

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

29th October 2020

Skype conference call at 2:30pm

The purpose of this meeting was to discuss the measures announced in Finance Bill 2020.

### Capital Taxes

#### Stamp Duties – Part 4

##### **Section 47 – Proposed amendment of section 81C of Principal Act (further farm consolidation relief)**

- Revenue informed practitioners that section 47 extends Farm Consolidation Relief for a further two years to bring the review in line with the corresponding CGT relief.

##### **Section 51 – Proposed amendment of Schedule 1 to Principal Act (stamp duties on instruments)**

- Section 51 amends consanguinity relief to extend it for a further two years until 1 January 2024.

#### Capital Acquisitions Tax – Part 5

##### **Section 53 – Proposed amendment of section 46 of Principal Act (delivery of returns)**

- Section 53 amends section 46 CATCA 2003, which requires the delivery of a return where a gift or inheritance comprises agricultural property or relevant business property where agricultural relief or business relief, respectively, apply. A return must now be delivered in respect of such gifts or inheritances irrespective of whether the taxable value of such agricultural property or relevant business property, when aggregated with the taxable value of previous gifts or inheritances since 5 December 2001, exceeds 80% of the relevant group threshold.
- Revenue informed practitioners that section 53 has been proposed to provide a better understanding from a CAT policy perspective how these valuable reliefs are used and availed of.
- Revenue confirmed where a return is not filed, the relief will not be denied but the normal late filing consequences will apply i.e. penalties.

##### **Section 54 – Proposed amendment in relation to 4-year time limit on enquiries, assessments and repayments**

- Section 54 amends sections 46, 49 and 57 of CATCA 2003 to provide for a fixed commencement date of 31 December in the year in which a return is received for the 4-year time period, during which the Revenue can, make enquiries, raise assessments and make repayments. An amendment also provides that the Revenue may raise an assessment at any time where an event occurs after a return is received which gives rise to any facts or matters relevant to the assessment.
- Revenue confirmed the purpose of the amendment is to align CAT with the corporation tax and income tax fixed commencement dates and that their focus is not directed at clawback events.
- Revenue confirmed that clarity will be provided in guidance as the wording in the proposed legislation is quite broad.

#### Capital Gains Tax – Part 1, Chapter 6

##### **Section 22 – Proposed amendment section 541 of Principal Act (debts)**

- Section 22 amends section 541 TCA 1997, which provides that where foreign currency is transferred by an account holder from one account to another in the same currency, there is no economic gain or loss and therefore does not give rise to an allowable loss or chargeable gain for CGT purposes.

## Direct Taxes

### Income Tax – Part 1, Chapter 3

#### **Section 3 – Proposed amendment to tax treatment of certain benefits payable under Social Welfare Acts**

- Section 3 amends section 126 TCA 1997 to provide for benefits payable under the Social Welfare Act, i.e. COVID-19 Pandemic Unemployment Payment, to be chargeable to tax under Schedule E and this applies from 13 March 2020.
- Practitioners queried if the COVID-PUP is taken into account for preliminary tax purposes and Revenue stated that they would revert on the matter.

#### **Section 8 – Proposed amendment to share scheme reporting**

- Revenue confirmed that section 897B TCA 1997 expands the mandatory reporting for share schemes.
- Practitioners queried what “cash equivalent of shares” refers to and noted where cash is given to employees, it is usually considered an emolument. Revenue confirmed that the section is intended to capture more than straight forward share issues but agreed to consider the matter further.

