Minutes of TALC Direct and Capital Taxes Sub-Committee Meeting

15th April 2021

Skype conference call at 2:30pm

Item 1: Review of minutes from meeting of 18th February 2021:

The minutes were agreed.

Item 2: Matters arising from meeting on 18th February 2021:

Matters arising were as follows:

a. **Difficulties experienced in the registration of companies which are foreign incorporated and do not have a branch for Irish company law purposes for taxes.**

Revenue noted that they had not received any additional information from practitioners.

Practitioners expressed the view that they had provided as much information as they could. It was noted that the cases that had been ongoing had now been resolved, but that the issue could arise again in the future. It was noted that there were two issues, being (1) delays in the CRO due to COVID-19 and the requirement for wet-ink signatures, and (2) the requirement for a company resident in Ireland through management and control, but which does not have a branch in Ireland (and a mismatch arose when registering for tax required a CRO number, but the company did not have an obligation to register for a CRO number).

b. **Section 980 – Practitioners queried whether the eCG50 process could be streamlined where multiple sellers are involved. Revenue agreed to consider this further.**

Revenue noted that the functionality to allow practitioners with a TAIN to register resident or non-resident individuals solely for CGT should go live in June.

Revenue further noted that the functionality to allow everyone access to the CGT system went live in April and this should be accessible, if registered for CGT, through ROS.

Revenue noted that there would be another development in June, to allow a soft copy of a CG50 to be dropped into the inbox of the customer and the agent. This has not been confirmed but is in the pipeline to go live in June.

Practitioners asked if the TDM would be updated to include these points. Revenue said it can be arranged if needed.

c. **Form CT1: Reporting of transactions with jurisdictions now considered to be non-cooperative for tax purposes.**

Revenue received feedback in advance of the meeting outlining the clarification they provided to practitioners in June 2020. Practitioners had requested this clarification be included in the guidance. Revenue confirmed that partial information is included in the help button on the ROS Form and it will be updated to include the remaining information. Practitioners asked if there was a timeline for when the ROS help button would be further updated and Revenue will come back on this point. It was noted that the TDM had been updated in relation to the CFC matter.

d. **Clarification on the tax treatment of exchanged/assigned unexercised KEEP share options on future exercise.**

Revenue noted that they have not received any correspondence on this issue. However, practitioners noted they felt they had provided the necessary information. It was agreed that the item be removed from the agenda.

e. **Letters of no-audit (LONA) – This matter is currently on the agenda for the next meeting of Main TALC, following which an update will be provided at this forum.**

It was noted that this has been elevated to Main TALC, but that there has been no recent Main TALC meeting.

Practitioners expressed concern that this is a difficult situation for solicitors as they can't release proceeds of sale to vendors until a letter of no audit is received and it was noted that the issue has been ongoing for some years. Practitioners urged for this to be dealt with as soon as possible.

f. **Update from Revenue on matters where submissions have been made. -** Addressed as part of agenda item 3.

g. **Draft Tax and Duty Manual "The treatment of certain gains and losses on Foreign Currencies for corporation tax purposes".**

Revenue has received feedback from the ITI and CCAB-I. Revenue will update the TDM and will circulate it again in draft form, hopefully in the next few weeks.

h. **New share schemes return.**

Revenue noted that they had received feedback on the new share scheme returns from the nominees (of the practitioner groups). Revenue considered the feedback and some changes have been made. Revenue noted that they will engage with the nominees again as they progress to the 'go live' date.

i. **DWT Declarations query.**

Revenue noted that they understood the impact that the combined issues created with COVID-19, delays in postal service and delays in receiving original documents. Revenue explained that, at the beginning of COVID-19, they had been contacted directly by some entities and had agreed to accept scanned copies of original documents in cases of genuine delay, with the original declarations to follow. Revenue confirmed that this has been discontinued with the acceptance of the relevant parties.

