Stamp Duties Consolidation Act 1999

Part 7: Section 80 - Reconstructions or amalgamations of companies

This document should be read in conjunction with section 80 SDCA 1999

Document created March 2023

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Table of Contents

1 Introduction

Section 80 of the Stamp Duties Consolidation Act (SDCA) 1999 makes provision for a stamp duty exemption to apply on the transfer of certain property in connection with a scheme for the *bona fide* reconstruction of a company or amalgamation of companies **(subsection (2))** or a merger **(subsection (4)).** Such schemes may involve transfers of shares, real property and debt. The purpose of this document is to provide general guidance on the operation of section 80.

2 Terminology

Section 80(1)(a) sets out the meaning that is to be given to certain terms used in the section, as follows:

A reference to **acquiring company** (a term used in relation to schemes of reconstruction or amalgamation) means a company with limited liability.

The term **merger** refers to a merger undertaken in accordance with Chapter 3, Part 9 or Chapter 16, Part 17 of the Companies Act 2014. This is considered further in section 4.

The term **shares** includes stock.

The terms **successor company** and **transferor company** (terms used in relation to mergers) have the meanings given to them by section 461 of the Companies Act 2014, which are as follows:

- **successor company**, in relation to a merger, means the company to which assets and liabilities are to be, or have been, transferred from the transferor company or companies, by way of that merger;
- **transferor company**, in relation to a merger, means a company, the assets and liabilities of which are to be, or have been, transferred to the successor company by way of that merger.

The term **undertaking** includes part of an undertaking. The meaning of the term undertaking is considered further in section 3.4.

Section 80(1)(b) provides that references in section 80 to a **company** include a society registered under the Industrial and Provident Societies Act 1893.

Some of the terms used in section 80 and a number of the concepts associated with reconstruction and amalgamation transactions are not specifically defined for the purposes of the section. In certain cases, their meanings have been established by reference to case law. See Appendix 1 for a list of relevant case law.

3 Scheme of reconstruction or amalgamation

Section 80(2) sets out the conditions that are to be met in order for an exemption to be available in relation to a scheme for the *bona fide* reconstruction of a company or amalgamation of companies. This section sets out guidance on the meaning of the terms **reconstruction** and **amalgamation**, followed by an overview of these qualifying conditions.

3.1 Reconstruction

A reconstruction involves the transfer of a business (or part of a business) by an existing company (referred to in **subsection (2)(a)(ii)** as the **target company**) to a new company (the **acquiring company**).

The acquiring company must be substantially owned by the same shareholders who owned the target company. Considering the word "reconstruction" in **Fallon and Another (executors of Morgan, deceased) v. Fellows (Inspector of Taxes),** Park J. stated:

> "The basic concept is that one starts with a group of shareholders who own a business through one corporate vehicle, and one ends with the same group of shareholders or substantially the same group of shareholders, who own the same business or substantially the same business, still through a corporate vehicle, but now through a different corporate vehicle."[1]

It is well-established that a partition of a company's underlying business or businesses between groups of shareholders cannot be a reconstruction.

In the High Court case **Patrick W. Keane And Company Limited v The Revenue Commissioners,** Edwards J. observed that "in order to avail of the section 80 exemption the quality of ownership must be real and meaningful and not technical".[2]

It is only required that the substantial identity of shareholding exists immediately after the transfer. It is not necessarily significant that as a next step the new shares in the acquiring company are sold. However, it is necessary that the reconstruction is not in any way contingent on the subsequent sale or transfer of shares and that the contract for the sale of shares is not in existence before the issue of shares by the acquiring company.

[1] **Fallon and Another (executors of Morgan, deceased) v. Fellows (Inspector of Taxes)** [2001] S. T.C. 1409.

[2] **Patrick W. Keane And Company Limited v The Revenue Commissioners** [2007] IEHC 466.

The acquiring company must carry on substantially the same business (or part of the business) after the reconstruction as was carried on by the target company before the reconstruction.

3.2 Amalgamation

An amalgamation involves the transfer of a business (or part of a business) by an existing company (the **target company**) to a new company (the **acquiring company**) where the shareholder ownership of the amalgamated businesses is substantially the same before and after the amalgamation.

