

## Minutes of TALC Direct and Capital Taxes Sub-Committee Meeting

Thursday 23<sup>rd</sup> February 2023 via Microsoft Teams

2.30pm to 4.00pm

### Minutes

#### Item 1: Minutes from meeting of 1<sup>st</sup> December 2022

The minutes of the meeting of 1<sup>st</sup> December 2022 were agreed as final.

#### Item 2: Matters arising from meeting of 1<sup>st</sup> December 2022:

- a. **The criteria for determining whether an offshore fund is equivalent to an Irish fund.** This Item was discussed under Item 8.4.
- b. **DAC6 – Relevant taxpayer – duty to disclose Arrangement ID in tax return(s). Revenue were to consider this matter further and requested further information on some points. Has the information been provided and can Revenue provide an update?** Revenue advised that no further information had been provided regarding transactions where a tax advantage no longer arose or was no longer recurring.

On this basis this item will be removed from the Agenda going forward.

#### Item 3: Items that are to remain on the Agenda:

##### **3.1 Revenue to report on the technical analysis leading to the withdrawal of Precedent 28**

Practitioners advised that they are considering the Revenue paper circulated at the meeting of the TALC Precedent 28 subgroup on 22<sup>nd</sup> November 2022 and are finalising the feedback at the moment. Practitioners noted that they would welcome a discussion at the subgroup once Revenue have had an opportunity to consider the submissions.

##### **3.2 Tax and Duty Manual on the classification of foreign entities for Irish tax purposes**

The status of this TDM was discussed under Item 8.5

##### **3.3 Revenue to provide an update on its TDM Review Process**

Revenue advised that a meeting with practitioners was held in October 2022 which provided valuable insights into how tax practitioners use and engage with TDMs currently. Those insights, including the impact of TDMs being removed from the Revenue website, are being considered carefully as part of the requirements analysis and impact assessment work that is ongoing.

Revenue is continuing work on its project to replace the technology that supports the review and publication process for Tax and Duty Manuals (TDMs), in line with its technology refresh programme. The requirements for the new system are currently being analysed, in advance of costing work and detailed planning.

The Revenue TDMs team will provide a further update to the practitioner representatives at the end of Q1 2023, as agreed at the October 2022 meeting. Meanwhile, the status of offline TDMs continues to be reported internally to Revenue senior management, via daily and monthly reports.

#### **3.4 Uncertainty regarding when a CG50 is required**

Revenue advised that they have reviewed their guidance as a result of the submission made to them in advance of the TALC Direct and Capital Taxes Sub-Committee meeting of the 1<sup>st</sup> December 2022.

Revenue noted the matter appears to have wider application than that outlined in the details provides, in particular where shares in a company derive their value from specified assets.

Section 980 TCA 1997 outlines in detail the process of withholding tax, at the rate of 15%, on certain disposals. The specific circumstances and merits of each case have to be examined and the provision of additional guidance will not meet the needs of the practitioners.

This item will be removed from the Agenda going forward.

#### **3.5 Guidance on “Leasing Ringfences – Section 403 and 404 TCA 1997”:**

Revenue advised that the last meeting of the subgroup took place on the 25<sup>th</sup> October 2022 and members were to consider the State Aid implications of the matter.

The next meeting of the subgroup is scheduled to take place on the 7<sup>th</sup> March 2023 and Revenue requested that submissions on the issue be made by the 2<sup>nd</sup> March 2023.

#### **3.6 Stamp duty on share buy-backs:**

Revenue advised that they had received no further feedback on this matter.

Practitioners advised that they wished to have a general discussion on a letter that was sent to Revenue. Revenue said that they had not received any letter. They asked whether it was possible that a letter had been sent to the Department of Finance. Practitioners advised that this may have been the case and agreed to forward the letter submitted to the Department of Finance to Revenue for consideration.

#### **3.7 Tips paid by electronic means:**

Revenue advised that an update will potentially be made to the 2023 versions of Income Tax Return (Form 11) and Income Tax Return (Form 12) to include a box to capture details of tips and gratuities received.

[Tax and Duty Manual 42-04-35a](#) ‘Employers’ Guide to PAYE will be updated to include examples that will give clarity on when tips and gratuities are taxable in the hands of the employee.

The updated Tax and Duty Manual will be shared with the TALC Direct and Capital Taxes Sub-Committee in advance of publication.

### **3.8 Section 845C TCA 1997**

Revenue advised that guidance in [Tax and Duty Manual 36-00-18](#) 'Treatment of Additional Tier 1 Capital' provides that "it would be expected that an 'equivalent' instrument would be one that shares the essential characteristics associated with AT1 instruments".

Revenue are of the opinion that provisions of section 845C TCA 1997 will never apply to a non-financial institution.