Revenue explained that, for 2021, Revenue's expectation is that custodians should get the originals. Where custodians have satisfied themselves that there is a genuine case of delay, and they have taken due care and have checked the validity and authenticity of the DWT declaration, a scanned copy would be acceptable but the original must be in transit when the scanned copy is sent. Revenue continued to say that where the original was not available in a short period (ie, two weeks) the custodian must fully resolve the matter. Revenue emphasised that it was only in exceptional circumstances that a scan is acceptable.

Practitioners asked if this view had been published and Revenue said that they would share this.

Practitioners noted that there was an update on the guidance notes on DWT in the last few days and that there was some uncertainty in respect of Euroclear. Revenue will come back with an update on this.

j. **Update from Revenue on Revenue Guidance**. **-** Addressed as part of agenda item 8.

k. **Other.**

It was noted that a query had been raised with Revenue in respect of PPS numbers being required in the case of inheritance where the amount of the benefit being taken is significantly lower than the amount that triggers the obligation to file a return. Revenue noted that the position had not changed. Revenue stated that the requirement for each person taking an inheritance to provide a PPS number was a statutory requirement and would not change unless there was a change in legislation. Revenue acknowledged that they were aware of delays in the Department of Social Protection (in obtaining PPS numbers) but it was their expectation that this issue would be resolved.

On a separate point in relation to the filing of CAT returns and a query as to an option to register for CAT on ROS. Revenue stated that this query had been forwarded to the relevant Revenue area and that they will come back to this sub-committee on this.

Item 3: Update from Revenue on matters where submissions have been made:

3.1 Stamp Duty – Associated Companies Relief TDM and manual on the classification of foreign entities for Irish tax purposes.

Revenue noted that an updated TDM clarifying the position in respect of the transfer of property has been recently issued which confirmed the current position. Revenue stated that they had agreed that the two year holding requirement in respect of property transferred a number of times would not apply provided the property remained in the wider group for two years from the last transfer.

In relation to partnerships, it was confirmed that partnerships can be looked through for the purposes of association, but that the transfer must be between bodies corporate. This also applied to foreign entities.

Revenue noted that it had previously mentioned that they were drafting a manual on the classification of foreign entities for tax purposes. A time frame for this could not be given at the moment. A draft will be circulated to this sub-committee for review before it is published.

Practitioners noted that it would have been helpful if the updated Associated Companies Relief TDM had been circulated in draft before publication. Practitioners expressed concern that some updates have the potential to cause confusion and noted that there seems to be an inconsistency in approach.

Practitioners noted that the best approach might be to make a submission to Revenue on this.

Revenue noted that, from their point of view, they were sticking to the legislation. Revenue stated that you could have a partnership in a foreign jurisdiction that is a body corporate and satisfies the conditions, but that it may not have a share capital structure.

Practitioners queried if the position in respect of non-Irish partnerships was still open for individual review and clarifications, and that some may be bodies corporate. Revenue confirmed that it was.

Revenue noted that as there were so many variations and types of entity at the moment it will remain a case of reviewing on a case by case basis, where appropriate.

Practitioners raised another concern in respect of loan waivers and write-offs and how it had been mentioned that conversion into capital might be a slightly different category to waivers, as assets aren't dissipated (and that it's one form of asset being replaced by another). It was agreed that this would be raised in the submission(s) to be made to Revenue.

Practitioners noted that the TDM says you can look through Irish Limited Partnerships and asked, in the context of foreign similar vehicles, was it Revenue's position they you can't trace through those without going to Revenue first? Revenue noted that it would be best to go to them first.

In relation to the proposed manual on the classification of foreign entities for tax purposes, it was noted that this will remain as a standing item on the agenda. Revenue was asked to clarify if they were working on a methodology, as opposed to a list of particular entities being classified in a certain way. Revenue said that they don't propose to go on a list basis – it will likely be a more principled approach.

3.2 TDM on the payment and receipt of interest and royalties without deduction of income tax.

Revenue noted that where interest is being paid to a tax transparent foreign entity, there should be withholding unless all foreign participants can avail of self-certification.

