Minutes of TALC Direct / Capital Taxes Sub-Committee Meeting

22nd October 2019

Office of the Revenue Commissioners, Dublin Castle, Dublin 2 at pm

The purpose of this meeting was to discuss the measures announced in the Finance Bill 2019.

Capital Taxes

Capital Acquisitions Tax – Part 5

Section 62 – Proposed amendment of section 48 of Principal Act (affidavits and accounts)

- Revenue informed practitioners that section 62 introduces a new section 48A into the TCA and is in preparation for the introduction of e-Probate and will aid in the collection and filing of data between Revenue and the Probate Office.

- Planning Division will provide more information regarding how e-Probate at the Main TALC meeting schedule for tomorrow [23rd October 2019].

- Section 62 is subject to a Ministerial Order and the issue of Regulations by Revenue.

Section 63 – Proposed amendment of section 86 of Principal Act (exemptions relating to certain dwellings)

- Section 63 amends the CAT dwelling house exemption following the decision in the Deane case in the High Court in 2018. Section 63 amends the CAT dwelling house exemption provisions in order that all properties inherited from the one estate are considered for the purposes of the dwelling house exemption.
- Section 63 also provides for a clawback mechanism in a scenario where a beneficiary receives a dwelling house as a gift / inheritance and subsequently receives an interest in a dwelling house from the same person.

Section 64 – Proposed amendment of Schedule 2 to Principle Act (computation of tax)

- Section 64 increases the Group A CAT threshold to €335,000 in respect of gifts / inheritances received on or after the 9th October 2019. Practitioners queried where a beneficiary that has already exceeded the previous CAT threshold and paid CAT can avail of a later increase in the CAT threshold for a subsequent inheritance. This was a feature when the CAT thresholds were decreasing. Revenue advised that the CAT threshold is a point in time exemption and retrospection does not apply.

Capital Gains Tax – Part 1 Chapter 6

Section 37 – Proposed amendment of provisions in relation to exit tax

- Section 37 amends section 627 TCA 1997, which impose an exit tax charge on unrealised gains where a company migrates its residence or transfers assets abroad, to ensure that the exit tax charge cannot be unintentionally bypassed.
  Practitioners queried when the charge to exit tax arises. Revenue advised that the charge applies from the date immediately before migration.

Stamp Duties – Part 4

Section 56 – Proposed amendment to of stamp duty rate on non-residential property

- Practitioners noted that there is a reference in the proposed subsection (4) to subsection (2) which appears to be incorrect and should instead be a reference to subsection (3). Revenue confirmed that the reference should be to subsection (3) and the reference will be amended at Committee Stage.
- Practitioners queried what was the intention of subsection (2). Revenue advised this amendment is in relation to the refund scheme and disapplies the new Stamp Duty rate of 7.5 per cent and new formula of 11/15 in respect of transactions that are availing of the transitional arrangements that apply to binding contracts entered into before the 9th October 2019 and where the sale or lease is finalised on or before the 31st December 2019. It ensures that refunds on such transaction will be calculated at 2/3 of 6%
- Practitioners noted the amendment is likely to have a negative impact on succession planning for smaller businesses with the rate of stamp duty now likely to be a deciding factor on whether to pass on a family business.

Section 60 – Cancellation schemes of arrangement

- Section 60 inserts a new section 31D into the Stamp Duties Consolidation At 1999 and practitioners queried what is the intention of the new section 31D. Revenue advised that the new section 31D imposes a Stamp Duty, at the rate of 1%, on the acquirer of a company where there is an agreement in place to acquire a company and the company that is to be acquired has entered into a Court approved scheme of arrangement involving the cancellation of its shares in accordance with the Companies Act 2014. The 1% Stamp Duty charge applies to to the consideration paid to the shareholders for the cancellation of their shares.

Direct Taxes

Income Tax – Part 1, Chapter 3

Section 5 – Proposed amendment to Benefit-in-kind: emission-based calculations

- Practitioners queried the position regarding benefit-in-kind on commercial vehicles which was referenced in the Budget speech but is not included in the published Finance Bill. Revenue advised that the proposed amendment applies to company cars only and not commercial vehicles.
- Practitioners also noted that there may now be an unintended misalignment between capital allowances and benefit-kind-rates for 2023 as a result of the proposed amendment. Revenue advised that they examine the issue.

