

## Company reconstruction and amalgamation: transfer of assets

### Part 20-01-02

This document should be read in conjunction with section 615 of the Taxes Consolidation Act 1997

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## Executive summary

This section operates in a situation where, one resident company takes over the whole or part of the business of another resident company and that other company receives no consideration for the transfer of the business other than the taking over of its liabilities.

### 2.1. Operation of relief

**Section 615** operates in a situation where, on a reconstruction or amalgamation, one company takes over the whole or part of the business of another company and that other company receives no consideration for the transfer of the business other than the taking over of its liabilities.

### 2.2. Corporation tax relief

The section provides that no corporation tax is to be charged in respect of chargeable gains accruing to the transferor company, but the transferee company is to be treated as if it had acquired the assets at the time and the price at which they were acquired by the transferor company. The relief does not apply if the acquiring company is an authorised investment company that is an investment undertaking (within the meaning of **section 739B**) or an authorised ICAV (within the meaning of section 2 of the Irish Collective Asset-management Vehicles Act 2015). **Finance Act 2017** extended the relief to transfers of assets by a transferor company to a transferee company as a result of a merger or division under the Companies Act 2014. The transferor company is treated as if it transferred the whole of its business and as if all its liabilities were the liabilities of the business where, immediately before the merger or division, it carried on a business.

### 2.3. Trading stock

The section does not apply to trading stock. Neither does it apply to the transfer of a specified intangible asset (within the meaning of **section 291A**) where both the company transferring the specified intangible asset and the acquiring company so elect by giving notice in writing to the Collector General not later than 12 months from the end of the accounting period in which the company acquired the asset.

Where an election is made by the transferor company and the acquiring company that the section does not apply and the transfer is not a transfer to which **section 400(6)** applies, both the disposal and the acquisition of the asset are treated, for CGT purposes, as having been made at market value

## 2.4. Conditions

The following conditions **must** be satisfied:

- the company transferring the assets must be Irish resident at the time the assets are transferred or, where it is resident in a Member State of the European Union or in an EEA state with which Ireland has a double tax treaty, the assets must be chargeable assets in relation to the company immediately before that time, and
- the company acquiring the assets must be Irish resident at the time of acquisition or, where it is resident in a Member State of the European Union or in an EEA state with which Ireland has a double tax treaty, the assets must be chargeable assets in relation to the company immediately after that time.

The effect of the above conditions is that, in addition to Irish resident companies, companies that are resident in a Member State of the European Union or in an EEA state with which Ireland has a double tax treaty (currently Iceland and Norway) can benefit from the relief to the extent that they operate here through a branch or agency.

## 2.5. Tax Briefing 48

In Tax Briefing 48 some of the issues affecting the availability of relief under **section 615** are discussed. Extracts from this article are in **Appendix 1**.

## 2.6. Revenue Precedent 701

Revenue Precedent 701, which deals with the partition of family trading companies, reads as follows:

Where a family trading company (or group of companies) is broken up into separate individual trading companies, such an event will not be regarded as a disposal for CGT purposes provided that the value of each individual's holding in the company or group remains strictly unaltered and also provided certain other conditions are met.

This precedent operates by applying the reliefs contained in section 587 and section 615. Full details are set out in **Tax Briefing 44**, which is reproduced in **Appendix 2**, and in **Tax Briefing 51** which is reproduced at point 7 of **Appendix 2**.

## 2.7. Submissions

Submissions in relation to proposed reconstructions, amalgamations or Partitions of Family Trading Companies should be made in accordance with “Guidelines on Revenue’s Service to Practitioners and Business Taxpayers” in Tax and Duty Manual [Part 37-00-00a](#)

## 2.8. Avoidance issues

It has come to the attention of Revenue that **section 615** is being used, in conjunction with the use of **section 617**, which provides relief from CGT on a transfer of assets within a group, as part of a scheme to avoid CGT liabilities on the ultimate disposal of those assets.