Revenue explained that section 9 of the TDM which deals with tax transparent foreign entities (Part 08-03-06) only relates to scenarios where section 246(3)(d) TCA is applicable. So if, for example, interest was paid by an Irish corporate borrower to a tax transparent Cayman partnership and one of the limited partners was an individual tax resident in a treaty country, then no other exemption under section 246(3) TCA would apply resulting in reliance on the treaty benefits. In such circumstances section 9 of the TDM kicks in and applies a test that all limited partners must complete the self-certification form even if all other limited partners would qualify for an exemption under section 246(3) TCA. However, if all the limited partners of the Cayman partnership satisfy section 246(3)(ccc) or section 246(3)(h) then section 9 of the TDM is not relevant.

In respect of the form being stamped, Revenue explained that this was just to confirm that the entity or the person is resident and can avail of DTA relief. Revenue noted that they are of the view that they have pushed this as far as they can in the TDM.

Practitioners expressed the opinion that the obligation was disproportionate in the context of a structure where you might have 10 partners and one is resident in a 'bad' country, such that withholding tax needs to be suffered on all of the interest rather than just a portion. It was emphasised that this was especially disproportionate in the case of a general partnership, where a general partner had no real economic interest in the underlying assets.

Practitioners also raised an issue in getting forms stamped in the US and noted that this was effectively ruling out situations where you have a US payee in a structure. Revenue noted that it was not aware of an issue in the US in this regard.

Practitioners asked if there were any changes envisaged in light of the submissions made? Revenue noted that this was published after the submissions had been received. Revenue would look into the US stamping issue further.

It was agreed that, subject to the US stamp issue being considered further, this item can be taken off the agenda.

Practitioners raised a query as to whether the treatment that applies to royalties also applies to annual payments, with the same withholding tax requirements. Revenue said they would take this one away and will provide an update.

3.3 "Subject to tax" provision in paragraph 9I, Schedule 24 (notional foreign tax credits) in light of the decisions of the Court of Justice of the European Union in the UK cases of Six Continents and FII GLO (C 35/11 & Case C-446/04).

Revenue noted that they had considered this further. The answer is the same from Revenue's point of view in terms of their interpretation of the legislation. Revenue will keep the matter under review, but, at this point in time, their view on 'subject to tax' remains the same.

Practitioners noted that the response from Revenue had been received that morning and that they would review it and come back to Revenue with any further comments.

3.4 Change to the treatment of rent in the R&D TDM.

Revenue noted that they were going to issue an updated TDM shortly. Revenue's view is that rent has to be incurred wholly and exclusively for the purpose of the R&D activity, and so is in line with other parts of the manual. Revenue emphasised that it couldn't be taken 'in connection with' or 'for the purposes of'. Revenue noted that they had taken some comments from submissions on board, but that they were not completely in agreement with practitioners.

Revenue noted that there will be three further updates to the R&D TDM in relation to:

1. EWSS and TWSS.
2. Qualifying Building: this is a COVID-19 measure which may allow taxpayers a chance to extend into the fifth year where they aren't able to meet the 35%.
3. If you have employees from recruitment agencies, you don't have to notify the recruitment agency that they are not entitled to the R&D credit.

Revenue noted that they had received a submission in respect of the KDB and R&D legislation and said that the reality was that the legislation is different. Revenue said that they have taken on board some comments from submissions, which is why the updated guidance was being issued, but that they won't be agreeing with everything.

Practitioners raised concern that there was a fundamental disagreement with Revenue regarding the treatment of rent.

Item 4: Sections 31C and 31D SDCA 1999 related queries:

In reply to queries set out in the agenda and notes for the meeting, Revenue noted that in respect of their statement in a recent TDM that the anti-avoidance provisions take precedence over section 79 and section 80 SDCA 1999, they were relying on section 31C(7)(c) SDCA 1999.

Revenue noted that, when section 31D was brought in, the Minister was concerned about cancellation schemes being used for anything other than 'restructuring companies' or 'to make a company whole again'. In relation to section 80, Revenue can't see a scenario where a cancellation scheme would qualify as a reconstruction and satisfy the conditions of section 80. Practitioners noted that they would provide an example for Revenue to consider in this regard.

