

## Close Companies: Interpretation and General

### Part 13-01-02

The purpose of this instruction is to explain some of the key definitions and terms used in the close company provisions of the Taxes Consolidation Act (TCA) 1997

Please note that examples illustrating, inter alia, the provisions addressed in this Tax Instruction are set out in Tax and Duty Manual [Part 13-02-02](#)

This document should be read in conjunction with Part 13 TCA 1997 (sections 430 to 441 inclusive).

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## 1 General

In determining whether a company is a **close company**, one or more of the following questions must be answered:

- (a) Is the company within one of the specific exceptions which exclude it from being a close company? [section 430(1)(a) to (e)]
- (b) Who are the participators in the company and what powers or rights do they possess or are they entitled to acquire? [section 432(2), (3) and (4)] [see paragraphs 3 and 4 of this Instruction for definition of **participator**]
- (c) What rights and powers of other persons are attributed to the participators? [section 432(5) and (6)]
- (d) Having regard to the rights, etc. of each participator, and other persons' rights which are attributed to the participator do -
  - (i) five or fewer participators control the company, or
  - (ii) participators who are directors control the company? [section 430(1)]
- (e) On a full distribution of its distributable income would more than half the distribution be distributable to five or fewer participators or to participators who are directors? [section 430(3)]

If the company is not within one of the specific exceptions listed under paragraph 2 of this Instruction and the answer to (d)(i) or (ii) or (e) is yes, the company is a close company.

### **Note 1 – Limited partnership structures:**

Revenue is aware, given the broad scope of Part 13 of the TCA, that a strict application of these provisions could bring certain companies owned and controlled by institutional investment entities such as private equity funds within the ambit of legislation which is ultimately focused at closely held companies. Accordingly, in a number of specific cases referred to Revenue for consideration, Revenue has agreed that the close company legislation would not apply to an Irish resident company in circumstances where the ultimate ownership and control of the company is widely dispersed among a large number of investors in funds operated through a limited partnership structure (e.g. a company where the shareholders are pension funds or other investment funds).

Decisions of this nature are arrived at strictly on a case by case basis as this will provide information on the circumstances of specific cases and will enable the position to be kept under review. In the event of clarification being sought with regard to potential cases coming within the above parameters, details should be submitted to the Revenue Technical Service. Procedures set out in the [Revenue Technical Service Guidelines \(TDM Part 37-00-00a\)](#) should be followed and the full

details of the facts and circumstances should be set out in a Form RTS1A. In particular, the following information should be provided:

- A statement or diagram of the group structure, including the name, location and Irish tax reference number, if relevant, of all entities.
- A list of all shareholders in the group, including the particulars of the shareholdings and percentage of shares held. In cases where there are more than ten shareholders in a particular company, details should be provided for the ten largest individual shareholders.
- Details of the ten largest interests held in the limited partnership structure, including the percentage of the interest held and whether the investors are individuals, companies, funds, other investment schemes, etc. The total number of interests in the partnership should be confirmed.
- Details of the relationship between individual shareholders and holders of interests in the limited partnership, if any.

### **Note 2 – Central Securities Depository**

Following the migration of Irish securities from the CREST system to Euroclear Bank in March 2021, Revenue is aware that a strict application of the TCA Part 13 provisions could bring certain companies within the ambit of the close company legislation. A wide interpretation could mean that the Central Securities Depository (CSD) or its nominee company may be regarded as falling within the definition of “participator” in section 433(1) as a result of the migration.

Revenue has agreed that the CSD or its nominee company would not be regarded as a participator and a company that was not previously regarded as falling within the Part 13 provisions would not be considered to fall within these provisions, solely as a result of the securities migration.

## **2 Exclusion from meaning of close companies [section 430]**

The following cannot be close companies:

- (a) A company not resident in the State. (Thus, none of the provisions regarding close companies applies to a non-resident company trading in the State through a branch or agency).
- (b) A society registered under the Industrial and Provident Societies Acts being a society within the meaning of section 698.
- (c) A building society within the meaning of section 702.
- (d) A company controlled by or on behalf of the State and not otherwise a close company, or a company controlled by or on behalf of a Member State of the European Communities (other than the State) or the

government of a territory with which Ireland has a tax treaty and which company is not otherwise a close company. This latter provision is with effect from 1 January 2003 (Finance Act 2003) [section 430(1), (2) and (2A)] [see paragraph 19 of this Instruction].