### Income Tax, Corporation Tax and Capital Gains Tax – Part 1, Chapter 4

#### **Section 11 – Covid Restrictions Support Scheme (CRSS)**

- Subsection 11 introduces new sections 484 and 485 TCA 1997 which provide for the new Covid Restrictions Support Scheme (CRSS). Revenue noted that businesses in level 3 and over are expected to avail of the scheme but there may be some businesses that need to avail of the scheme in levels lower than 3.
- Revenue confirmed that a business needs to carry on a Case I trade to qualify for the scheme and demonstrate a 25% reduction in turnover due to COVID-19. Businesses must have a tax clearance certificate in place. If all qualifying conditions are met, then businesses can claim a cash payment in the form of an Advance Credit for Trading Expenses (ACTE) up to a maximum of €5,000 per full week in the scheme.
- Revenue noted there were some typos in section 484 and have noted these for Committee Stage amendments.
- Practitioners had a number of items for clarification:
  - **Definition of Business Premises:** Practitioners noted that not all businesses have a fixed place of business but have been impacted by the restrictions. Revenue stated that the legislation appears to be clear in that it would not apply to a business without a “fixed place of business.” Practitioners asked about the policy intention to exclude businesses, such as, a concert promoter, circus, etc. Revenue stated that the policy decisions were a matter for the Department of Finance but noted that the relief was intended to be a targeted relief designed for businesses required to shut their doors due to Government restriction and was not intended for secondary businesses. The support is available for business premises to help with the fixed costs they incur. Revenue noted that the guidelines are being updated regularly and they are receiving many queries on “business premises”.
  - **Concept of Access:** Practitioners noted that suppliers to the businesses that are restricted from opening their business to the general public are ruled out of the scheme but queried whether a takeaway or juice bar would be able to register for the scheme where, for example, access to a shopping centre is not restricted but footfall has decreased as most shops in the centre are closed. Revenue advised that they consider a decline in footfall as a side effect of the restrictions and therefore, such types of businesses do not qualify for the scheme.
  - **Partnerships:** Revenue confirmed that each partner in a partnership must register for the scheme.
  - **Taxis:** Revenue confirmed that taxi drivers cannot avail of the scheme.

- **€5,000 Weekly Limit per Business Premises:** Practitioners queried if businesses need to look at each business premises separately for the ACTE weekly limit of €5,000. Revenue confirmed that the limit is per business premises, as originally there were some counties subject to different levels of Government restrictions.
- **One Business Premises Used by a Number of Self-employed Individuals:** Revenue confirmed where there are a number of self-employed individuals working from one fixed place of business (such as, personal trainers or hairdressers) the limit per business premises is applied to each of them separately.
- **Updated Guidance:** Practitioners raised concerns about draft legislation that permits Revenue to update guidance throughout the duration of the scheme and asked if any changes will be prospective. Revenue clarified that the legislation is quite strict on what Revenue can change – any change in the guidance will be to provide clarity.
- **Registration Facility:** Revenue noted that the registration facility is due to open next week. The first claims will be able to be made in mid-November. Revenue also noted that the 8-week timeframe to register commenced on 13 October 2020, and while recognising the short timeframe, Revenue suggest that businesses register as soon as possible in order to make a claim on time.
- **Published List:** Revenue confirmed that the names and addresses of the businesses that avail of the CRSS will be published in line with Revenue practice and similar to the TWSS and EWSS.
- Revenue confirmed that updated guidelines on the CRSS will issue tomorrow.

**Section 13 – Proposed amendment of Chapter 1 of Part 18 of Principal Act (payments in respect of professional services by certain persons)**

- Revenue outlined they are making provision for the electronic return of PSWT and confirmed it would be mid-2021 before the system will be up and running.
- Paper forms will remain in place until the end of June 2021. There will not be a dual system but there will be a lead in time and stakeholder engagement at the beginning of 2021.