Amalgamation was considered by Romer LJ in **Re Walker's Settlement,** in which he said:

> "It contemplates a state of things in which two companies are joined so as to form a third entity, or one company is absorbed into and blended with another company."[3]

While there must be continuity of business activity, there is no requirement (unlike a reconstruction) that substantially the same business must be carried on before and after the transfer. With a blending of two businesses a difference in businesses would be expected before and after the amalgamation.

3.3 Qualifying conditions

Section 80(2)(a) sets out the main conditions that are to be met in the case of a reconstruction or amalgamation, as follows:

1. A company with limited liability (the **acquiring company**) is to be registered, a company is to be established by Act of the Oireachtas or the nominal share capital of an existing company has been **increased (subsection (2)(a)(i)). Subsection (2)(b)** provides that a company with limited liability that is to be registered does **not** include a private company limited by shares.[4] The issue of any authorised unissued share capital of the acquiring company is treated as an increase in its nominal share capital **(subsection (2)(c)).** To be treated as issued, the shares must be registered in the name of the shareholder.
2. The company that is to be registered, established or has increased its share capital does so with a view to acquiring:
   - the **undertaking** (or part of the undertaking) of a particular existing company, referred to as the **target company (subsection (2)(ii)(I)),** or
   - at least 90% of the issued share capital of a target company **(subsection (2)(ii)(II)).**

[3] **Re Walker's Settlement** [1935] Ch 567 at 583.

[4] This is a company to which Part 2 Companies Act 2014 applies.

The term **undertaking** is not specifically defined for the purposes of section 80. It has been interpreted by the courts to mean the business or enterprise undertaken by a company including all its assets, goodwill and other intangible rights. It involves a level of activity as opposed to the mere ownership of assets. The disposal of assets is not necessarily a disposal of an undertaking unless those assets are capable of constituting a business in their own right. The transfer of part of an undertaking is also possible where it is similarly capable of constituting a business in its own right.

Revenue accepts that the transfer of a 100% shareholding of a company carrying on a business in its own right constitutes the transfer of an undertaking.

The mere purchase of an undertaking (or part of an undertaking) does not qualify for relief as it must be carried out as part of a scheme for reconstruction or amalgamation.

3. Not less than 90% of the consideration for the acquisition (except any part of that consideration that consists in the transfer to, or discharge by, the acquiring company of liabilities of the target company) must consist of:

   - where an undertaking is to be acquired, in the issue of shares in the acquiring company to the target company or to holders of shares in the target company **(subsection (2)(iii)(I)),** or
   - where shares are to be acquired, in the issue of shares in the acquiring company to the holders of shares in the target company in exchange for the shares held by them in the target company **(subsection (2)(iii)(II)).**

Where shares are issued by the acquiring company to the shareholders of the target company in return for their shares, the shares must be issued on a proportionate basis.

The consideration can include cash, but this must not exceed 10% of the consideration.

Where the acquiring company already owns more than 10% of the issued share capital of the target company, the acquiring company cannot acquire 90% of the issued share capital of the target company.

Section 80(3) provides that **one** of the following two conditions must also be met for the exemption to be available in the case of a reconstruction or amalgamation.

The **first condition** is that the memorandum of association of the acquiring company provides that one of the objects for which the company is formed is the acquisition of the undertaking of, or shares in, the target company. Before the Companies Act 2014, the traditional limited company had a memorandum of association that contained an objects clause setting out the purpose(s) for which the company was formed. All companies now have a constitution that may or may not contain a memorandum of association. The constitution of a designated activity company (DAC) and of a public limited company (PLC) both contain a memorandum of association.

The **second condition** is that the document authorising the increase in the acquiring company's share capital (such as a resolution passed by the company) shows that the increase is authorised for the purpose of the acquisition of the undertaking of, or shares in, the target company. The target company must be identified with reasonable certainty in either the memorandum of association or in the document authorising the increase in the acquiring company's share capital.

3.4 Place of incorporation of acquiring company and target company

Section 80(10) provides that the exemption will be available notwithstanding that:

- the acquiring company is incorporated in another EU Member State, another Economic Area[5] (EEA) State or the United Kingdom, or
- the target company is incorporated outside of Ireland.