- (e) A company controlled by another company (or other companies) which is not itself (or are not themselves) a close company (or close companies) and cannot be treated as a close company except by taking as one of the 5 or fewer participators requisite for its being so treated, a company which is not a close company, **or**

if the company cannot be treated as a close company except by virtue of paragraph (c) of section 432(2) and would not be a close company if the reference in that paragraph to participators did not include loan creditors who are companies other than close companies [section 430(4)] [see paragraph 20 of this Instruction].

- (f) A “quoted” company in which 35 per cent or more of the voting power is held by the “public” [see paragraph 21 of this Instruction].

The specific exceptions mentioned in (a) to (f) of paragraph 2 above may exclude a company from being a close company even if five or fewer persons can be shown to control it.

For companies within (b) above there is an important exception in respect of section 438 [see Tax and Duty Manual [Part 13-02-03](#)]. The application of (d) to (f), however, involves the concept of control and is considered in more detail in paragraphs 13 to 20 of this Instruction.

### 3 Definition of a “Participator” [section 433(1)]

A participator is any person having a share or interest in the capital or income of the company. A participator specifically includes the following:

- (a) A person who possesses or is entitled to acquire share capital, voting rights, loan capital (except in respect of an ordinary bank loan) [see paragraph 5 of this Instruction].
- (b) A person who is a loan creditor of the company [with regard to the meaning of “loan creditor” see paragraph 6 of this Instruction].
- (c) Any person who possesses or is entitled to acquire a right to receive or participate in distributions of the company (as defined by sections 130-135 TCA) or any amounts payable by the company (in cash or in kind) to loan creditors by way of premium on redemption [see paragraph 5 of this Instruction].

- (d) Any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for his benefit [see paragraph 5 of this Instruction].

## 4 Extension of the definition of a “Participator”

The definition of a “participator” is extended for the two following purposes so that a participator in a company which controls another company is to be treated for such purposes as being also a participator in that other company:

- (a) For the purposes of section 436, under which certain expenses incurred by a close company in respect of benefits provided to a participator are treated as a distribution to the participator, (extended meaning of distributions for close companies - see Tax and Duty Manual [Part 13-02-01](#)).
- (b) For the purposes of section 438, under which loans to participators are subject to deduction of tax on the grossed-up value of the loan (loans to participators - see Tax and Duty Manual [Part 13-02-03](#)).

If, for example, A Ltd., holds all the issued share capital of B Ltd. and B. Ltd. makes a loan to X, a shareholder in A Ltd., that loan is within section 438, since X as well as being a participator in A Ltd. is deemed also to be a participator in B. Ltd.

## 5 The concept of a potential participator (“entitled to acquire” and “entitled to secure”) [section 433(1)]

The words “entitled to acquire” and “entitled to secure” introduce the concept of a potential participator. Thus, for example, a person is a participator if, by means of a contractual right or some other arrangement, he can -

- (a) require a shareholder to transfer shares to him, or
- (b) secure the issue to him of unissued capital of the company, or
- (c) secure that if a distribution is made by the company or if a loan is redeemed by the company at a premium, he or she has a share in the distribution or the premium.

Similarly, a person is a participator if by means of a contractual right or some other arrangement he or she can secure that income or assets of the company will be applied directly or indirectly for his or her benefit.

References to being “entitled to acquire” or “entitled to secure” apply where a person is at present entitled to acquire, etc., at a future date and where a person will at a future date be entitled to acquire, etc.

## 6 Participator [the role of a “Loan Creditor”] [section 433(6)]

For the purpose of (b) of paragraph 3 (and for certain control tests, see paragraph 14) “**loan creditor**” in relation to a company, means a creditor in respect of:

- (i) any debt incurred by the company for -
  - (I) any money borrowed or capital assets acquired by the company,
  - (II) any right to receive income created in favour of the company, or
  - (III) consideration the value of which to the company was (at the time when the debt was incurred) substantially less than the amount of the debt (including any premium on the debt),
- or
- (ii) any redeemable loan capital issued by the company.