In respect of the practitioner queries that had been submitted to Revenue, with the examples on apportionment of consideration and the interaction between section 29 and 31C as set out immediately below, Revenue noted that they couldn't see any issues with the analysis as it was set out.

Examples provided:

Apportionment of consideration

Revenue guidance, (pg 8), example Tom, Dick and Harry suggests apportioning the consideration (for the shares) between assets acquired to trade/generate income and assets acquired to make a gain/trading stock and the relevant provision is section 31C(6). In the example, the hotel building is an asset used for the purpose of the trade, the "sole or main object" was not "of realising a gain" but the asset was acquired/held for the purpose of running the business. Therefore 1% applies to the value of the hotel property and 7.5% to the non-residential value. Can Revenue confirm that this example represents their interpretation of s31C(6) SDCA 1999, specifically sub parts (a) and (b) is the legislative basis for the Tom, Dick and Harry example per Revenue guidance.

Interaction between Section 29 (conveyance on sale combined with a building agreement) and 31C.

The Revenue guidance (pg 4) states that certain land (with building agreement for residential) which is subject to section 29 is 'treated as residential property'. This applies for the purposes of deciding whether a company derived the majority of its value from residential versus non-residential property for the purposes of the section 31C test. Assuming section 31C applies, can Revenue confirm that the consideration (for the shares) is apportioned and the part attributable to value of this land (within section 29) is subject to stamp duty at 1%/2%?

Item 5: Stamp duty returns / stamp cert query:

In reply to queries set out in the agenda and notes for the meeting, in relation to concerns that had been raised in respect of stamp duty returns being made out of hours and whether a stamp certificate could issue on that 'same day', Revenue noted that there were two issues:

1. There would need to be system development work done which is not something that could be done quickly; and
2. There would be issues where a stamp duty certificate could not be issued before payment had cleared.

Revenue will look at this, but they are not convinced that it will be possible to ensure that a stamp certificate could issue on that 'same day'.

Item 6: DAC 6 Guidance:

DAC 6 Guidance - Queries in relation to Revenue's TDM "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" (Part 33-03-03):

Specific queries were set out in the agenda and notes for the meeting. These have been replicated below, for good order and ease of review:

a.* "*Inclusion of Arrangement ID in Form CT1

Section 5.6 of the TDM notes, in relation to the duty of a relevant taxpayer to include the Arrangement ID in their tax return in accordance with s817RD(8)/(9), that "[i]n practice, relevant taxpayers will not be expected to comply with this requirement for returns that are made in respect of accounting periods ended prior to 1 January 2020 or tax years prior to 2020". In the case of a corporate taxpayer with an accounting period ending between 1 January 2020 and 31 May 2020, the corporation tax return for that accounting period will have been due for filing at some point between October 2020 and February 2021. As this was before the due date for submission of DAC6 reports for the 'lookback' period, in most cases the relevant taxpayer did not hold the Arrangement ID at the time when the tax return was filed.

We would therefore ask if it is necessary for such relevant taxpayers to reopen corporation tax returns already submitted for chargeable periods ending between 1 January and 31 May 2020 to which s817RD(9) applies in order to add the reference number assigned to the arrangement?"

In respect of moving the filing date from July 2020 to 2021, Revenue noted that their intention was to amend the date on which a DAC6 return was to be filed with Revenue – it wasn't supposed to relax any other DAC6 obligations that were more in the 2020 space, such as conducting look back assessments.

Revenue confirmed that where a relevant taxpayer filed a corporation tax return between November and February 2021, and could not give an arrangement ID (because they weren't available), they should refile their returns in order to ensure that they have the correct filing position for 2020 (ie, to include the Arrangement ID) – this should be done without unreasonable delay.

b.* "*Duty of a Relevant Taxpayer to File a Return

Section 5.6 also includes a footnote to specify that "[i]n circumstances where an intermediary was responsible for reporting, but neither filed a return nor provided the taxpayer with an Arrangement ID, the relevant taxpayer should make a return to Revenue to obtain an Arrangement ID to include in their return of income."