This is on the proviso that the acquiring company or the target company, as the case may be, corresponds to an acquiring company or target company within the meaning of section 80.

3.5 Types of reconstruction and amalgamation

In practice, there are three main types of reconstruction or amalgamation:

- share for undertaking two-party exchange;
- share for undertaking three-party exchange; and
- share for share exchange.

In a share for undertaking two-party exchange, the acquiring company issues shares in itself to the target company in exchange for the undertaking (or part of the undertaking) of the transferor. The two parties are the target company and the acquiring company. In such a transaction, a reconstruction is effected by interposing the acquiring company between the target company and its undertaking.

In a share for undertaking three-party exchange, the acquiring company issues shares to the shareholders of the target company in exchange for the undertaking (or part of the undertaking) of the target company. The three parties are the target company, the acquiring company and the shareholders of the target company.

In a share for share exchange, the acquiring company issues shares to the shareholders of an existing target company in exchange for their shares in the target company.

[5] The EEA includes all Member States of the EU plus Iceland, Liechtenstein, and Norway5. The Isle of Man, Channel Islands and Gibraltar are **not** Member States of the EU or the EEA.

3.5.1 Illustrative examples

In the examples below it is assumed that the qualifying conditions for the relief are satisfied.

Example 1: Share for undertaking two-party exchange

Company A (target company) has two shareholders Mary and Una. It carries on a manufacturing business and a retail business. It carries on the manufacturing business in a premises it owns.

Company A decides to transfer its manufacturing business to a new company as it wants to separate it from its retail business. It incorporates a new company, Company B (acquiring company), for the purpose of acquiring the manufacturing business. A business transfer agreement is executed wherein Company A agrees to transfer the manufacturing business to Company B in return for Company B issuing shares to it. A deed of transfer is also executed wherein Company A agrees to transfer the premises to Company B. As a result, Company B acquires the manufacturing business and premises and in return Company A acquires shares in Company B.

Example 2: Share for undertaking three-party exchange

Company A decides to transfer its car business to a new company, Company B, that it incorporates for this purpose. A business transfer agreement is executed wherein Company A agrees to transfer the car business to Company B in return for Company B issuing shares to Tom and John, its two shareholders. A deed of transfer is also executed wherein Company A agrees to transfer the premises to Company B. As a result, Company B acquires the manufacturing business and in return the shareholders in Company A acquire shares in Company B.

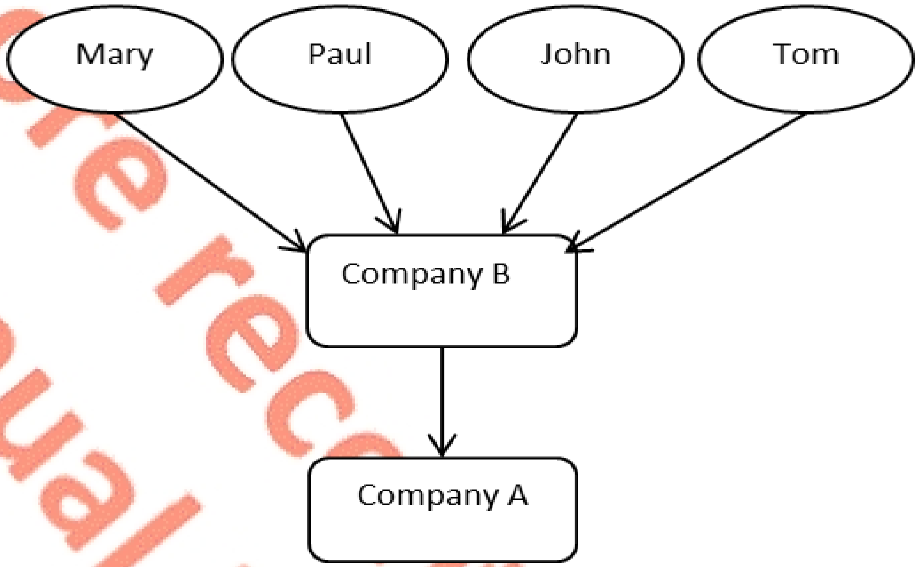
Example 3: Share for share exchange

Company B (acquiring company), owned by John and Tom, wants to acquire Company A (target company). To do this, it issues shares to Mary and Paul, the shareholders of Company A. In return, Mary and Paul transfer their shares in Company A to Company B.