A person carrying on a business of banking shall not be deemed to be a loan creditor in respect of any loan capital issued or debt incurred by the company for money loaned by such person to the company in the ordinary course of that business.

### **Person with a beneficial interest in any debt or loan capital [section 433(7)]**

A person who is not a creditor in respect of any debt or loan capital to which subsection (6) of section 433 applies but nevertheless has a beneficial interest in that debt or loan capital shall to the extent of that interest be treated for the purposes of Part 13 as a loan creditor in respect of that debt or loan capital.

A debenture issued by a company which is redeemable makes the debenture holder a loan creditor. While a normal trade creditor is not a loan creditor, a person, other than a banker, advancing money to a company to acquire a capital asset is a loan creditor.

An example of (II) above is where a person covenants to pay an annuity to a company in consideration of payments in capital form to be made to him by the company.

It should be borne in mind that section 130 TCA (Distributions) provides that the interest, etc., on certain loans is a distribution. As regards such loans, the creditor is in any case a participator as he “possesses a right to receive or participate in distributions of the company” [see paragraph 3 (c) of this Instruction].

## 7 Rights & Powers of certain other persons attributable to the participator [section 432(5) and (6)]

In addition to the rights and powers which a participator possesses (or is entitled to acquire), the rights and powers of certain other persons are attributed to the participator and count as his rights and powers for the purpose of determining who controls the company (see paragraphs 13 to 20 of this Instruction). The rights, etc., so attributed are as follows:

- (a) The rights and powers of the participator's nominee, i.e., any rights or powers which another person possesses on his/her behalf or may be required to exercise on his/her direction or behalf.
- (b) The rights and powers of the participator's associates (including the rights and powers of nominees of associates but not of associates of associates).
- (c) The rights and powers of any companies of which he has control or he or she and his or her associates (including nominees of associates but not associates of associates) have control.

In applying (a) to (c), such attributions are to be made as will result, if possible, in the company being treated as under the control of five or fewer participators.

## 8 Associate of a participator [section 433(3)(b) and (c)]

The relevance of identifying "associates" of participators arises in a number of ways. It is particularly important in relation to the question of control as interests of associates are attributed to the persons with whom they are associated for that purpose. Provisions dealing with expenses of participators and loans to participators extend to associates of participators while the legislation on excessive interest paid to certain directors extends also to their associates.

An "**associate**", in relation to a participator or any other person (e.g., a director), is:

- (a) A person in any of the following relationships to the participator:
  - (i) husband or wife;
  - (ii) ancestor;
  - (iii) lineal descendant;
  - (iv) brother or sister;
  - (v) partner.



- (b) the trustee or trustees of any settlement in relation to which the participator (or any relative of his living or dead - within (a)(i) to (iv) above is or was the settlor [section 433(3)(b)(ii)]; [but see the second sub-paragraph of paragraph 10) of this Instruction].
- (c) where the participator is interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person, any other person interested therein. Trust here specifically excludes an approved pension fund or a trust exclusively for the benefit of employees, directors and/or their dependants [section 433(3)(b)(iii) TCA] [however see paragraph 11 of this Instruction].

**“settlement”** includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property [section 10(1) TCA].

**“settlor”**, in relation to a settlement, means any person by whom the settlement was made, and a person shall be deemed for the purposes of this section to have made a settlement if the person has made or entered into the settlement directly or indirectly and, in particular (but without prejudice to the generality of the preceding words), if the person has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement [section 10(1) TCA].

As regards (a)(i) above, separated spouses should be regarded as associated with each other. Other relatives in (a)(ii) to (iv) above should be regarded as associated only if there is a blood relationship, e.g., half-sisters are associated but stepsisters are not.

## 9 Associate of Participator [Meaning of “interested in” – see paragraph 8(c) above]

The executors or administrators are “interested” in the assets of a deceased person’s estate during the period of administration (*Willingale v Islington Green Investment Co.*, 1972, 48 T.C. 547). The beneficiaries should also be regarded as “interested” in any assets of the estate from which they may benefit.