A typical example of the type of avoidance scheme referred to would run as follows:

- A. Trading company (Tradeco) establishes a subsidiary company (Subco) and transfers its business worth, say, €50m to Subco within the provisions of **section 617**. Tradeco makes a loan of €50m to Subco to enable it to pay the consideration under the Business Transfer Agreement. This loan will remain outstanding.
- B. A new company (Newco) is established and the beneficial ownership of Newco will be held outside the group in question, but it will be regarded as tax resident in Ireland.
- C. Under a scheme of reconstruction or amalgamation for the purposes of **section 615**, Subco will transfer its business and its assets and liabilities (including its liabilities to Tradeco) to Newco. In return, Newco will issue shares in itself to Tradeco. At this point, Newco is 100% owned by Tradeco and will be considered to have no value because its assets will be matched by debt.
- D. Tradeco subsequently sells the shares in Newco to an unconnected party for a nominal amount which might be of the order of €10 and, as arranged, the purchaser then provides the funds necessary to repay the inter-company loan amount due to Tradeco, which Revenue would regard as the “true” consideration.

The sole purpose of the overall structure employed is to dispose of the assets of Tradeco to an unconnected party in a manner that will seek, by misusing the deferral relief provisions of **sections 615** and **617**, to ensure that the disposal is made without an attaching CGT liability.

**Section 615** is designed to ensure that, in cases where there is a transfer of assets as a consequence of a company reconstruction or amalgamation of two or more companies, there is a deferral of CGT, which should arise on the ultimate disposal of the assets. **It was never intended that relief would be**

**applicable where, as a result of the section being used as part of a tax-avoidance scheme, the CGT charge on the ultimate disposal of the assets would be eliminated.**

**Section 617** is designed to ensure that, where there is a disposal of assets from one company in a group to another company in that group, there will not be a CGT charge. The CGT charge is to arise on a disposal of assets outside the group. In this regard, it should be noted that the structuring of Newco to ensure that, prior to the transfer of assets from Subco, it is held outside the group, as outlined in B above, is for no other reason than to ensure that, when the assets of Subco are acquired by Newco, the relief in **section 615** will apply rather than the relief in **section 617** continuing to roll on with the transfer of assets from Subco to Newco, which would be the case if Newco were held within the group. This is important for the working of the avoidance scheme because, if the group transfer relief in **section 617** were to apply (rather than the group reconstruction relief in **section 615**), then the **section 617** relief would be clawed back by reference to the provisions of **section 623** at the point when Newco would be sold to the unconnected party. **Section 623** contains a charge to tax in cases where a company leaves a group within a period of 10 years after acquiring assets from another group member.

Section 41 FA 2015 amended section 615 by providing that the section will not apply to a scheme of reconstruction or amalgamation involving the transfer of the whole or part of a company's business to another company unless it is shown that the reconstruction or amalgamation is effected for bona fide commercial reasons and does not form part of an arrangement where the main purpose, or one of the main purposes, of which is the avoidance of liability to income tax, corporation tax or capital gains tax. The amendment applies to disposals made on or after 22 October 2015.

Any case where a CGT charge cannot be imposed under normal CGT rules on the "true" consideration paid on the ultimate disposal of assets in respect of which relief under **section 615** has been granted should be examined to decide whether it can be challenged under **section 615(4A)**, **section 811** or **section 811C**, as appropriate. The net effect of the tax-avoidance schemes on the lines of the one outlined above is that a business worth, say, €50m is sold for a nominal amount, thus avoiding a CGT charge. It is clear that these schemes need to be challenged as the "true" consideration for the disposal is €50m rather than the nominal amount paid by the purchaser to Tradeco for the shares in Newco.

## Appendix 1

### **Extract from Tax Briefing, Issue 48 (June 2002)**

Section 615 operates where, on a reconstruction or amalgamation, a company takes over the whole or part of the business of another company and that other company receives no consideration for the transfer of the business other than the taking over of its liabilities. The section provides that no corporation tax is to be charged in respect of chargeable gains accruing to the transferor company, but the transferee company is to be treated as if it had acquired the assets at the time and the price at which they were acquired by the transferor company. This section does not apply to trading stock.

To qualify for relief under this section -

- The scheme must involve the transfer of the whole or part of a company's business to another company
- The acquiring company must be resident in the State at the time of the acquisition or the assets are chargeable assets in relation to that company immediately after the transfer
- The transferor company must be resident in the State at the time of the acquisition or the assets are chargeable assets in relation to that company immediately before the transfer
- The transferor company must receive no consideration for the transfer, apart from the other company taking over the whole or part of its business liabilities.