We note that this appears to place a duty on a relevant taxpayer to file a return in circumstances that are not envisaged in the legislation. The duty of a relevant taxpayer to make a return is governed by s817RD(1) which provides that the relevant taxpayer must make a return to Revenue in circumstances "where there is no intermediary, or the relevant taxpayer has been notified by an intermediary under section 817RC(10)" of the application of legal professional privilege.

We would therefore be grateful for the opportunity to discuss this."

Revenue noted that they were mindful that a relevant taxpayer is now a chargeable person for the purposes of Part 41 and, as such, they have to include an Arrangement ID in their tax return. Revenue emphasised that this obligation is not with reference to who made the DAC6 disclosure but is due to the fact that someone is a relevant taxpayer. Revenue explained that this was to cover a scenario such as a difference of opinion as to whether an arrangement was to be disclosed or not. In such a scenario, a taxpayer may wish to disclose it themselves and get an Arrangement ID. Revenue explained that the footnote is just to explain how a taxpayer can get an Arrangement ID where an advisor hasn't been provided with one.

Practitioners asked Revenue to clarify that it was still clear that relevant taxpayers do not have an obligation to file a return in circumstances outside what is envisaged in the legislation. In response, Revenue said that, where a relevant taxpayer has engaged in a reportable transaction, they are a chargeable person. Revenue explained that there could be a situation where there was a disagreement between an intermediary and the taxpayer as to whether a transaction was reportable. Revenue wanted to ensure that, as the relevant taxpayer has an obligation to disclose an Arrangement ID, that the taxpayer is comfortable that they have met their obligation.

Practitioners raised a concern in respect of where a transaction is not reported by an intermediary, not because of a difference of opinion but, say, because of a failure on behalf of the intermediary to comply with their obligations. Practitioners said that this update gives the sense that the responsibility to report in such a situation would fall on the taxpayer where, in fact, it's not a statutory obligation on the taxpayer.

Revenue noted that the taxpayer has a separate obligation to disclose an Arrangement ID so, if an intermediary, for whatever reason, hasn't reported the arrangement, Revenue want to ensure that the taxpayer knows how they can get an Arrangement ID.

c. "Multiple Reporting - Exemption for Relevant Taxpayers

Section 5.5 of the TDM refers to situations where more than one relevant taxpayer is required to file a return of all of the specified information either with Revenue or with the competent authority of another Member State. The guidance confirms that a relevant taxpayer can be exempted if they retain specific written evidence that another relevant taxpayer has returned all of the specified information either with Revenue or with the competent authorities of another Member State.

We note that s817RD(5) of the legislation provides that a relevant taxpayer shall be exempt from making a return to Revenue if it has obtained written confirmation from either an intermediary or another relevant taxpayer involved in the same reportable arrangement that the specified information has been returned to Revenue. However, the legislation does not extend the exemption to situations where the specified information has been returned to the competent authorities of another Member State. This was specifically provided for in the case of an intermediary through the introduction of s817RC(6A) in Finance Act 2020.

We would therefore ask if it is intended that a similar addition will be made to s817RD to provide for this exemption in circumstances where the relevant taxpayer receives the required evidence from an intermediary or another relevant taxpayer that all of the specified information has been returned to the competent authorities of another Member State?"

Revenue noted that a relevant taxpayer can be exempt from the obligation to file a return where they obtain written confirmation from an intermediary, or other taxpayer, that the specified information has been returned to Revenue. Revenue said that they could not comment on future tax policy or legislative proposals but noted that DAC6 provides that a relevant taxpayer should be exempt from filing in Ireland where it would have been obliged to do so, but a return was filed in another member state (or by another taxpayer in Ireland) and the return contains the same information that the taxpayer would have had to return.

Item 7: Negative interest on deposit bank accounts:

Detail was set out in the agenda and notes for the meeting in relation to the application of negative interest rates by financial institutions.

At the February sub-committee meeting Revenue noted that it would consider the tax treatment of negative interest on individual savers when Irish banks imposed negative interest. Irish banks are imposing negative interest. Practitioners suggested that taxpayers subject to Case III/IV should be entitled to loss relief on sums charged as negative interest and Revenue were asked to confirm the tax treatment.