Paragraph 8(c) treats persons interested in shares subject to a trust or estate as associates of one another - “interested in” in that paragraph refers both to beneficial and fiduciary interests. The context of paragraph 8(c) is such that the interests of executors are clearly included and the reference to “the estate of a deceased person” is particularly appropriate in the case of an unadministered estate. The position of an administered estate would be different because the shares would be vested either in the trustees (the executors becoming trustees on completion of the

administration of the estate) or in the beneficiaries [for information see the cases of *Gartside v CIR* [1968 AC 553] and *J Bibby & Sons Ltd v CIR* 29 TC 167].

See, however, paragraph 11 of this Instruction.

## 10 Circumstances in which executors or trustees are participators

Executors who hold shares forming part of the estate of a deceased person are participators, as are trustees holding shares forming part of a trust. Where the trustee, etc. is the sole trustee or the first named of two or more trustees, etc., and the Constitution or Memorandum and Articles of Association of the company provide that the sole trustee or the first named trustee has the voting rights attaching to the shares, that trustee possesses the voting rights of any shares he or she holds in his or her own right and of any shares forming part of the trust.

The trustee or trustees of any settlement to which (b) of paragraph 8 applies are associates of the participator and therefore any rights or powers which they possess as trustees of that settlement are, in effect, deemed to belong to the participator. This does not, however, apply to any rights or powers such trustees possess in other capacities, e.g., in relation to shares owned by them personally or as trustees of other settlements of which neither the participator nor any of his or her relatives (living or dead) within (a) (ii)-(iv) of paragraph 8 is or was the settlor. It should be noted that the rights and powers of the settlor and his or her relatives may not be distributed to the settlement trustees under (b) of paragraph 8, i.e., this association is one way only.

Where (c) of paragraph 8 applies, a participator interested in shares or obligations of the company which are subject to the trust is associated with each other person so interested, i.e., trustees, beneficiaries, life tenant may all be associates of the participator. It is immaterial whether the participator in question is a participator because of interests in the trust or for other reasons.

See, however, paragraph 11 of this Instruction.

## 11 Individuals entitled or eligible to benefit under a trust not regarded as an associate of a participator

An individual who is entitled or eligible to benefit under a trust is not to be regarded as an associate of a participator under section 433(3)(b)(iii) [see (c) of paragraph 8 of this Instruction] solely because of that entitlement or eligibility, if:

- (a) the trust relates exclusively to an exempt approved scheme as defined in Chapter I of Part 30, TCA 1997, or
- (b) the following applies:

- (i) the trust is exclusively for the benefit of the employees, or the employees and directors, of the company or their dependants (and not wholly or mainly for the benefit of the directors or their relatives), and
- (ii) the individual in question is not (and could not, as a result of the operation of the trust, become), either on his own or with his/her relatives, the beneficial owner of more than 5 per cent of the ordinary share capital of the company

and, in applying subparagraph (b) above, any charitable trusts which may arise on the failure or determination of other trusts shall be disregarded [section 433(3)(c)].

A trust should not be regarded as outside (b)(i) above solely because charitable trusts may arise on the failure or determination of the other trusts.

Where an individual's only interest in a trust (which holds shares in or has made loans, etc., to the company) springs from his entitlement or eligibility to benefit under the trust and the trust is within (a) or (b)(i) and the individual satisfies the conditions in (b)(ii), he should not be regarded, solely because of section 433(3)(b)(i), as having as his associates (or as being an associate of) any other person interested in the shares, etc., which are the subject of the trust. Where, however, the individual is a trustee of a trust within (a) or (b)(i) (which holds shares in the company) his associates are (and he/she is an associate of) -

- (A) as regards a trust within (a), the other trustees of the trust;
- (B) as regards a trust within (b)(i), the other trustees of the trust and any other person interested in the trust who is not within (b) (ii).

Similarly, where the trust (which holds shares in the company) is within (b)(i) but the individual entitled or eligible to benefit under the trust does not satisfy the conditions in (b)(ii) his associates are (and he is an associate of) -

- (A) the trustees of the trust, and
- (B) any other person interested in the trust who is not within (b)(ii).