Section 10 - Proposed amendment to Section 128F of Principal Act (key employee engagement programme [KEEP]

There was a detailed discussion on various aspects of the proposed legislation. The following points were covered:

- The complexity of the proposed measures. The measures are targeted at SMEs and these SMEs may have limited capacity to address their complexity. Practitioners noted that proposed subsection (1)(j) disqualifies a company from the relief where it fails to submit the prescribed reporting return by 31 March in the year following the relevant chargeable period. It appears unduly harsh that a company and employees could be automatically disqualified from the relief in circumstances where, for example, a filing is made on 2 April in the following year. This is particularly the case when considering the cohort of companies, i.e. SMEs, that is within the scope of these measures. Practitioners suggest that word "shall" be replaced with "may" so that Revenue still has the ability to disqualify the company/group in cases of, for example, consistent non-compliance.

- Practitioners also noted that the reporting obligations placed on a company operating KEEP are more onerous that those operating an Approved Profit Sharing Scheme (APSS) and a Save as You Earn Scheme (SAYE).
- The definition of a “qualifying holding company” is restrictive and does not reflect the commercial reality that a holding company in many cases also carries on a trade. It can happen that an SME group grows organically where, for example, the company carries on a trade and then sets up a subsidiary to carry on a trade in the UK or Northern Ireland or to expand its business into new lines of activity. This should not disqualify the holding company and wider group from relief under KEEP where, the group’s activities are eligible activities within the framework of the relief.
- A “wholly or mainly” test is introduced in subsection(1)(a)(i)(c) in relation to the holding of shares. Practitioners noted that guidance would be welcome on the meaning of this term in practice.
- Confirmation that the buyback of shares acquired under KEEP can be expected to meet the conditions for the benefit of the trade test in section 176, TCA 1997 would be welcome. This would allow the SME to provide assured liquidity in their shares.
- KEEP does not impose an ownership or holding period for the shares on the employee once the scheme shares have been acquired under the terms of a KEEP scheme. Section 177, TCA 1997 should be amended to align its application with the understood policy intent of the KEEP provisions.
- An amendment to section 178 was suggested to allow the SME to buy back employee KEEP shares in tranches, so as not to require the SME to repurchase the entire employee’s holding at one time.
- It is not possible for many SMEs to provide assured liquidity in their shares unless there is a mechanism in place whereby the company can redeem or buy back the KEEP scheme shares from the employees. The KEEP provisions already provide, at subsection (11), a bona fide commercial reason test to be met as part of the scheme’s requirements. It was suggested that section 135(3A) should also be amended so that arrangements that are put in place between employees and a company to provide for purchase of KEEP shares upon the happening of such events as the departures of employees, etc. do not bring the company and employee within the scope of these measures.

Income Tax, Corporation Tax and Capital Gains Tax – Part 1, Chapter 4

Section 19 – Proposed amendment of Section 81 of Principal Act (general rule as to deductions)

- Subsection (1)(a) provides that a tax deduction is not available in respect of “taxes on income” in computing the amount of profits or gains chargeable to tax under Schedule Case I or Case II and clarifies in legislation Revenue’s long held view.
- Subsection(1)(b) provides that impairment losses are deductible, from the 1st January 2018, and is intended to take account of developments in account standards.

Section 24 – Proposed amendment of Part 2 of Part 29 of Principal Act (scientific and other research)

- Revenue outlined how the revised R&D tax credit provisions will be applied.
- Practitioners raised concerns regarding the notification requirement at the time of making payment and suggested that a reasonable period could be allowed at the year-end to notify the party to which the R&D is outsourced of the intent to make an R&D claim. Such an approach would allow for any complexities that may arise regarding companies with different year ends.

Section 24 is subject to a commencement order by the Minister for Finance pending State Aid approval.

Section 25 – Proposed amendment of Part 16 of Principal Act (relief for investment in corporate trades)

Revenue indicated that the formula contained in subsection (1) will require amendment at Committee Stage.

There was a detailed discussion on various aspects of the proposed legislation. The following points were covered:

- The increase in the EII investment limits.
- The purpose of the proposed amendment to section 508(R) which Revenue advised is to ensure that there will be no circular flows of EII investment.
- Connected party rules particularly in connection with Spouse and Spouse investments and Angel investors.
- As an EII company is obliged to file a third-party return [Form 21R - Return of Third-Party Information by Nominee Holders of Securities] the failure to do so will result in the withdrawal of the EII relief granted. Practitioners enquired if thought had been given to changing this to a monetary penalty instead.