**Section 15 – Transfer Pricing**

Section 15 amends section 835A TCA 1997 to inset a new definition of “relevant person” and substitutes a new section 835E TCA 1997, which deals with transactions between two domestic entities in Ireland and the exclusion of transfer pricing rules for non-trading transactions. There was a detailed discussion on various aspects of the proposed legislation. The following points were covered:

- Revenue outlined that the revised definition of “relevant person” is to ensure the documentation requirements in section 835G TCA 1997 are met.
- Revenue also provided some background on the substitution of the new section 835E TCA 1997. It has always been Revenue’s view that a qualifying person must have profits or gains relating to an arrangement chargeable to corporation tax or income tax (except for section 129 TCA 1997) and the new section 835E clarifies this.
- Practitioners queried the purpose of the reference to section 835F in the first amendment in the first subsection of the section (i.e. section 15 (1)). Revenue confirmed this is to ensure the same treatment (ensuring documentation requirements are satisfied) will apply to SMEs.
- Practitioners queried what the reference to income tax in section 835E (1)(a)(ii) means. Revenue confirmed that the exclusions will not apply to non-resident companies within the charge to income tax.
- Practitioners asked whether the reference to a trade in section 835E (5) includes professions. Revenue stated it is not intended to include professions. Practitioners noted an issue has arisen on another matter where there may be Case II companies. The legislation refers to Case I and Case V trades, practitioners queried if Case III foreign companies are included. Revenue confirmed that the legislation is limited to Case I and Case V only. Revenue recognise that many structures relate to Case I and Case V and the legislation

was designed to ensure that no mismatch in the rates occurs.

- Practitioners asked about the status of the existing guidance regarding 2020 transactions. Revenue confirmed that the guidance will be updated to reflect the new legislation and will be released when the proposed amendments in Finance Bill 2020 become law at the end of the year. Revenue noted that discussions need to continue at the TALC BEPS sub-committee as there is still some disagreement regarding scope, which needs to be clarified.
- Practitioners asked about the meaning of a loan, for example, where a debt has arisen due to intra-group transactions that are not loans. Revenue stated that they would have considered these intra-group balances when drafting the legislation, but that clarity will be provided in guidance. Practitioners noted that if there is an interest free debt, the qualifying loan arrangement conditions will not be met. Revenue confirmed that where balances, which arose as a direct result of certain intra-group transactions, are outstanding, it was their intention that the legislation would cover the debt left outstanding.
- Practitioners noted that replacement loans are not included in the legislation and where holding companies have a loan replaced, they will not qualify for the exclusions. Revenue agreed that replacement loans are not covered by the legislation.
- Practitioners highlighted the problematic nature of the legislation, as drafted, for many Irish businesses and queried the policy rationale for the proposed amendment. Revenue stated the EU freedom of establishment rules were considered in the context of how Ireland to Ireland transactions are treated differently to Ireland to foreign transactions under the Irish transfer pricing regime. Practitioners stated there are many cases under EU law which have permitted transactions between domestic entities to be treated differently under the transfer pricing regimes of other EU jurisdictions.
- Practitioners queried why multi-tier holding companies are not included in the exclusions. Revenue stated that this was considered by the Department of Finance and the decision was taken after consideration not to include multi-tier holding companies. Practitioners noted that this will be a major issue for established groups. Revenue confirmed that the legislation was drafted within certain parameters and any policy change would need to be made by the Department of Finance.
- Practitioners also noted situations where a holding company pays interest (acquirer) and the holding company on lends - if the lending is an interest free loan, this will not be within the scope of a qualifying loan arrangement.
- Practitioners asked about rent-free situations and the free use of property, especially in the context of SMEs. This will be a significant problem when the transfer pricing rules are extended to SMEs. Revenue advised that the "main" exclusion, subject to the other provisions of the section, is effectively in subsection (1), which defines a 'qualifying relevant person'. Practitioners also raised the issue with charging some form of rent due to the different tax rates. Practitioners stated that this will also impact certain capital taxes reliefs (especially for SMEs) – where a property is used by other group companies for free, as it is their view that Revenue usually accept that this is not for investment purposes and charging rent will impact this. Revenue confirmed that they will discuss replacement loans and the free use of property with the Department of Finance.
- Practitioners queried what "nominal" means, as this is very subjective and asked if any guidance will be provided. Practitioners noted that the arbitrary nature of the term is embedded in the legislation. Revenue stated that it is a very relative term which depends on the specific arrangement, and while it will be covered in guidance they will not be prescriptive. Revenue clarified that the inclusion of subsection (4) was to guard against artificial arrangements being used to engineer scenarios falling within the exclusion, for example by charging €1 as consideration. Revenue confirmed that if there is a nominal consideration in respect of a loan it may also be a qualifying loan arrangement subject to subsection 5. Revenue noted that there are a number of intra-group transactions that will not qualify for the exclusions.