## 12 Definition of "director", "ordinary share capital" and "associate of a person"

For the purposes of this Part, "**director**" includes any person -

- (a) occupying the position of director by whatever name called,

- (b) in accordance with whose directions or instructions the directors are accustomed to act,
- (c) who is a manager of the company or otherwise concerned in the management of the company's trade or business, and
- (d) who is, either on his or her own or with one or more associates, the beneficial owner of, or able, directly or through the medium of other companies or by any other indirect means, to control, 20 per cent or more of the ordinary share capital of the company [section 433(4) TCA].

The expression "either on his own or with one or more associates" [in section 433(4)(d)] requires a person to be treated as owning or, as the case may be, controlling what any associate owns or controls, even if he does not own any share capital on his own, and the expression "either on his own or with his relatives" (in sub-paragraph b (ii) of paragraph 11 above) has a corresponding meaning [section 434(5)].

**"ordinary share capital"**, in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders of which have a right to a dividend at a fixed rate, but have no other right to share in the profits of the company;

**"Associate of a person"** has a similar meaning to associate of a participator (see paragraphs 8 to 11 of this Instruction), substituting "person" for "participator".

As regards the interpretation of "on his own or with one or more associates", see paragraph 11 of this Instruction.

### 13 Control [requirements necessary in order to establish that a company is a close company]

Having determined who is a participator in the company and having ascertained the rights and powers which a participator possesses (or is entitled to acquire or secure) and has attributed to him under paragraphs 7 to 10 of this Instruction, it is necessary, in order to establish that the company is a close company, to show that it is controlled by -

- (a) five or fewer participators, or
- (b) participators who are directors,

and is not excluded from being a close company by (d) to (f) of paragraph 2 of this Instruction.

## 14 Control [section 432 TCA]

**Control** is defined under several headings:

- (a) Control over the affairs of the company [paragraph 15].
- (b) Control through voting power [(a) of paragraph 15].
- (c) Control through share capital or through issued share capital [(b) of paragraph 15].
- (d) Control over income of the company [(c) of paragraph 15].
- (e) Control over assets of the company [(d) of paragraph 15].

If a person or two or more persons together satisfy any of the conditions in par. 15 and 16, he or they have control of the company [section 432(3)].

## 15 Control [elements of control] [section 432(2) TCA]

A person has control of a company if he exercises or is able to exercise or is entitled to acquire control, whether direct or indirect, over the company's affairs and, in particular, but without prejudice to the generality of the preceding words, a person controls the company if he or she possesses or is entitled to acquire:

- (a) the majority of the voting power in the company;
- (b) the majority of the share capital or of the issued share capital of the company, or
- (c) such part of the issued share capital as would, if the whole of the income of the company were in fact distributed among the participators (without regard to any rights which he or any other person has as a loan creditor) entitle him to receive the greater part of the amount so distributed, or
- (d) such rights as would, in the event of a winding up or in any other circumstances entitle him to receive the greater part of the assets which would then be available for distribution among participators.

For these purposes a person is treated as entitled to acquire anything which he is entitled to acquire at a future date or will at a future date be entitled to acquire [section 432(4)].

## 16 Control [right to greater part of assets]

Control under (d) of par. 15 exists where a person or persons have a right to receive the greater part of the assets then available for distribution among participators, in

any circumstances, e.g. on redemption of redeemable share capital or on repayment of loans to the company but also, specifically, on a winding up of the company.

“Participators” for this purpose includes loan creditors [unlike (c) of paragraph 15].

## 17 Control [position regarding more than one person or one group of persons]

More than one person or one group of persons may “control” a company. For example, one person may have the greater part of the voting power, while another holds the greater part of the issued share capital and a third is entitled to the greater part of the assets in a winding-up.

Alternatively, if say three persons, A, B and C, each hold one-third of the shares in a company, and they are not connected in any way which would allow the rights and interest of one to be attributed to another, then control is held by A and B or B and C or A and C. It could also be contended that A, B and C together control the company since together they hold more than half the shares and section 432(3) provides that where two or more persons together satisfy any of the conditions in section 432(2) they shall be taken to have control of the company. It would not normally be necessary to advance such a contention in determining “closeness” since control by two persons makes the company close and the addition of a further person to the controlling combination is superfluous.

