Minutes of TALC Direct and Capital Taxes Sub-Committee Meeting

Thursday 30th November 2023 via Microsoft Teams

11.30am to 12.15pm

Minutes

Item 1: Minutes from meeting of 7th September 2023

The minutes of the meeting of 7th September 2023 were agreed as final.

Item 2: Minutes of Joint TALC and TALC Direct and Capital Taxes Sub-Committee Finance (No.2) Bill 2023 meeting of the 25th October 2023

Revenue advised that the Draft Minutes of Joint TALC and TALC Direct and Capital Taxes Sub-Committee Finance (No.2) Bill 2023 meeting of the 25th October 2023 will be circulated shortly.

Item 3: Matters arising from meeting of 22nd June 2023:

a) **Agricultural relief and definition of farmer – Section 89 (1) CATCA**: Revenue advised that the request is still under consideration and that they hope to be in a position to circulate a response in advance of the TALC Direct and Capital Taxes Sub-Committee meeting.

b) **Section 79 SDCA 1999:** Revenue advised that the request is still under consideration and that they hope to be in a position to circulate a response in advance of the TALC Direct and Capital Taxes Sub-Committee meeting.

Item 4: Matters arising from meeting of 7th September 2023:

a) **Clawback of stamp duty relief on merger of a trade - Section 79 SDCA:** This item was discussed under Item 3(b) Matters arising from meeting of 22nd June 2023.

b) **Draft Tax and Duty Manual 26-00-02 – 'Taxation of Life Assurance Companies – Old Basis Business and New Basis Business':** Revenue thanked practitioners for feedback received on the Draft Tax and Duty Manual and advised that due to Finance (No.2) Bill 2023 commitments they have only started a review of the feedback provided recently. Revenue also advised that they are also actively engaging with the Life Assurance industry in respect of the Draft Tax and Duty Manual.

Revenue confirmed that when the Draft Tax and Duty Manual has been updated it will be circulated to members of the TALC Direct and Capital Taxes Sub-Committee before publication.

Item 5. Matters Arising from Joint TALC and TALC Direct and Capital Taxes Sub-Committee Finance (No.2) Bill meeting 25th October 2023:

a) **Section 21 – Residential premises rental income relief:** At the meeting of the 25th October 2023 practitioners queried if Section 21 will work as intend as it appeared that the clawback provision in the new Section 480C does will work properly in that the clawback is assessable at marginal rates. For example, if the credit was €600 the amount assessable will be €3,000 as that amount at 20% gives the €600 credit. However, there does not appear to be anything to limit the taxation of that €3,000 to 20%. Revenue indicated that they would review the wording of the clawback.

   Revenue thanked practitioners for highlighting the issue and advised that the had reviewed the clawback provisions and advised that there will be a possible Finance Bill 2024 change to clawback provisions to ensure that then clawback work as intended. The proposed amendment will have no impact on claims that are to be made in 2024 as the clawback of the relief will not be done until after the end of the year.

b) **Section 77 –Amendment of section 46 'delivery of returns':** Revenue advised that they could not envisage any scenario where employer provided loans would be impacted by section 46 and advised that employer provided loans should not be within scope of CAT and thus not within scope of this provision.

Issues raised following the meeting of the 25th October 2023:

Following the meeting of the 25th October 2023 practitioners submitted queries on the following sections of the Finance (No.2) Bill 2023 , as initiated, to Revenue for consideration:

a) Section 5 – Time limits for certain assessments and repayments
b) Section 25 - Amendment of section 1041 of Principal Act (rents payable to non-residents)
c) Section 47 - Amendment of section 599 (disposals within family of business or farm)
d) Section 12 – Taxation of rights to acquire shares or other assets

Revenue gave feedback on each section at the November 2023 meeting.

Practitioners requested if the queries on the four sections and the Revenue feedback could be included as an Appendix to the Minutes of the Joint TALC and TALC Direct and Capital Taxes Sub-Committee Finance (No.2) Bill meeting 25th October 2023 as had been done last year with other Finance Bill queries. Revenue agreed to this request.

For completeness the queries on the four sections and the Revenue feedback also as attached to these Minutes as an Appendix.

Capital Taxes:

No Capital Taxes items received for discussion at this meeting.

Direct Taxes:

Item 6: Draft Tax and Duty Manual 34-00-01 - Provisions relating to residence of individuals:

Revenue advised that they are planning a review of this Tax and Duty Manual in early 2024 and requested comments or observations from practitioners on items in the current Tax and Duty Manual that they believe will require further clarification and/or other items that they would like to see included in the revised Tax and Duty Manual.

Revenue requested that feedback be provided by Wednesday the 31st January 2024 if possible.

Item 7: Guidelines to assist businesses to determine correct employment status classification:
Practitioners queried if Revenue guidance would be prepared to assist businesses and practitioners to determine the correct employment status classification when applying the five-step framework in the Supreme Court judgment relating to the employment status of "Domino's Pizza" delivery drivers in the Revenue Commissioners v. Karshan (Midlands) Ltd. t/a Domino's Pizza case.

Revenue advised that current guidance contained in the Code of Practice on Determining Employment Status was updated in 2021 by an interdepartmental working group comprising the Department of Social Protection, Revenue and the Workplace Relations Commission (WRC).

Following the Supreme Court judgement in the Domino's Pizza case the Code of Practice will be required to updated again. This will involve Revenue working with colleagues in the Department of Social Protection and the Workplace Relations Commission to update the content in the Code of Practice to reflect the judgement.