Corporation Tax – Part 1, Chapter 5

Section 26 – Transfer Pricing
Section 26 substitutes a new Part 35A, which deals with transfer pricing, into the TCA.
A detailed discussion regarding the proposed new Part 35A the followed. Numerous points were raised including

- Increase in the penalties to €25,000.
- The section applies for accounting periods starting on or after the 1st January 2020 and will apply to a company for the next accounting period that starts on or after the 1st January 2020.
- Possible conflict between Transfer Pricing and CFC rules.
- The possibility of setting up a Transfer Pricing sub-group and the publication of Revenue Guidance.

Section 27 – Proposed amendment of section 110 of Principal Act (securitisation)

- Revenue advised on what impact the amendments to section 110 would have.
- Revenue advised that the transfer pricing rules being introduced by section 26 will not apply to profit participating notes issued by a section 110 company.
- Revenue Guidance will be issued to cover the changes introduced.

Section 28 – Proposed amendment of Part 25A of Principal Act (real estate investment trusts)

- The amendments made in this section are designed to ensure that the correct tax is paid in relation to the disposal of property by a REIT.
- The amendments provide that REIT distributions funded from the proceeds of a property disposal are subject to Dividend Withholding Tax, in the same manner as distributions of property income profits.
- To ensure disposal proceeds are not held within the REIT, the amendment also provides that, where proceeds have not been re-invested in other property assets or distributed within 2 years, they will be deemed to form part of the REIT profits 85% of which must be distributed each year.

Section 29 – Proposed amendment to Irish real estate funds

- Revenue advised that the objective of the proposed amendment is to introduce additional anti-avoidance rules and further compliance requirements into the IREF taxation regime. The section amends the calculation of the amount on which IREF tax is levied to make sure that any gains which are reflected in the market value of the unit, but which are not reflected in the accounts of the IREF, are subject to IREF tax.
- Section 29 also places the IREF return filing requirement on a mandatory footing and amends Schedule 29 is to provide for a penalty for non-compliance with the IREF return requirements.
- Practitioners raised concerns that the changes that are creeping into the IREF scheme are having serious impacts on the overall scheme.
- Practitioners also noted that Section 29 may mean that investors may not be able to claim double tax relief in their home jurisdiction.

Section 30 – Hybrid mismatches.
In advance of the introduction of this section extensive discussions were held at TALC BEPS Implementation Sub-Committee and Revenue thanked practitioners for their input to these discussions.

A detailed discussion on various aspects of the proposed legislation followed and the following points were covered:

- ATAD1 makes it clear that the scope of the anti-hybrid rules is not intended to capture mismatches arising from valuation differences, this principle is not set out in section 30.
- In the definition of associated enterprise at section 835AA(5), the reference to '25 per cent' being construed as '50 per cent' should cross refer to subsection (2) [which describes the 25 per cent ownership relationships] instead of subsection (1).
- In the definition of 'payer' in respect of a payment, should subparagraph (a) refer to an *entity* and not an enterprise? It is understood that it is not intended that the measures should require testing of payments between individuals and companies as the measures are intended to apply to corporate taxpayers.
- Concerns were raised by practitioners that the Worldwide taxation measures, as currently drafted, do not adequately deal with regimes such as the US federal income tax regime.
- Should the carry forward relief at section 835AV refer both to inclusion as well as dual inclusion outcomes – depending on whether the deduction denied and carried forward arose under double deduction or deduction without inclusion outcomes.

Revenue confirmed that guidance will be used to clarify some of the issues raised.

Section 33 – Amendment of Part 28 of Principal Act (purchase and sale of securities)

- Revenue advised that Section 33 clarifies in legislation Revenue's long held practice in respect of Stocklending and Repo transactions and is being introduced in conjunction with Anti-Hybrid Rules.

Miscellaneous – Part 6

Section 66 – Mandatory automatic exchange of information in relation to reportable cross-border arrangements
As the relevant Revenue Official was unable to attend for this Section queries were answered after the TALC meeting via email. The email correspondence is reproduced below for completeness.

Intermediary Reporting Obligations

Query: I note that the Irish legislation only provides for an intermediary not to report where legal professional privilege would apply in the context of court proceedings. This is a very limited exclusion and, in light of the European wide application of the Directive, does not reflect what other countries are doing.

In particular, France and Germany have criminal sanctions for breach of professional secrecy rules and it is clear from their introduction of the Directive that they are not requiring any breach of confidentiality by professionals unless the clients have consented.

This does result in the reporting requirements for Irish intermediaries (but not European intermediaries) being wider in cross border transactions than for any non-Irish intermediaries and does create distortions in this regard which are odd in light of the purpose of the Directive to have standardised EU wide reporting for cross border transactions (remember, the new provisions are not relevant to solely domestic transactions that do not involve foreign entities).