Practitioners noted the unexpected nature of the proposed changes to the transfer pricing rules given the ongoing discussions and collaboration with Revenue throughout the year on updating the Transfer Pricing Tax & Duty Manual. Revenue acknowledged this but considered it important to continue with meetings of the TALC BEPS sub-committee to obtain practitioners' feedback. Practitioners also noted that many groups will need to

restructure before the end of the year if the draft legislation is not amended, many of which had to restructure in 2019 following the provisions in Finance Act 2019. Practitioners suggested that the new section 835E appears to disadvantage Ireland versus other EU countries, as there is a perceived narrowing of the exemptions. Practitioners are of the view that the section is not in line with the anti-hybrid rules introduced in Finance Act 2019. Revenue noted that they do not consider that the exclusion has been narrowed. Revenue stressed that they cannot divulge Finance Bill provisions in advance, and it is not in a position to disclose legal advice received by the Department of Finance on the matter. Revenue stated the intention was not to narrow the rules but to clarify how they should operate. Revenue stated they would raise practitioners' queries and issues with the Department of Finance for further consideration.

#### **Section 16 – Proposed amendment of Schedule 2 to Principal Act (machinery for assessment, charge and payment of tax under Schedule C and, in certain cases, Schedule D)**

- Revenue confirmed the changes to Encashment Tax introduce an exemption for Irish companies, increase the rate from 20% to 25% in line with the withholding tax rate and provide for automatic returns of certain information to Revenue.
- Practitioners queried why the rate was increased to 25% which Revenue confirmed was to bring the rate in line with the normal withholding tax rate as most cases refer to dividends.

#### **Corporation Tax – Part 1, Chapter 5**

#### **Section 17 – Proposed amendment of section 288 of Principal Act (balancing allowances and balancing charges)**

- Practitioners noted that this change on Budget night was unforeseen and unexpected. Practitioners have clients that were in the middle of transactions and will now be impacted by the change.
- Practitioners also highlighted how the perception of Ireland is becoming negative from a MNE perspective. In addition, many pharma companies that on-shored IP here in the past still make “milestone payments” and the proposed section as drafted is very problematic.
- Revenue confirmed the change was a policy decision and any issues would need to be taken up with the Department of Finance.

#### **Section 20 – Proposed amendment of Anti-Hybrid Rules**

- Revenue confirmed the amendments ensure that the anti-hybrid rules operate as intended by:
  - amending a technical error in the definition of associated enterprises to ensure compliance with ATAD,
  - amending provisions relating to the timing of the test of association to address unintended consequences of the current legislation,
  - providing that certain anti-hybrid rules do not apply where there is no economic mismatch outcome because a charge to tax arises under a Controlled Foreign Company regime, and
  - clarifying the application of one of the anti-hybrid rules where the participator is a tax-exempt entity.
- Practitioners welcomed the changes and queried where there is a no economic mismatch outcome, if Revenue could consider the scenario where there is a payment mismatch between a participator and hybrid entity. Revenue requested details to be provided to consider this matter further.
- Practitioners requested if the definition of associated enterprises will apply with effect from 1 January 2021. Revenue confirmed that this definition applied prior to the introduction of legislation in Finance Bill 2020, therefore practitioners can interpret this for 2020 even though the Bill refers to 1 January 2021. Practitioners asked if guidance will be updated for this clarification. Revenue will consider this.