Two stock transfer forms are executed to transfer the shares: one for the transfer of Mary's shareholding in Company A to Company B and the other for the transfer of Paul's shareholding. As a result, Company A becomes a wholly owned subsidiary of Company B and in return the shareholders of Company A obtain shares in Company B.

Before the share for share exchange:

After the share for share exchange:



4 Mergers

This section sets out guidance on the operation of the stamp duty exemption that is available where a merger is undertaken, as provided for by **section 80(4).**

As noted in section 2, for the purposes of section 80, the term **merger** refers to a merger undertaken in accordance with Chapter 3, Part 9 or Chapter 16, Part 17 of the Companies Act 2014. The Companies Act 2014 provides for three specific types of merger:

- **merger by absorption**, which occurs where a company transfers all its assets and liabilities to its parent company.
- **merger by acquisition**, which occurs where a company acquires all the assets and liabilities of one or more other companies in exchange for the issue of shares, with or without an additional payment.
- **merger by the formation of a new company**, which occurs where all the assets and liabilities of one or more companies are transferred to a new company incorporated for the purpose of the merger in exchange for the issue of shares to the shareholders of the transferor(s), with or without an additional payment.

In accordance with **subsection (4)(b),** it is a requirement that the successor company is:

- a private company limited by shares;
- a designated activity company (DAC); or
- a public limited company that is not an investment company.[6]

In all types of merger, the transferor company is automatically dissolved without going into liquidation.

The section 80 exemption for mergers was introduced by Finance Act 2017 and applies to mergers that are undertaken on or after 25 December 2017. However, Revenue accepts that the exemption can apply in respect of instruments executed on or after 23 December 2014, provided all other qualifying conditions are satisfied.

4.1 Illustrative examples

Example 1: Merger by acquisition

Company B wants to acquire the assets and liabilities of an existing Company A. To do this it issues shares to the shareholders of Company A who will, following the merger, be shareholders of Company B. Company A will be dissolved without going into liquidation.

Example 2: Merger by formation of new company

Company C is incorporated for the purpose of acquiring the assets and liabilities of Companies A and B. In return, it issues shares to the shareholders of Companies A and B which companies are then dissolved without going into liquidation. The shareholders of Companies A and B become shareholders of Company A.

5 Application of exemption

Where the conditions in either **subsection (2)** (reconstructions or amalgamations) or **subsection (4)** (mergers) are met, **subsection (5)** provides that any instrument made for the purposes of or in connection with:

- the transfer of the undertaking or shares, or
- the assignment of any debts, whether such debts are:
  - debts of the target company assigned to the acquiring company, or
  - debts of the transferor company assigned to the successor company as a result of the merger,

will **not** be chargeable to stamp duty, if it would otherwise be so chargeable under the following Heads of Charge:

[6] Within the meaning of section 2, 963 or 1001 Companies Act 2014, respectively.

- CONVEYANCE or TRANSFER on sale of any stocks or marketable securities,
- CONVEYANCE or TRANSFER on sale of a policy of insurance or a policy of life insurance where the risk to which the policy relates is located in the State, or
- CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance.

The stampable instrument in relation to a merger depends on the manner in which the merger is effected, as follows:

- merger effected under the summary approval procedure - the resolution referred to in section 202(1)(a)(ii) Companies Act 2014;
- merger effected by a High Court order confirming the merger under section 480(2) Companies Act 2014 - the High Court order;
- where the merger involves at least one PLC - the order made under section 1144 Companies Act 2014.

For the purposes of the exemption, the above-mentioned instruments are treated as a conveyance on sale in accordance with **subsection (11).**

Subsection (6) provides that the instrument of transfer must be executed within the 12-month period following the date of incorporation of the acquiring company or the date of the resolution to increase the acquiring company's nominal share capital.