This item will be removed from the Agenda going forward.

### **Item 4: Stamp Duty Issues:**

#### **4.1 Resting on contract anti-avoidance provisions and phased completions**

Sections 31A and 50A Stamp Duty Consolidation Act are two anti-avoidance provisions which target the use of resting on contract and long agreements for lease to mitigate stamp duty on the purchase of development land, impose a stamp duty charge on a contract for the sale of land / long agreement for lease when 25% of the consideration for the land has been paid to the vendor.

Practitioners queried if Revenue could provide confirmation that, for phased completions where 25% or more of the full contract consideration may be paid prior to the final completion, the taxpayer may treat each completion as a standalone transaction involving an "estate or interest in land", such that a stamp duty liability will only arise where 25% of the consideration for each phase has been paid, and conveyances / leases for that phase have not been stamped within 30 days.

Revenue noted that the stamp duty treatment of any transaction will depend on the specific facts and circumstances of each case. Therefore, it would not be appropriate to provide the confirmation requested in relation to the two sections, which are important anti-avoidance sections. Revenue advised practitioners that where there is a genuine doubt as regards the tax treatment of a particular transaction, a submission should be made to Revenue via the Revenue Technical Service.

#### **4.2. Tax numbers for stamp duty purposes for foreign bodies corporate**

Practitioners noted that the application form for a tax number for stamp duty purposes for a foreign body corporate includes a requirement to provide the Irish tax numbers of any associated bodies corporate that have tax numbers. There is no instruction that these numbers must be provided on the form, and there is no room for these numbers in the area of the form where they are requested. Where an applicant includes these details in a cover email, the application is routinely rejected, with an instruction to add the numbers to the form. We would suggest that if the numbers are required on the form, this should be clearly stated on the form, and adequate space provided on the form.

Revenue advised that they are preparing specific forms to facilitate the application by a Foreign Body Corporate / Unincorporated for a tax reference the filing of a Stamp Duty Return and it is expected that the forms should be available shortly. Both forms will contain sufficient space to provide details of associated companies and their tax reference numbers.

Practitioners requested that the application forms could be circulated to members of the TALC Direct and Capital Taxes Sub-Committee in advance of publication and Revenue advised that the forms would be circulated.

#### **4.3. Paper stamp certs and other stamp duty documents being posted out by Revenue**

Practitioners queried why Revenue considers it necessary to post out documents in paper form as they will have been previously processed electronically and whether there are plans to continue or discontinue this position.

Revenue advised that for pre-2012 cases a paper return is submitted and a paper Stamp Duty Certificate is issued.

If a paper return is submitted for post-2012 cases then a paper Stamp Duty Certificate will also be issued.

#### **Item 5: Update on R&D Discussion Group:**

At the Main TALC meeting in September 2022, it was agreed that, going forward, the minutes from the R&D Discussion Group meetings could be shared with the TALC Direct and Capital Taxes Sub-committee and a brief update provided at committee meetings to facilitate questions, as required.

The Draft Minutes of the R&D Discussion Group meeting of the 26<sup>th</sup> January 2023 were circulated to members of the TALC Direct and Capital Taxes Sub-Committee on the morning of the 23<sup>rd</sup> February 2023.

Revenue will put procedures in place in order that the minutes of the R&D Discussion Group will be circulated to members of the TALC Direct and Capital Taxes Sub-Committee on a timely basis.

Revenue gave feedback on the discussion that took place at the meeting and advised that the Research and Development Tax And Duty Manual is currently being updated and will be circulated to the R&D Discussion Group.

A brief discussion regarding allowable expenses for R&D purposes of cloud computing costs took place. Revenue advised that cloud computing costs can be very significant with the R&D expenditure forming a very small percentage of the cloud computing costs. The R&D cloud computing costs have to be easily identifiable and the issue has to be looked at on a case by case basis. This issue will be explored in more detail at the next meeting of the R&D Discussion Group.

#### **Item 6: PAYE Settlement Agreements – Removal of Revenue Webpages**

Practitioners have received feedback that the Revenue webpages on the PAYE Settlement Agreements (PSA) has been removed from the Revenue website.

Revenue advised that they had no record of any webpages on PAYE Settlement Agreements being removed from the Revenue website and asked for clarification on what exact webpages are being referenced.

#### **Item 7: Extension of Agri-Tax Measures:**

Several agri-tax measures, which were due to expire on 31 December 2022, were extended to 30 June 2023 by Finance Act 2022. These are:

- Young Trained Farmer Stamp Duty Relief
- Farm Consolidation Stamp Duty Relief
- Farm Restructuring CGT Relief
- Young Trained Farmer Stock Relief
- Registered Farm Partnership Stock Relief

Practitioners noted the new Agriculture Block Exemption Regulation (ABER) came into effect on the 1 January 2023 and queried the likely timing of the extension of these agri-tax measures given the Minister for Finance had confirmed that the five reliefs would be extended at the earliest opportunity once the new ABER came into operation.