## 18 Control [minimum controlling combinations]

In determining whether companies are “associated companies” only “minimum” controlling combinations should be considered. Combinations containing superfluous members should be disregarded, e.g., a company controlled by the unconnected persons A, B and C, but not by any one or two of them alone, should not be regarded as associated with any company controlled by one of them alone or by any two of them.

## 19 Companies controlled by the State, EU Member State or government of a tax treaty country

A company is not to be treated as a close company where it is controlled by or on behalf of the State. A company is to be regarded as controlled by the State if it is controlled by persons acting on behalf of the State (e.g. Minister for Finance). Where a company is so controlled but would otherwise be a close company (for example, by reason of being controlled by 5 or fewer persons), it will not be regarded as a close company unless the persons in control are acting independently of the State. This rule also applies to those companies controlled by or on behalf of a Member State of the European Communities or by the government of a territory with which Ireland

has a tax treaty and which company is not otherwise a close company [section 430(1), (2) and (2A)].

## 20 Company controlled by a non-close company

A company is not to be treated as a close company where either both of the conditions in (a) or both of the conditions in (b) below are satisfied:

- (a) The company is controlled (under any of the control tests in par. 14 to 17 of this Instruction) by a company which is not a close company (referred to in these instructions as an open company), or by two or more such companies, and it cannot be treated as a close company (under the control tests in par. 14 to 17 of this Instruction) except by including an “open” company in the group of five or fewer participators.
- (b) A company is also excluded from the definition if it comes within that description only by reason of the extended “control” provision of section 432(2) and the participator is regarded as such only because the participator is a loan creditor of the company and is not a close company (the effect of section 432(2) is that a person is taken to have control of a company if, in the event of the winding up of the company, the person would be entitled to receive the greater part of the distributable assets of the company) [section 430(4) TCA] [see paras 15(d) and 22 of this Instruction].

Where, in considering the above, it is necessary to take into account a company not resident in the State, the non-resident company is to be treated as a close company if, were it resident in the State, it would be such a company [section 430(5) TCA]. Thus, an Irish resident company controlled by a non-resident closely held company is considered to be a close company even if the ultimate shareholders are non-resident.

For the purposes of (a) and (b) above, shares held by trustees after 5th April, 1976, are deemed to be in the beneficial ownership of a company which is not a close company provided that both the following conditions are satisfied:

- (i) The shares in question are held on trust for an exempt approved retirement benefits scheme as defined in Chapter 1 Part 30 TCA; and,
- (ii) The fund or scheme is not established wholly or mainly for the benefit of persons who are, or are dependants of, employees or directors or past employees or directors of -
  - (A) the company being tested,
  - (B) any company associated with it,

- (C) a company controlled by directors and/or associates of directors of the company being tested, or of two or more persons each of which is such a director or associate, or
- (D) a close company.

(As regards the meaning of “associate”, see paragraphs 8 to 12 of this Instruction).

The broad effect of the above conditions is that the fund or scheme must be one established for the benefit of employees, etc. of an unrelated company which is not a close company [section 430(6)].

## 21 Company with publicly quoted shares [section 431]

A company in which 35 per cent or more of the voting power is beneficially held by the public is not a close company.

A company claiming that it is not a close company by virtue of section 431, has to show that all the following conditions are satisfied at the relevant time:

- (i) Shares (or stock) (exclusive of shares, etc., entitled to a fixed dividend or entitled to a fixed dividend with a further right to participate in profits) in the company carrying not less than 35 per cent of the total voting power in the company -
  - (A) have been allotted unconditionally to or acquired unconditionally by and are deemed to be beneficially held by the public (see (b) below); and
  - (B) any such shares, etc., have within the preceding twelve months been the subject of dealings on a recognised stock exchange and have within those twelve months been quoted in the official list of a recognised stock exchange [section 431(3) TCA].
- (ii) The voting power possessed by the principal members whether or not the shares are held by the public does not exceed 85 per cent of the total voting power in the company [section 431(4)].

The total voting power for the purposes of (i) and (ii) above is that of all the issued shares (or stock) including that of shares, etc., entitled to a fixed dividend, etc. which are excluded under (i) above in determining the voting power in the hands of the public. If the company cannot show that (ii) above is satisfied the remaining conditions are irrelevant.

