the tax advantage gained or sought to be gained from the disclosable transaction.

There is provision for the application of ***section 1077C*** (relating to the making of an order by the court for the recovery of a penalty where it has determined that a penalty applies) and also for the non-application of ***section 1077D*** (proceedings against an executor, administrator or estate in the case of the death of a person in respect of whom the court has imposed a penalty). ***(7) & (8)***

817P Appeal Commissioners

Summary

This section allows Revenue to make an application to the Appeal Commissioners for a determination in respect of various issues arising under ***Chapter 3***. These include making a determination that information or documents be made available to Revenue where a person has failed to provide the information or documents on foot of a notice under various provision of ***Chapter 3***. While the right to make such an application rests with the Revenue Commissioners, the Appeal Commissioners will hear and determine the appeal in the manner provided for in ***Part 40A***. Any party affected by such an application will, therefore, be able to argue their case before the Appeal Commissioners and have representation.

Details

Revenue may make an application to the Appeal Commissioners for a determination in respect of the following -

- requesting that any person who claims that a transaction is not a disclosable transaction under section 817I furnishes to Revenue all relevant information and/or documentation to support their claim, ***(1)(a)***
- to obtain all relevant information where Revenue have reasonable grounds for believing that a person has not disclosed all of the specified information relating to a disclosable transaction, in compliance with a notice under section 817K(1), ***(1)(b)***
- seeking information about or documents relating to a disclosable transaction to be ***(1)(c)***

made available by a person following failure to comply with the notice under section 817K(2),

- that a transaction is to be treated as a disclosable transaction, or *(1)(d)*
- that a transaction is a disclosable transaction. *(1)(e)*

The Appeal Commissioners shall, on hearing the application, make a determination - *(2)*

- on the basis of whether or not the information and documentation should be made available to Revenue,
- if they are satisfied that Revenue have reasonable grounds for believing that the transaction is disclosable,
- on the basis of whether the information or documentation sought should be made available to Revenue in their entirety, partially or not at all,
- if they are satisfied that Revenue have taken all reasonable steps to establish the nature of the transaction, and
- if they are satisfied that the transaction is a disclosable transaction.

For the purposes of the appeal hearing in relation to subsection (1)(d), reasonable steps may include the making of a pre-disclosure enquiry or the making of an application in accordance with subsection (1)(a). Situations where Revenue may believe that a disclosable transaction has taken place could include – *(3)*

- the fact that the transaction falls within a particular specified description,
- an attempt by the promoter to avoid or delay responding to a pre-disclosure enquiry from Revenue under section 817I in respect of the transaction under enquiry or a determination by the Appeal Commissioners in accordance with subsection (1)(a), and
- failure by the promoter to comply with a pre-disclosure enquiry from Revenue under section 817I or a determination by the Appeal Commissioners in accordance with subsection (1)(a) in relation to another transaction.

While the right to make such an application rests with the Revenue Commissioners, it will be heard by the Appeal Commissioners as if it were an ordinary appeal. Any party affected by such an application will, therefore, be able to argue their case before the Appeal Commissioners and have representation. *(4) & (5)*

817Q Regulations (*Chapter 3*)

Summary

This section provides for the making of regulations by the Revenue Commissioners, with the consent of the Minister for Finance, in relation to various aspects of ***Chapter 3***. These include specifying the period of time within which a disclosure has to be made, the information to be provided and the manner in which it is to be provided, the classes of transaction that are to be considered transactions of a "specified description" and the circumstances in which a person is not to be treated as a promoter. These regulations are the Mandatory Disclosure of Certain Transactions Regulations 2011 (S.I. No. 7 of 2011) and the Mandatory Disclosure of Certain Transactions (Amendment) Regulations 2014 (S.I. No. of 2014).

Details

Revenue may, with the consent of the Minister for Finance, make regulations in relation to various aspects of ***Chapter 3*** including - *(1)*

- Specifying the circumstances in which a person is not to be considered a promoter so as to narrow the very broad definition of promoter contained in ***section 817D(1)***.

- Specifying the manner and form of delivery of information under ***Chapter 3***.
- Specifying transactions which are not disclosable transactions.

Every regulation made under this section must be laid before the Dáil and such regulations may be annulled by resolution of the Dáil. ***(3)***

817R Nomination of Revenue Officers

This section allows the Revenue Commissioners to authorise any of their officers to carry out the functions authorised by the Chapter and regulations made under it.

CHAPTER 4

Payment notices and scheme participants

Overview

This chapter introduces a new payment notices regime for certain types of tax avoidance arrangements. The main features of the regime can be summarised as follows:

- Where a person is found to have engaged in unsuccessful tax avoidance by the Appeal Commissioners, Revenue may issue a payment notice demanding immediate payment of the tax due notwithstanding that the taxpayer has further rights of appeal.
- Where a person entered into a tax avoidance arrangement of a similar type to one which the Appeal Commissioners already found to be unsuccessful, Revenue may issue a payment notice demanding immediate payment of the tax due notwithstanding that the taxpayer has further rights of appeal.

