

## Minutes

### TALC Ad-hoc Sub-committee Companies Act 2014 Meeting

Date 6 April 2016

Location & Time Conference Room 1, Cross Blocks 8-10, Dublin Castle 10:30 am

#### Attendees:

**Law Society:** Sonya Manzor

**ITI:** Sharon Burke, David Fennell

**PwC:** Fiona Carney

**William Fry:** Barbara Kenny

**Revenue:** Michael Buckley, Jeanette Doonan, Maresa Hempenstall, Jean Kennedy, Alan Kelly, John McGorry

**Non-Attendee:** Kimberley Rowan (Chartered Accountants)

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#### Introduction

The purpose of the meeting was to discuss the core, high level taxation issues arising out of the Companies Act 2014, with a specific focus on merger and division transactions. This was done with a view to identifying what measures might need to be taken with regard to tax legislation, guidance, etc. as a result of the Companies Act 2014 provisions relating to mergers and divisions.

#### **Item 1: Legal Analysis of Mergers and Divisions**

Practitioners provided an overview of the type of transactions that are provided for in the Companies Act 2014 and their respective legal effects. The Companies Act 2014 deals with mergers of Irish private companies, one of which must be a LTD company.

#### **Points Noted:**

- Under domestic law, in a majority of cases the Summary Approval Procedure can be used to effect a merger (a High Court order would not be required, resulting in a significant saving of time and money for the relevant companies).
- To date, practitioners' experience of mergers under the Companies Act 2014 has largely been in relation to groups that are tidying up their group structures. The advantages of a merger under the Companies Act 2014 include a) that contracts are automatically transferred without the need for assignment or novation; b) the ability to effect the merger is not dependent on having available distributable reserves; and c) the transferor company dissolves at the same time as the transfer, without the time or expense of a liquidation being required.
- The practitioners talked through the main documents including the Common Draft Terms of Merger, a Declaration of Solvency by the directors of each company and a unanimous shareholder resolution. Certain additional documentation is not required in group mergers and is only required where a 3<sup>rd</sup> party is involved.

- According to practitioners, a division is less likely to be encountered in practice than a merger. However, the practitioners are aware of a small number of taxpayers that are considering undertaking a division.
- The practitioners talked through divisions highlighting that a court order is required. Therefore they are not as simple as mergers and thus are not likely to be as popular.
- As part of a division, in order to secure the court order, the meeting was told that there needs to be a fair distribution of assets and liabilities to protect the shareholders and creditors of the successor companies.
- In terms of notification, all that is required is a newspaper advertisement.
- The first implication of a merger is that a company dissolves which gives rise to a disposal of assets. Not all assets will necessarily form part of the trade but under a merger all assets and liabilities transfer.
- The second implication is that the company dissolves at the same time as the transfer, such that there is no priority in relation which event happens first. The practitioners highlighted that in their view the implication is, that at that point in time, the company concerned is owned by no-one. They highlighted that having no relationship with any other company could have implications for group relief provisions.
- The successor company is deemed to be a party to the original contracts. The practitioners stated that the implication of this is that any liabilities that have not at the relevant time crystallised would transfer to the successor company or companies. Revenue pointed out that this should include underpayments of tax.
- Practitioners queried the implications of this in a division and who would be liable. The Companies Act provides that successor companies are jointly and severally liable.

## **Item 2: Stamp Duty**

### **Points Noted:**

- The practitioners were of the view that the majority of mergers would take place by way of the Summary Approval Procedure (SAP) rather than by way of a Court Order.
- The practitioners expressed the view that transfers of assets pursuant to a merger would take place by operation of law without the requirement for a stampable instrument and thus would be outside the scope of stamp duty. Revenue said it would consider this.
- Revenue queried the necessity for the current statutory exemption under section 87B SDCA 1999 if assets were transferred by operation of law. Both the practitioners and Revenue are to consider this further.
- The practitioners were of the view that a statutory exemption would be required to address the case where an additional instrument is required under the law of another jurisdiction to give legal effect to a transfer of assets in that jurisdiction because such an instrument might be regarded as being within the scope of Irish stamp duty.
- Revenue queried whether the current sections 79 and 80 SDCA 1999 could cater for the new merger provisions or could be amended to do so. The practitioners did not think that this would be appropriate and saw the need for a specific exemption.
- The practitioners are to review their proposal about the need for a specific exemption for an ICAV.

## **Item 3: CGT**

### **Points Noted**

- Practitioners noted that a doubt arises as to whether the existing CGT reliefs will apply to the types of mergers provided for in the Companies Act 2014. The fundamental change made by the Companies Act 2014 is that, in the case of mergers and divisions, all assets and liabilities are transferred by a transferor company to a successor company. As such, it is not possible to effect a 'hive-off', with the result that all the assets and liabilities of the transferor company that are transferred may not exclusively relate to that company's trade.
- It was agreed that the extinction of shares is substantially the same as the cancellation of

shares in the context of sections 584 and 587 TCA 1997.

- In relation to the relevant sections of the TCA, i.e. 584, 586, 587, 615 and 617, a fundamental question is whether these provisions apply to mergers and divisions even where all assets and liabilities are transferred by the transferor company, including those not exclusively related to the trade.
- The practitioners contended that the effect of the Companies Act 2014 is that there is no 'tax leakage' since that Act requires that the economic interests of the transferor and successor company will remain the same after the merger or division has occurred. Once a company is within the charge to tax, the existing reliefs should continue to apply.
- Revenue noted that a legislative amendment may be required but that a legislative change could possibly be achieved through an adjustment of existing provisions to accommodate mergers and divisions. Practitioners to revert with views on that. However, before deciding on what legislative amendments (if any) are required, it was agreed that Revenue would consider whether the reliefs could apply even where the assets and liabilities transferred by the transferor company to the successor company included assets and liabilities that do not relate exclusively to the trade.
- A number of follow on CGT/CAT matters related to potential clawbacks of existing reliefs on shareholder disposals arising from mergers/divisions have been flagged as matters for discussion by the sub-committee at a future date.

#### **Item 4: Tax Obligations and Administrative Issues**

##### **Points Noted**

- A number of detailed matters were discussed under the broad heading of compliance and related matters under meeting agenda item 6. Revenue responses were provided to some questions and there were a number of agreed follow-up points.
- There was some discussion around whether these matters would be best dealt with as general administrative practice or on a case by case basis.
- The accounting procedure was discussed. Audited accounts are prepared up to 3 months before the merger date. There is no legal obligation to have audited accounts for the last 3 months and so management accounts are prepared for this period..
- A list of questions and confirmations circulated in advance of the meeting were discussed. Revenue is to revert on a number of items including how the tax liabilities and certain relief entitlements, tax filing and tax payment obligations of the transferor company can be transferred to the successor both from a legal and administrative perspective.
- Practitioners are to put forward a business case outlining why a relieving provision for the successor company in relation to the Capital Goods Scheme is required.

##### **AOB**

- The practitioners noted that, arising out of the Companies Act 2014, there will be implications for the suffix for many companies e.g. DAC, LTD and that there may be implications for Revenue and its systems.
- The attendees agreed to convene a follow-up meeting to discuss the issues highlighted.

<b>Action Points</b>	<b>Responsible</b>	<b>Timescale</b>
Revenue to seek legal advice on stamp duty exemption.	Revenue	
Practitioners to revert on ICAV to clarify what the issue is.	Practitioners	
Practitioners to provide Revenue draft CGT legislative provisions.	Practitioners	
Information regarding tax filing and payment obligation procedures to be provided by Revenue.	Revenue	

Submitted for approval by Secretary

Approved by TALC Committee Members