#### **Miscellaneous – Part 6**

#### **Section 56 – Appeals to Appeals Commissioners**

- Revenue noted the changes to section 56 made several amendments to the TCA 1997 to facilitate improvements to the tax appeals process, including permitting an Appeals Commissioner to dismiss a case

where the 'statement of case' is not provided.

- Practitioners queried the wording in the section relating to an Appeals Commissioner dismissing a case where the 'statement of case' is not provided. Revenue stated that section 949E (2)(b) TCA 1997 defines the documentation required and should remove any doubt. Practitioners stated the draft legislation appears to be quite broad and noted concern over situations if Revenue did not submit information required to progress the appeal that the case would be dismissed, and the taxpayer would have no alternative available.
- Practitioners asked if assurances could be provided to taxpayers that both sides of an appeal would be treated equally and fairly and if, for example, where Revenue do not provide the information required to progress the appeal then the appeal should be upheld in favour of the taxpayer. Revenue noted the matter raised for consideration.

#### **Section 57 – Mandatory disclosure of certain transactions**

- The proposed amendments to Chapter 3, Part 33 TCA 1997 include amendments to clarify reporting obligations. Revenue confirmed that guidance will be updated to reflect the Finance Bill 2020 changes.

#### **Section 59 – Returns of certain payment card transactions by payment card providers**

- Revenue confirmed debit and credit card issuers are required to provide details of non-Irish suppliers. Revenue noted that an EU VAT Directive will be implemented in 2024 which this amendment helps them to prepare for.
- Revenue is receiving information under section 891D TCA 1997, but online transactions are not included. Revenue is keen for providers to implement these changes early and allow time to work through any development issues that may arise. Revenue stated this will allow them to provide input into the EU Directive in the run up to implementation. Revenue also noted throughout the EU, Ireland has one of the highest rates of online shopping therefore it makes sense to kickstart this process. The changes are included in the TCA 1997 instead of the VATCA 2010 because all financial services powers are included in the TCA 1997.
- Revenue confirmed sections 891D and 891DA TCA 1997 will be updated further when the EU Directive is implemented.

#### **Section 60 – Amendments consequential on migration of shares to EU central securities depository**

- Revenue confirmed section 60 makes a number of amendments to the TCA1997 and the CATCA 2003 arising from the withdrawal of the UK from the EU. This involves the migration of shares and securities in Irish registered companies from a central securities depository (CSD) in the UK to a CSD in Belgium and the future settlement of trades in those shares and securities in the latter CSD.
- Revenue confirmed that an amendment will be brought at Committee Stage to include stamp duty changes, to incorporate the changes at the end of March 2021, as the deadline to include stamp duty changes in the Finance Bill (as initiated) was missed.
- Practitioners asked how the changes will be approached. Revenue confirmed they will be moving away from net to securities. Revenue is trying to expand the definition of shares to ensure all types of securities and some types of interest are captured. Revenue want to capture transfers outside the CSD, but unless there is a change in the beneficial ownership it is difficult to envisage how any stamp duty charge will apply. Practitioners highlighted that this is a matter of Belgian law and clarity is needed on how the rules are intended to operate. The ADR exemption needs to remain in place.
- Practitioners queried if there will be any adverse consequences for the close company position and the continued application of section 129 - Franked Investment Income. Revenue confirmed a legislative amendment is not required and may issue guidance on this point.

#### **Section 61 – Proposed amendment of section 28B of Emergency Measures in the Public Interest (Covid-19) Act 2020**

- Revenue confirmed section 61 makes provision for the inclusion of proprietary directors in the Employment Wage Subsidy Scheme (EWSS) with effect from 1 September 2020.

#### **Section 62 – Proposed amendment of Emergency Measures in the Public Interest (Covid-19) Act 2020**

- Revenue confirmed section 62 makes provision for the inclusion of the Temporary Wage Subsidy Scheme (TWSS) in the Debt Warehousing Scheme.