Subsection (7) provides that the exemption will not apply in relation to an instrument which is chargeable under the Head of Charge "CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance" unless the target company or the transferor company, as the case may be, obtains a conveyance of that property **before** the date on which the instrument is executed. Notwithstanding this provision, where the property concerned comprises a leasehold interest in property, the target company or transferor company will be treated by Revenue as having obtained a conveyance of the property where the leasehold interest has been directly acquired by the target company or transferor company by virtue of the grant of a lease from the lessor and such lease has been duly stamped. In addition, an exemption may be available where the property comprises goodwill which has been acquired by the target company or transferor company by trading over many years.

6 Anti-avoidance

Subsection (12) provides that an exemption will not apply under section 80 unless the scheme of reconstruction or amalgamation or the merger:

- is effected for *bona fide* commercial reasons; and
- does not form part of a scheme or arrangement for the avoidance of tax or duty.

This anti-avoidance provision was introduced by Finance Act 2017.

7 Claiming the exemption

The exemption is claimed on a self-assessment basis where the qualifying conditions for the relief are satisfied (but see section 7.1 below in relation to the threshold for issued share capital). The claim is made on a stamp duty return filed through Revenue's Online Service (ROS). While supporting documentation in relation to the claim is not required to be included with the return, such documentation should be retained for six years from the later of the date of the stamp duty return (or the amended stamp duty return) or the date the stamp duty was paid, as it may be requested by Revenue in the event of a follow-up compliance check.

7.1 Repayments where time allowed to meet issued share capital threshold

A scheme of reconstruction or amalgamation may take place over an extended period of time, such that stamp duty must be paid on any stock transfer forms as the execution of which does not bring the percentage of the issued share capital acquired over the required 90% threshold. In such circumstances, **section 80(9)** provides that Revenue may repay the stamp duty where it can be shown that, subject to having satisfied the other qualifying conditions, at least 90% of the issued share capital of the target company has been acquired within:

- 7 months after the first issue of shares made for the purposes of the acquisition, or
- 6 months after the date on which the invitation was issued to the shareholders of the transferor to accept shares in the transferee,

whichever is earlier.

A 4-year time limit (from the date the instrument of transfer was stamped) applies to claims for refund (section 159A refers).

8 Withdrawal of exemption

Section 80(8) provides that the exemption will be withdrawn *ab initio* in the following circumstances:

1. It is subsequently found that the exemption was not properly due **(subsection (8)(a)).**
2. It is subsequently found that the conditions set out in **subsection (2)** are not fulfilled in relation to the reconstruction or amalgamation as actually carried out **(subsection (8)(a)).**
3. Within the period of **2 years** following the date of the registration, establishment or authority for the increase of the share capital of the acquiring company, the **target company ceases to be the beneficial owner of the shares issued to it** by the acquiring company in consideration of the acquisition. However, this condition does not apply where the cessation is a result of reconstruction, amalgamation or merger or a liquidation **(subsection (8)(b)).**

4. Within the period of **2 years** following the date of the registration, establishment or authority for the increase of the share capital of the acquiring company, the **acquiring company ceases to be the beneficial owner of the shares in the target company**, in respect of which the acquiring company had been allowed an exemption under this section. However, this condition does not apply where the cessation is a result of reconstruction, amalgamation or merger or a liquidation. **(subsection (8)(c)).**

In a three-party share for undertaking exchange there is no holding period for shares issued to the shareholders in the target company.

There are no specific 'post relief' conditions applying to a merger.

Where an exemption is withdrawn in these circumstances, interest (in accordance with section 159D) is calculated to the date on which the stamp duty is paid -

- from the date of the conveyance or transfer where the qualifying conditions set out in section 2 are not satisfied;
- from the date the target company ceases to be the beneficial owner of shares issued to it;
- from the date the acquiring company ceases to be the beneficial owner of the shares acquired in the target company.

8.1.1 Illustrative examples

Example 1: share for undertaking exchange

Company A Ltd. (target company) transferred an undertaking to Company B (acquiring company) and executed a deed of transfer on 10 January 2019 for this purpose. It claimed stamp duty relief on the instrument of transfer. The consideration it received for the undertaking consisted of shares in Company B. Company A had passed a resolution on 1 November 2018 to increase its share capital for the purpose of acquiring the undertaking.