817S Payment Notices

Summary

This section provides that Revenue may issue a payment notice to a taxpayer who engaged in tax avoidance and who has been unsuccessful at appeal.

Details

A number of terms are defined, for the purposes of this Chapter. Many of these definitions are linked to other parts of the Acts. ***(1)***

This section applies to a person who entered into, after 23 October 2014: ***(2)***

- a tax avoidance transaction, within the meaning of ***section 811C***,
- a disclosable transaction, within the meaning of ***Chapter 3*** of this Part, or
- a transaction to which a specific anti-avoidance provision, within the meaning of ***Schedule 33***, applies

and a Revenue officer made or amended an assessment the effect of which was to withdraw a tax advantage, within the meaning of ***section 811C*** or ***Chapter 3*** as appropriate.

Where the Appeal Commissioners have heard an appeal on that assessment or amended assessment and have determined the appeal in favour of Revenue, then Revenue may send a payment notice to the person requiring immediate payment of the amount stated in the payment notice, notwithstanding that the person has a further right of appeal. ***(3) & (5)***

The amount stated in the payment notice will be the lower of: ***(4)***

- The amount of tax in the assessment that is due as a result of the withdrawal or denial of the tax advantage, and
- The tax that would be due and payable if the assessment, as amended for the Appeal Commissioners determination, became final and conclusive.

Where an amount of tax that is paid on foot of a payment notice is subsequently found to be due to the taxpayer, for example where the High Court or Supreme Court determine that a lower amount of tax was actually due in relation to the withdrawal or denial of the tax advantage, then Revenue must repay that amount with interest. To ensure that interest is due from the date the amount was paid to Revenue, the taxpayer is deemed to have made a valid claim for the repayment 93 days before the payment was made. ***(6)(a)***

Any time limits for repayments in the Acts are specifically dis-applied for the purposes of any repayments due under this section. ***(b)***

For the purposes of collection of taxes by the Collector General, a payment notice is treated as if it was a demand made by the Collector General. ***(7)***

817T Payment Notices and Scheme Participants

Summary

This section provides that Revenue may issue a payment notice to a taxpayer who engaged in tax avoidance which is substantially similar to tax avoidance which has already been successfully challenged before the Appeal Commissioners.

Details

A scheme is defined as a transaction to which ***section 817S(2)*** applies ***(1)***

A scheme participant is a person who entered into a transaction to which ***section 817S(2)*** applies or a substantially similar transaction.

This subsection sets out when a transaction is substantially similar to another transaction. The following four circumstances cover when a transaction is substantially similar to another: ***(2)***

If the first transaction is one to which ***section 817S(3)*** applies, meaning it is a tax avoidance arrangement which has been found not to work by the Appeal Commissioners, and if the same principles and reasoning given by the Appeal Commissioners in relation to that case was applied to an amended assessment in a second case and would result in that amended assessment being upheld, then the second case is substantially similar to the first. ***(a)***

If two transactions were assigned the same transaction number under the mandatory disclosure regime. This means that the two transactions were implemented on foot of the same advice by the same advisor. ***(b)***

If two transactions were implemented by two taxpayers on foot of advice from the same legal advisor who asserted legal professional privilege (LPP), where, had that advisor not asserted LPP the two transactions would have been assigned the same transaction number. ***(c)***

If a promoter failed to comply with the mandatory reporting regime, but if they had, the two transactions would have been assigned the same transaction number. ***(d)***

Where Revenue sends, or could send, a payment notice to a taxpayer under ***section 817S*** and that taxpayer is a scheme participant, then Revenue may also send a payment notice to all other participants in that scheme. ***(3)***

A payment notice sent to a scheme participant under this section must have a copy of the ***(4) & (10)***

Appeal Commissioners determination appended to it, and the normal obligation on Revenue in relation to secrecy shall not apply in relation to this determination. The notice must state why the transaction in question is substantially similar to the transaction to which the determination relates and. if relevant, it must include the transaction number. It must also state the amount of tax that is payable under the payment notice.

A taxpayer who receives a payment notice may write to Revenue, within 30 days, providing additional information and request that Revenue reconsider whether or not their transaction is substantially similar to the transaction to which the determination relates. Revenue must consider the additional information and make a determination that either confirms or withdraws the payment notice. ***(5) & (6)***

Where a taxpayer is aggrieved with Revenue's decision to confirm a payment notice, they may appeal in writing, within 30 days after the date of the notice, to the Appeal Commissioners. The Appeal Commissioners determination on this matter is final and conclusive. ***(7) & (9)***

If more than one taxpayer is aggrieved with a payment notice and has appealed those payment notices, the Appeal Commissioners may consolidate or hear two or more appeals together. If the Appeal Commissioners believe it is appropriate, they may decide to determine the appeal based on written submissions rather than holding a hearing. ***(8)***

The particular subsections of ***section 817S*** that apply to payment notices will also apply to payment notices issued under this section. For example, the contents of the payment notice are as set out in ***section 817S(5)***, the provisions relating to repayment of tax with interest in ***section 817S(6)*** also apply to these payment notices and these payment notices are also, for the purposes of collection of tax, treated as if they were a demand made by the Collector General. ***(11)***