#### **Section 63 – Covid-19: special warehousing and interest provisions (income tax)**

- Revenue confirmed section 63 provides for the extension of the Debt Warehousing Scheme to income tax and preliminary tax.
- Practitioners queried if the warehouse covers joint assessment where the assessable spouse has Schedule E income and the other spouse is self-employed but has been affected by the COVID-19 restrictions. Revenue confirmed that this is case and can be included in the warehouse. After the meeting Revenue indicated that, where one spouse/civil partner is self-employed and the other has PAYE income, Revenue will treat the assessable spouse/civil partner as eligible to avail of debt warehousing if the income of the self-employed spouse/civil partner in 2020 is estimated to be less than 75% of that spouse's/civil partner's income for 2019.
- Revenue confirmed that the declaration is made when filing the income tax return.
- Practitioners asked about what 'total income' includes. Where a taxpayer owns rental property and does not collect the rent can they meet the 25% reduction in income test? Revenue confirmed that the landlord will qualify if the tenant is unable to pay the rent due to Covid-19. Revenue advised that the landlord may need to provide confirmation if the request for warehousing is examined (for example, an agreement with the tenant to waive rent, or demonstrate that there has been a default)
- Revenue also confirmed that 'total income' has the same meaning as included in the TCA 1997 (section 3).
- Practitioners also queried the interaction of debt warehousing and section 997A TCA 1997 which disallows a PAYE credit for a director where their employer has not paid PAYE, and whether guidance will be updated. Revenue confirmed they will revert to practitioners on this point. After the meeting Revenue confirmed that section 997A will not be disapplied in warehousing cases, so a director for the purposes of that section will not get credit for warehoused amounts that have not been paid. However, if the director avails of income tax warehousing under this section, s/he can warehouse all unpaid liabilities, including the unpaid Schedule E liabilities.

#### **Sections 64, 65 & 66 – Proposed amendment to Covid-19: special warehousing and interest provisions**

- Revenue confirmed sections 64, 65 and 66 include an amendment in respect of an error in the legislation whereby the interest was not calculated on a reducing balance basis.

#### **Sections 67 – Repayment or refund of payment made in excess of liability to tax assessed by taxpayer**

- Revenue confirmed section 67 provides that where a taxpayer appeals an assessment, and in connection with that appeal, makes a payment to Revenue and subsequently wins the appeal, the taxpayer will not be entitled to interest on the amount repaid.
- Practitioners queried the rationale for this section and highlighted the unfairness of the amendment as the taxpayer is denied the use of the monies while the appeal is in progress. Revenue noted that the change was introduced to protect the Exchequer due to a number of large cases awaiting a determination from the Tax Appeals Commission (TAC). Revenue confirmed they would raise practitioners' concerns with the Department of Finance.
- Practitioners queried the effective date of the change. For example, where cases are awaiting a determination and the TAC decide in favour of the taxpayer in early 2021, will they be denied interest on the amount of tax repaid? Revenue confirmed they would consider this point and revert. Revenue has confirmed that in cases where a taxpayer has made a payment on account and ultimately wins a case, interest would be payable up to the date of the enactment of Finance Bill 2020.

## **Attendees at the meeting**

### **Revenue**

- Sharonne O'Reilly
- Alan Kelly
- Alan Carey
- Jeanette Doonan
- Áine Hollingsworth
- Dave Brennan
- Michael Buckley
- Jacqueline O'Callaghan
- John Quigley
- Barry O'Dwyer
- Geraldine Hegarty
- Liam Smith
- Edel Butler
- John McGorry
- Emily Swift

### **CCAB-I**

- Norah Collender
- Maud Clear
- Peter Vale
- Enda Faughnan
- Ken Garvey
- Cormac Kelleher
- Colin Smith

### **Law Society**

- Caroline Devlin
- Maura Dineen
- John Cuddigan
- Aidan Fahy

### **ITI**

- Laura Lynch (Chair)
- Lorraine Sheegar
- Laura Harney
- David Fennell
- Stephen Ruane
- Cillein Barry
- Tom Maguire
- David Moran
- Paul Nestor