Has the implementation in other jurisdictions been considered in relation to the wording of the provisions into Irish law to ensure a consistent application?

Response: Yes, implementation of the DAC6 in other jurisdictions was considered when drafting the transposing legislation.

Specifically in relation to legal professional privilege, it is stated in Art. 8ab(5) of the Directive:

Each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State.

In accordance with the wording of this paragraph, we took into account the position of legal professional privilege under Irish law when drafting the proposed legislation (i.e. section 817RD(9)(b)). Furthermore, to ensure consistency of application, the proposed legislation has been aligned directly with the reporting exemption provided for promoters in cases of legal professional privilege under the existing domestic disclosure regime (i.e. section 817J TCA 1997).

Guidance on the application of the DAC6 in Ireland (including legal professional privilege) will be issued by Revenue next year.

Page 111 of Finance Bill as initiated

Query: The draft legislation removes the obligation to report where it has been reported to the Revenue Commissioners. As the directive deals with cross border transactions, it is possible that a transaction might have been reported to another tax authority other than Revenue. As such, the saver should be extended to where another tax authority (as well as Revenue) has received a notification.

Response: Paragraphs (3) and (4) of Art. 8ab of the Directive require Member States to provide for a reporting exemption where an intermediary is required to file information with the competent authority of more than one Member State. In accordance with the wording of those paragraphs, such an exemption is available only to the intermediary who files the information with another competent authority:

3. Where the intermediary is liable to file information on reportable cross-border arrangements with the competent authorities of more than one Member State, such information shall be filed only in the Member State that features first in the list below:
   (a) the Member State where the intermediary is resident for tax purposes; 5.6.2018 L 139/6 Official Journal of the European Union EN
   (b) the Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
   (c) the Member State which the intermediary is incorporated in or governed by the laws of;
   (d) the Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

4. Where, pursuant to paragraph 3, there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if it has proof, in accordance with national law, that the same information has been filed in another Member State.

Section 73 – Miscellaneous technical amendments in relation to tax

Practitioners queried the policy intention behind section 73(1)(e) which amends section 485C (high earners restriction) TCA1997. As the Revenue Official was unable to attend it was agreed that this query would be answered by email after the meeting.

The Revenue email responses is reproduced below:

The amendment in Paragraph 1 (e) of the Schedule to Finance Bill 2019 (referred to in section 73 of the Bill) is to the definition of “ring-fenced income” in section 485C TCA, which is the definition section for Part 15 Chapter 2A TCA, which deals with the high income individuals’ restriction.

Section 485C TCA contains, *inter alia*, definitions of “adjusted income”, which is subject to the restriction, and “ring-fenced income”, which is excluded from “adjusted income” and not subject to the restriction.

When the provision was first introduced, “ring-fenced income” included certain income that was subject to “final liability” taxes at a rate below the higher rate of income tax and was therefore not included in “adjusted income”. These provisions were included in paragraphs (c) and (d) of the definition of “ring-fenced income”.

The sections in question were section 730J (payments in respect of foreign life policies), 730K (disposal of foreign life policies), 747D (payments in respect of offshore funds) and 747E TCA (disposal of an interest in offshore funds).

Income in those sections which was taxable at a rate higher than the higher rate of income tax was not ring-fenced and was included in “adjusted income”.

Since the high-income individuals’ restriction was introduced in Finance Act 2006, the tax rates in sections 730J, 730K, 747D and 747E TCA have been amended on a number of occasions and are now greater than the higher rate of income tax, but the definition of “ring-fenced income” in section 485C was not updated accordingly. Some of the cross-references in the definition of “ring-fenced income” were also incorrect.

The amendment restores the original position – namely, that income in those sections which is taxed at a rate higher than the higher rate of income tax is not “ring-fenced” but is included in the calculation of “adjusted income”. It does so by deleting paragraphs (c) and (d) of the definition of “ring-fenced income”.

Attendees at the meeting of 26 October 2017

Revenue

- Philip Brennan (Chair)
- Sharonne O’Reilly
- Alan Kelly
- Caitriona Crowley
- Jeanette Doonan
- Áine Hollingsworth
- Mary Breen
- Aisling Gallagher
- Lynda O‘Keeffe
- Alan Carey
- Sinead McNamara
- Dave Brennan

CCAB-I

- Kimberley Rowan
- Peter Vale

Law Society

- Caroline Devlin
- Maura Dineen
- John Cuddigan

ITI

- David Fennell
- Clare McGuinness
- Sharon Burke
- Laura Lynch
- Laura Harney
- Emma Arlow
- Sarah Meredith
- Stephen Ruane
- Paul Nestor