Revenue advised that as this is a policy decision the query should be addressed the Department of Finance.

#### **Item 8: Tax and Duty Manuals:**

##### **8.1 TDM 04-05-01 'Section 79'**

A draft TDM 04-05-01 covering sections 79, 79A, 79B and 79C TCA 1997, which was updated to take account of points raised in previous discussions at TALC, was circulated in advance of this meeting.

Revenue advised that they had received no feedback had been received on the TDM to date and it will be published shortly.

Practitioners requested that publication of the TDM be delayed in order for feedback to be given.

##### **8.2 TDM 35-02-06 'Foreign Branch Double Taxation Relief'**

**The following note was provided in advance of the meeting:**

*A Statement of Practice ("SoP") was previously issued by Revenue in relation to foreign branch double taxation relief. This SoP has since been incorporated into TDM [35-02-06](#).*

*A request is made for further guidance to address an issue regularly faced by Irish insurance companies. The background to this issue is as follows:*

- *Irish regulated insurers often write insurance business across the EU either on a Freedom of Services (FOS) or Freedom of Establishment (FOE) basis depending on the presence, if any, they have in a customer location.*
- *Where an Irish insurer establishes a branch in an EU jurisdiction (on a FOE basis), they will pay tax in Ireland on their worldwide income with their IFRS or Irish GAAP accounts as the starting position for their tax computation.*
- *In the foreign branch location, however, they may have to file / pay local corporation tax based on local GAAP accounts.*
- *The accounting for insurance business under IFRS vs. a local foreign GAAP can be quite different in terms of the recognition of investment gains, acquisition costs, valuation of policyholder liabilities, etc. What this means in practice is that in a given year there may be a loss in e.g. a French branch under local French GAAP so no French corporation tax is paid. However, under IFRS, the French branch makes a profit and so Irish corporation tax is paid. The following year the reverse may be the case i.e. French tax paid on French branch profits as computed under French GAAP but there is an IFRS loss and so no Irish corporation tax paid on French branch profits. Technically there is no double taxation in a given year, however, in reality there is double taxation on the same profits, it is just that the profits are recognised in different years due to different accounting conventions.*
- *The knock-on impact of the change to Schedule 24 para 7(3)(c) in Finance Act (No2) 2013 was that foreign tax suffered in a year, that was not allowed as a deduction, could not be carried forward under Schedule 24 para 9FA(2). In other words, any benefit of the foreign tax was lost.*
- *This SoP was requested and introduced on foot of this.*

*While the issuance of the SoP at the time was welcome, it included the general 4-year time limit on reclaims (under section 865).*

*In reality, the time limit on claiming the double tax credit relief in this manner (by way of throwback of foreign tax paid) renders the concession null and void i.e. it is not as simple as the example above that the timing difference in profit recognition differs by only a year – in many cases the timing difference in recognition of these profits will far exceed the 4-year time limit included now in the TDM.*

*Separately, the SoP/TDM provides that where income is recognised for tax purposes in Ireland for an earlier period than in the foreign branch territory, there can be a carry back of 87.5% of the foreign tax as a credit and any balance can be carried forward. In other words, there has to be tax in Ireland in an earlier year and foreign tax in a later year. Again, due to accounting differences it actually could be the case that the foreign profits / tax arises before the Irish profits / tax.*

*Revenue advised that section 865 TCA 1997 is very specific and provides that Revenue shall not make a repayment of tax beyond the general 4-year time and Revenue are unable to deviate from this.*

Revenue advised that a review of the taxation of savings products was announced by the Minister for Finance during his Finance Bill 2022 speech in October 2022 and the issue could be brought up as part of this review.

### **8.3 TDM 04-09-01 'Section 110: Entitlement to Treatment:**

**The following note was provided in advance of the meeting**

*On 21 December 2022, Revenue released [eBrief No. 216/22](#) highlighting that the Tax and Duty Manual (TDM) [04-09-01](#) on the entitlement to the treatment under Section 110 has been updated. The updates to the TDM include the following at paragraph 2:*

*However, there are provisions that apply a "double trade" test (e.g. section 452(2)(a)(ii) refers to "a trading expense in computing the amount of the company's income from the trade". In order for these provisions to apply, a qualifying company must ensure that the particular income/ expense itself is of a trading nature. It is not sufficient to rely on the 'Case I' basis of calculation of a qualifying company alone, to meet this "double trade" test.*