Revenue stated that interest on which DIRT applies is Schedule D, Case IV income. Revenue noted that as, under section 256 TCA, a company that provides a deposit taker with a corporation tax number doesn't suffer DIRT, the deposit interest becomes taxable under Schedule D, Case III. If a bank is charging negative interest, interest which would have been Case III will be less (and so the 'lower' amount will be taxable, and there should have been no 'loss' as such).

Practitioners queried the treatment for individual investors. Revenue said they had focused on companies but that they would look at this further. It was noted that AIB are calculating the interest in a negative fashion in the same manner as they would calculate it on a credit account – the idea here being that, if it's taxable when positive, a taxpayer should be entitled to loss relief when negative. Revenue said they would take this away and look at it for individuals. Practitioners noted that it will become an issue of increasing importance and that if Ireland doesn't give relief, there is a risk that these individuals will take their money to a jurisdiction that will.

Item 8: Update from Revenue on Revenue Guidance on:

8.1. Section 110

Revenue noted that, with regard to the last sub-committee meeting, the general consensus was to press ahead with the section 110 TDM, omitting the guidance on CLOs. Revenue has no major issue with this. It was noted by Revenue that they were extremely busy with the interest limitation rules consultation process, so the section 110 TDM has been shelved for the moment, but that it is on the list of priorities to pick up again. In terms of timing, Revenue noted that it was impossible to say, but that it was high on the agenda.

Practitioners noted that the key urgency with this was due to audit deadlines.

8.2. R&D

Revenue had no update on the ministerial order – it's with the Department of Finance.

8.3. Leasing

Revenue noted that a working group put together a number of items for discussion on future potential amendments and that this brought clarity as to which matters are to be dealt with as policy / legislative amendments and what can be dealt with in guidance. Revenue hope to circulate an updated TDM in the coming weeks. In terms of timing, Revenue couldn't give a definitive answer on this – again due to work on the interest limitation rules taking precedence.

Practitioners noted that the combined approach of the Department of Finance and Revenue has been useful here.

8.4. Stock-lending and repos transactions

Revenue have received feedback on the outstanding accounting treatment in respect of finance charges in pension funds and intend to publish guidance shortly which should hopefully clarify outstanding queries.

Practitioners noted that it would be very important for them to see the draft TDM before it's published. Revenue agreed that the draft guidance would be re-circulated before it is published. Practitioners noted that one key issue was that the legislation didn't reflect the historic guidance, so it is important to be clear on what clarifications can now be provided in guidance, and on what items a legislative change would be required. Revenue noted that they didn't believe there had been a significant departure from the historic statement of practice. Revenue will come back to the sub-committee on this as soon as possible.

Item 9: AOB:

9.1 Fees to corporate service providers

A query was raised as to whether there has been any change in the practice of the tax implications for a corporate service provider that provided a NED (non-executive director). Practitioners noted that the last time the sub-committee looked at this, the final agreement was that there would be PAYE applied on the NED elements of the fee to the corporate service provider. However, it's now understood that there is a decision coming down the line from Revenue that VAT should be applied on that type of fee structure also. Practitioners agreed to send Revenue a note on this, and Revenue agreed to take this away and come back with a response.

9.2 New representative

Declan Rigney, Revenue was welcomed to the sub-committee; and the retirement of Philip Brennan, Revenue was noted.

Item 10: Next meeting - Thursday, 24th June at 2.30 pm

Attendees at this meeting:

Revenue	ITI	CCAB-I	Law Society
Therese Bourke Dave Brennan Alan Carey Maria Doyle Karen Drake Alan Kelly Sinead McNamara Jacqueline O'Callaghan Lynda O'Keeffe Declan Rigney	Cillein Barry David Fennell Clare McGuinness Stephen Ruane Lorraine Sheegar Tom Maguire	Maud Clear Norah Collender Enda Faughnan Ken Garvey Cormac Kelleher Peter Vale	Siun Clinch (Secretary) Padraic Courtney Caroline Devlin Maura Dineen Aidan Fahy (Chair) David Lawless