The transferor company is treated as having disposed of the assets with no loss or gain arising. The transferee company, for the purposes of calculating indexation relief on eventual disposal, is treated as having acquired the assets at the time and price at which they were acquired by the transferor company.

Consequently, when the acquiring company eventually sells the assets to some third party the gains made by both the first and the second companies will at that time be brought into charge and indexation relief applies accordingly.

Relief does not apply to the issue of shares by a company under a scheme of reconstruction or amalgamation unless that scheme is effected for bona fide commercial reasons and not as part of a tax avoidance scheme.

Where a bona fide reconstruction takes place to which the provisions of Section 587 and 615 apply, it is not the practice of Revenue to invoke a distribution charge under Section 130 TCA 1997.

## Appendix 2

### Partition of family trading companies - CGT

Extract from Tax Briefing, Issue 44 (June 2001)

#### 1 Introduction

The intention of this article is to explain the relief available in the case of a partition of a family trading company together with the circumstances in which the relief may be granted. This article essentially sets out how precedent 701\* is to be applied.

\*Precedent 701 reads:

“Where a family trading company (or group of companies) is broken up into separate individual trading companies, such an event will not be regarded as a disposal for CGT purposes provided that the value of each individual’s holding in the company or group remains strictly unaltered and also provided certain other conditions are met.”

#### 2 Background

There are occasions where a family carries on separate identifiable trades under the umbrella of a single company (or a single trade which is capable of division into more than one separate trade). Similarly, the trades may be carried on by more than one company or within a group structure. This might arise, for instance, where the original corporate structure was put in place by a deceased parent and inherited by the various family members. For commercial or other reasons the family members may now wish to divide the separate trades between the family members so that each trade can be owned and carried on wholly by individual members.

#### 3 Partition

Where, in the case of a family trading company

- shares are reorganised into separate classes
- new companies are formed to take over the separate trades allocated to the different classes
- with each group of shareholders receiving shares in a different company

the relief’s provided by section 587 and 615 will apply, if the conditions set out below are satisfied. The desired separation must occur on the transfer of a trade to another company, in exchange for the issue of shares by that company.

#### 4 Conditions

- No money or moneys worth changes hands
- No value shifting takes place, i.e. the value of each shareholder's holding before and after the partitioning is identical
- Acceptance that assets transferred between companies pass to the transferee company at the original date of acquisition and cost to the transferor company
- Acceptance that new shares received in exchange take on original date of acquisition and cost of old shares
- Applies to 'family' partitions only ['family' as defined in section 598(1)(a) TCA 1997]
- Applies to 100% family companies only
- All parties must be Irish tax resident
- Applies to separation of trading companies only i.e. trades capable of division into separate trading entities, e.g. a number of retail outlets, two distinct trading activities such as manufacturing and distribution/sales. In practice where the value of non-trade assets does not exceed 10% of the value of the trading entity as a whole relief will be given
- The separate trades must continue post partition /not available as an alternative to a partial winding up or to be used as a mere separation into trade assets and investment assets
- Where the partition involves the division of a group of companies, the entity to be transferred can be a 100% trading subsidiary of a 100% family company. The provisions of section 623 TCA 1997 will, however apply
- Relief does not extend to stamp duty
- Must be for bona fide commercial reasons and not to secure a tax advantage of any kind.