Shares etc. are deemed to be beneficially held by the public only if:



- (i) they are beneficially held by a company resident in the State which is not a close company or by a company not so resident which would not be a close company if it were so resident, or
- (ii) they are held on trust for an exempt approved scheme as defined in Chapter 1 of Part 30, TCA, 1997, or
- (iii) they are not comprised in a principal member's holding.

**Principal Member:** The "principal member" of a company is defined by reference to the voting power which a person holds or which can be attributed to that person. If, on that basis, the person is one of the 5 persons holding the largest voting power and the person's voting power exceeds 5 per cent, the person is regarded as a principal member. Where there are 2 or more equal holdings, the number of principal members is increased to more than 5 to bring in those equal holdings [section 431(2)(a) and (b)].

The following shares, etc. are **not** to be regarded as beneficially held by the public:

- (i) Shares, etc., allotted to or acquired by or held by -
  - (A) any director or associate of a director of the company, or
  - (B) any company which is under the control of any such director or associate or of two or more persons each of whom is such a director or associate, or
  - (C) any associated company of the company [section 431(7) TCA].
- (ii) Shares, etc., held as part of any fund the capital or income of which is applicable or applied wholly or mainly for the benefit of, or of the dependants of, the employees or directors or past employees or directors of-
  - (A) the company, or
  - (B) any company within (i)(B) or (C) above [section 431(7)(a) TCA].

As regards (i), reference to shares held by any person include references to any shares the rights or powers attached to which could be attributed to that person under section 432(5).

## 22 Asset distribution test under section 432(2)(c) – treatment of loan creditor

A company is not to be treated as a close company if:

- (i) it is close by virtue of section 432(2)(c), only [see par.15(d) of this Instruction], and
- (ii) it would not be close if “open” companies were not regarded as participators by virtue of their interest in the company as loan creditors.

In arriving at the amount available for distribution among the participators, any amount due to an “open” company as a loan creditor (including any amount due to it as a holder of loan capital) may be deducted in arriving at the amount available for distribution among the participators if the result is that the company ceases to be close. (If the “open” company loan creditor also holds shares in the company, it will, of course be a participator in respect of that holding but in determining what amount would be distributable to it in a winding-up, the amount due to it as a loan creditor should not be added to the amount due to it as a shareholder).

The instructions in the preceding sub-paragraph should not be applied in any case in which, as a result of omitting “open” company loan creditors as participators in applying the control tests referred to above, a company which would otherwise be an open company becomes a close company.

## 23 Tests to determine whether a company is a close company

Normally, it will be possible to determine that a company is a close company by reference to -

- (a) the holders of the issued share capital, or
- (b) the holders of the voting powers attaching to the issued share capital,

Where, however these tests fail to establish that the company is a close company, it will be necessary to consider other tests of control. In applying these other tests, the following pointers may be of assistance:

- (i) In considering whether a person is “entitled to acquire” or “to secure”, there must be in existence some contractual right or other arrangement giving him that entitlement.
- (ii) The control test under section 432(2) TCA (see paragraph 15 of this Instruction) depends on dividend rights of the issued capital and will mainly be of interest where shares with no voting rights carry the right to a high dividend.
- (iii) The control test in paragraph 16 of this Instruction [specifically under section 432(2)(c) TCA] will normally be of interest only where loan creditors are participators or certain share capital carries special rights to participate in the assets available for distribution in a winding-up.

In considering any of the control tests, it is essential to have available an up-to-date copy of the company’s memorandum and Articles of Association and copies of any relevant trust deeds, etc.

## 24 Powers of Inspector to obtain information [section 435 TCA]

Section 435 empowers an inspector by written notice to request information to enable him or her to implement the provisions relating to close companies and it requires companies and individuals to supply the information. The inspector may require the person in whose name shares are registered to state the name and address of the beneficial owner of the shares. The inspector may also require a company to supply him or her with the names and addresses of persons to whom bearer securities were issued and he or she may require those persons to furnish him or her with information to enable him or her to determine the names and addresses of the beneficial owners of the security.