*Firstly, we would note that in our view the wording in Section 110(2) ("the profits or gains shall be computed in accordance with the provisions applicable to Case I of that Schedule") should extend to all references to the term "trade" and not merely to the first use of that term within any particular subsection. It is unclear to us that the distinction being drawn in the updated TDM was intended by the drafters of the section and we would be interested to hear Revenue's views in this regard.*

*In relation to the updated TDM, we understand that the basis for the above update is that section 452(2)(ii) uses the term "trade" twice.*

*In addition to section 452 TCA 1997, other sections of the TCA use the term "trade" twice and therefore we would be grateful for clarification as to whether the updated TDM applies to those sections also. These sections include:*

- *Section 817C(2)(b)*
- *Section 77(6A)(b)*
- *Section 284*

*As such, these sections should not apply to a qualifying company whose particular income/ expense is not of a trading nature.*

Revenue advised that TDM 04-09-01 provides general guidance on Section 110 TCA 1997 and, as such, will not provide comprehensive guidance on every provision of the Tax Acts where trade or trading is mentioned. It is not the intention of Revenue to update the TDM.

Clarification can be given, if required, by submitting a query via Revenue Technical Service (RTS).

### **8.4 TDM 27-04-01 'Offshore Funds: Taxation of Income and Gains from EU, EEA and OECD member states'**

Revenue updated guidance (Paragraph 2.1.1 of TDM Part 27-04-01) to provide for a non-exhaustive list of those general legal and regulatory criteria that should be considered to assist in establishing whether the threshold of 'similar in all material respects' is met, when determining the equivalent nature of an offshore fund to its Irish counterpart.

A Draft TDM 27-04-01 including the update to Paragraph 2.1.1 was circulated in advance of this meeting.

Revenue advised that, to date, they had received no feedback on the updated TDM.

Practitioners queried whether examples could be included of what would be considered equivalent and whether some of the factors that can be used to determine equivalence carry more importance than others.

Revenue confirmed they have repeatedly requested examples for inclusion in the TDM and are yet to receive any. Revenue agreed to extend the timeline for the submission of examples until Friday the 3<sup>rd</sup> March 2023. Following this date, where no appropriate examples are received, Revenue proposed to publish the TDM as circulated.

### **8.5 Tax and Duty Manual on the classification of foreign entities for Irish tax purposes.**

A draft TDM was circulated by Revenue for discussion in advance of the meeting of the 1<sup>st</sup> December 2022 and practitioners have provided feedback on the TDM.

A meeting of the TALC Foreign Entities Sub-Group is scheduled to take place on the 9<sup>th</sup> March 2023 @ 10:00.

An invite and Agenda, which will be the same as the Agenda circulated by the CCAB-I previously, is to be circulated.

### **8.6 TDM 33-03-03 'EU Mandatory Disclosure of Reportable Cross-Border Arrangements'**

Practitioners noted that an updated version of the Revenue TDM 33-03-03 on DAC 6 appears to have been "quietly" released in November 2022. There was no mention of the update, as would ordinarily be expected, in an e-Brief.

Practitioners would request that any future changes to TDM 33-03-03 be formally highlighted via an e-Brief.

Revenue advised that TDM 33-03-03 was updated in November to include a link to the EU list of non-cooperative jurisdictions. The link was inserted as the EU list of non-cooperative jurisdictions is updated frequently, the most recent update being the 14<sup>th</sup> February 2023, and absent the link the TDM would have to be updated each time the EU list of non-cooperative jurisdictions was updated.

Where a material change is made to a TDM it is Revenue policy and practice to issue an e-Brief to practitioners advising of the changes made.



**Item 9: Workplan Items for 2023:**

Corporate Spin-Offs was agreed as a Workplan Item for 2023. A submission outlining the issues is to be made.

**Item 10 AOB:**

Declan Rigney advised that this would be his last meeting as Chair of the TALC Direct and Capital Taxes Sub-Committee and thanked the practitioner bodies and Revenue Officials for their input to the TALC Direct and Capital Taxes Sub-Committee.

**Attendees at this meeting:**

Revenue	ITI	CCAB-I	Law Society
Declan Rigney (Chair) Karen Drake Eleanor Smiley Áine Hollingsworth Jacqueline O'Callaghan Aisling Dooley Caroline O'Rourke Laila Tamosunea Mary Breen Dave Brennan (Secretary)	David Fennell Laura Lynch Stephen Ruane Clare McGuinness Lorraine Sheegar Peter Croke Tom Maguire	Peter Vale Gearóid O'Sullivan Enda Faughnan Ken Garvey Cormac Kelleher Colin Smith	Rachael Hession Caroline Devlin Aidan Fahy David Lawless John Cuddigan