## 5 Advance Approval

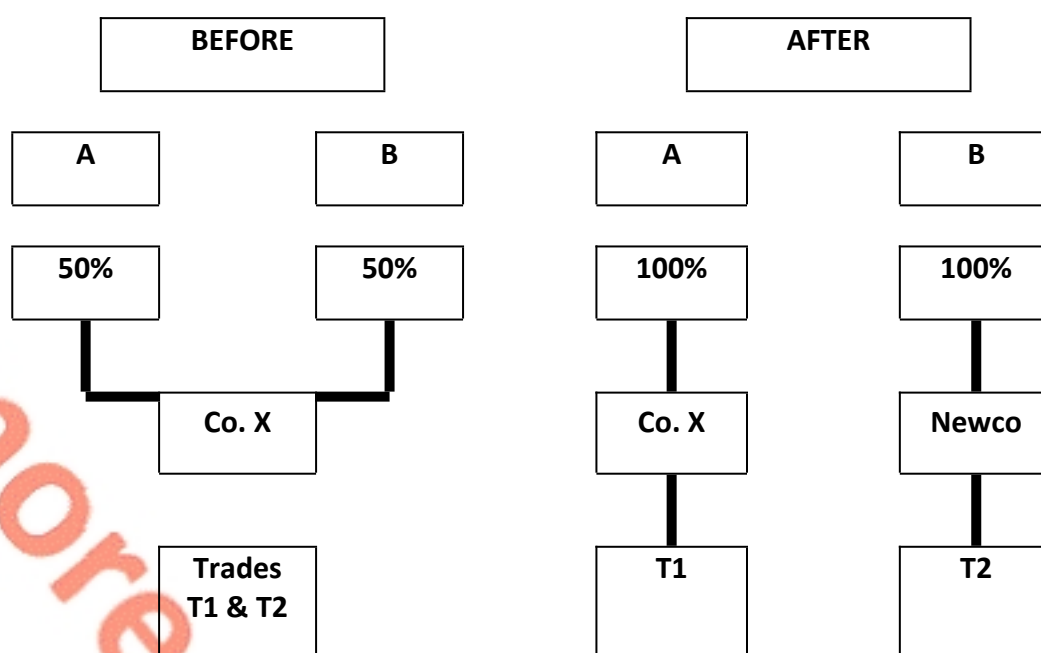
Advance approval should be sought for this relief (see **par 2.7**). Requests for approval should identify the parties involved (quoting full tax references) and outline the existing structure, the reasons for the partitioning and the proposed new structure together with the proposed steps to achieve the new structure. Undertakings may be sought in relation to some of the conditions above.

## 6 Example

A & B hold shares 50/50 in Co. X, which carries on two trades, T1 & T2. The following steps could be put in place to achieve the relief under this precedent:

1. Co. X reorganises its share capital into two separate classes to reflect the trades, which are to belong to the respective shareholders post partition. [There would then be two classes of shares, one class held by A which derives its value solely from the assets and trade of T1, and the other class held by B, which derives its value solely from the remaining trade, T2.]
2. B sets up Newco which he owns 100%
3. Co. X transfers trade T2 to Newco in return for Newco issuing new shares to B in respect of his holding in Co. X
4. B's shareholding in Co. X is cancelled.
5. A holds all the shares in Co. X, which now carries on the trade of T1. B holds all the shares in Newco, which now carries on the trade of T2.

If the conditions outlined above are satisfied, the relief provided by section 587 will apply to the shares issued by Newco and the transaction will be treated as an exchange of shares. The new holding will be treated in the hands of the shareholder as if it was the original holding. Additionally, the relief provided by section 615 will apply to the transfer of the trade by Co. X to Newco, so that no corporation tax will be charged in respect of chargeable gains accruing to Co. X, but Newco will be treated as if it had acquired the assets at the time and the price, at which they were acquired by Co. X.



## 7 Tax Briefing 51

Tax Briefing 51 outlines further, how precedent 701 may have application in relation to a partition.

Extract from Tax Briefing, Issue 51 (January 2003)

**Tax Briefing** issue 44 explains the relief available in the case of a partition of a family trading company together with the circumstances in which the relief may be granted. Essentially the article outlines how precedent 701\* is to be applied, particularly the conditions which must be satisfied and the specific method to be adopted to achieve partition. Revenue will nevertheless accept that where partition is achieved by means of a capital reduction resolved and passed at an extraordinary general meeting and confirmed by the High Court pursuant to Section 72 Companies Act 1963, precedent 701 may have application. For relief to be granted, all other conditions, as outlined in **Tax Briefing** issue 44, must be satisfied.

### **Precedent 701 reads:**

“Where a family trading company (or group of companies) is broken up into separate individual trading companies, such an event will not be regarded as a disposal for CGT purposes provided that the value of each individual’s holding in the company or group remains strictly unaltered and also provided certain other conditions are met.”