Company A then sells the shares it had received from Company B on 5 August 2019. As this sale takes place within two years of 1 November 2019, the stamp duty relief claimed is subject to a clawback. Interest must also be paid from the date of the execution of the deed of transfer of the undertaking on 10 January 2019 to the date of payment of the clawback amount to Revenue.

Example 2: share for share exchange

Tom and Mary are the shareholders in Company A (target company) that was acquired by Company B (acquiring company) in a share for share exchange. This involved the transfer of shares in Company B to Tom and Mary in return for Tom and Mary's shares in Company A. Both stock transfer forms were executed on 9 February 2019 following the passing of a resolution on 1 October 2018 by Company B to acquire Company A. Stamp duty relief was claimed in respect of the stock transfer forms.

A few months after the shares were exchanged, Company B became insolvent and was liquidated resulting in the cessation of its beneficial ownership of the shares in Company A. However, because this cessation of beneficial ownership was caused by the liquidation of Company B, the stamp duty relief is not clawed back.

Note: If Company B had not been liquidated but Tom and Mary had instead sold their shares in Company B, this would not trigger a clawback, as the legislation does not provide for a clawback in such circumstances.

9 Interaction with other provisions

A relief for associated companies is available under section 79 SDCA 1999, details of which are outlined in the Associated Companies Relief Tax and Duty Manual. In certain circumstances, a transfer may be exempt from stamp duty under both provisions. However, only one exemption may be claimed.

Relief for capital gains tax and corporation tax for schemes of reconstruction and amalgamation is available under the Taxes Consolidation Act 1997. It is important to note that as there are certain differences between the various reliefs, it is possible to have a scheme that qualifies for stamp duty relief but does not, for example, qualify for capital gains tax relief.

10 Compliance interventions

When undertaking a compliance intervention in respect of returns where a section 80 exemption has been claimed, Revenue will check that all of the qualifying conditions have been met. In such circumstances, Revenue will seek supporting documentation, which may include a group schematic of the various entities involved in a scheme and the transfers of shares and assets between them.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

11 Appendix 1 – Relevant case law

Term/concept	Case law reference
Reconstruction and Amalgamation	• **Swithland Investments Ltd. V IRC** [1990] STC 448.
	• **Re South Africa Supply and Cold Storage Co. Ltd**. [1904] 2Ch. 268.
	• **IRC V Kent Process Control Ltd.** [1989] STC 245.
	• **Crane Freuhauf Ltd. V IRC** [1975] STC 51.
	• **Brooklands Selangor Holdings V IRC** [1970] 2 All ER 76.
	• **Baytrust Holdings Ltd. V IRC** [1971] 3 All ER 76.
	• **Thomas Firth & John Brown (Investments) Ltd. V IRC** [1971] 3 All ER 76.
	• **Re Walkers Settlement** [1935] Ch. 567.
	• **IRC V Ufitec Group Ltd.** [1977] 3 All ER 924.
	• **Keane (PW) & Co Ltd. v Revenue Commissioners** [2008] ITR 57
Particular existing company	• **Chelsea Land and Investment Company Ltd. V IRC** [1978] 2 All ER 113.
Undertaking	• **Baytrust Holdings Ltd. V IRC** [1971] 3 All ER 76.
	• **E. Gomme Ltd. V IRC** [1964] 3 All RE 497.
	• **Salaried Person's Postal Loans v HMRC**
	• **McGregor v Adcock** [1977] STC 206
	• **Mannion v Johnston** [1988] STC 758
Issue of shares	• **Murex V IRC** [1933] 1 KB 173.
	• **Oswald Tillotson V IRC** [1933] 1 KB 134.
	• **Baytrust Holdings Ltd. V IRC** [1971] 3 All ER 76.

	• **Crane Freuhauf Ltd. V IRC** [1975] STC 51.
	• **Brotex Cellulose Fibres V IRC** [1933] 1 KB 158.
Consideration for the acquisition	• **Central and District Properties Ltd. V IRC** [1966] 2 All ER 433.

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