Revenue further advised that the updated Code of Practice will be shared with all stakeholders including members of the TALC Direct and Capital Taxes Sub-Committee before publication.

Item 8: Form CT1 – Panel 15.1 – Dividend Withholding Tax (DWT)
Practitioners queried if the additional information ["Tax Reference Number" and "Amount Paid"] required to returned in Panel 15.1 of Form CT1 for accounting periods ending in 2021 are only required to be completed where the distribution is paid to a connected person within the meaning of s10 TCA 1997?

Prior to this update, Panel 15.1 required the provision of the following details:

- Date of distribution
- Gross value of distribution
- Value of DWT deducted, if any

Revenue advised that they had not had sufficient time to review this query and will revert with a response early next year.

Item 9: Section 891H – long accounting period
Practitioners submitted a detailed query in respect of Country-by-Country reporting as follows:
The CbCR revenue threshold test included in the definition of an Excluded MNE Group in Article 1 of the OECD model legislation ensures that a CbC report should not be required for a Group that has a total consolidated group revenue of less than €750m during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

Paragraph 28 of Revenue's Tax and Duty Manual, *Country-by-Country Reporting (Part 38-03-21)*, states that *"where an accounting period of an MNE Group is less than 12 months the threshold […] should be prorated"*. This aligns with one of the options presented in the OECD's October 2022 guidance on the application of the filing obligation rules where the consolidated financial statements for the preceding fiscal year were prepared using a short accounting period (Chapter 4, paragraph 3.2, option 3). However, neither the Revenue TDM nor OECD guidance appears to consider the treatment of the revenue threshold test in circumstances where the preceding fiscal year was a long accounting period. Rather, the guidance focuses on what data should be included in the CbC report for a long current fiscal year once the threshold has been exceeded.

Take the following example:

The Irish ultimate parent entity of a multinational group is considering whether it is required to prepare a CbC report for the current fiscal year.

- Due to a change in the group's accounting period, the group (parent and all subsidiaries) prepared its financial statements for the preceding fiscal year for a 17-month period.
- The group recorded €800 million revenue in its consolidated financial statements for that 17-month period.

- Pro-rated on a time basis, its revenue for the preceding 12-month period was therefore c. €565 million.
- Alternatively, if the €750 million threshold was adjusted for a 17-month period, the threshold would be €1,062.5 million.

Can Revenue confirm that the above group should be considered an Excluded Group for CbCR purposes?

To the extent that either a pro-rating of the consolidated turnover or the €750m threshold is considered appropriate, can Revenue please confirm whether this approach should also be applied in the following circumstances:

- The Irish ultimate parent entity of a multinational group is considering whether it is required to prepare a CbC report for the current fiscal year.
- The Irish ultimate parent entity was a newly incorporated entity in the preceding fiscal year and so to align its year end with the newly acquired subsidiaries (who prepare their accounts to 31 December each year), it prepared its consolidated financial statements for the preceding fiscal year ("the tested period") for a 17-month period to a 31 December year end.
- On preparing the consolidated group accounts for the preceding fiscal year, the following results were included on a line-by-line basis:
    - The full 17-month period figures for the ultimate parent entity, and
    - The 12-month figures for the newly acquired subsidiaries ending on the same 31 December year end as the ultimate parent entity.
- The group recorded €800 million revenue in its consolidated financial statements for that 17-month period.
- Pro-rated on a time basis, its revenue for the preceding 12-month period was therefore c. €565 million.
- Alternatively, if the €750 million threshold was adjusted for a 17-month period, the threshold would be €1,062.5 million.
- However, looking at the actual results of the group for the 12-month period immediately preceding the balance sheet date of the tested period, the consolidated group turnover exceeded €750m.

Can Revenue please confirm how the revenue threshold test in the definition of Excluded MNE Group should be applied in the above scenario?

Revenue advised that they had not had sufficient time to review this query and will revert with a response early next year.

Item 8: AOB:

The ITI will be in the Chair of the TALC Direct/Capital Taxes Sub-committee in 2024 and Laura Lynch has agreed to act as Chair for the upcoming year on behalf of the ITI. The dates for meetings in 2024 will be confirmed in January 2024.

Attendees at this meeting:

Revenue	ITI	CCAB-I	Law Society
Tom James (Chair) Karen Drake John Kelly Barbara Ní Neachtain Eleanor Smiley Dave Brennan (Secretary)	Lorraine Sheegar Clare McGuinness Kim Doyle David Fennell Laura Lynch Cillien Barry	Peter Vale Gearóid O'Sullivan Enda Faughnan Ken Garvey Cormac Kelleher Colin Smith	Rachael Hession Caroline Devlin Aidan Fahy David Lawless John Cuddigan Aileen Keogan

Appendix

Following the TALC Direct and Capital Taxes Sub-Committee meeting of the 25th October 2023 queries on the following sections of Finance (No.2) Bill 2023, as initiated, were submitted to Revenue for consideration.

a) **Section 5 – Time limits for certain assessments and repayments:**

Query: There would appear to be a potential mismatch between Revenue's ability to issue an assessment (Section 5(4)) versus employers getting credit for taxes paid (Section 5(3)). For example, for a March 2019 PAYE period, an employer could get credit /rebates for taxes paid until December 2023 whereas Revenue could issue assessment until December 2024. It is unclear whether this is the policy intention.

Response: Revenue can confirm this was the intention of the policy and brings the position in line with timelines associated with Income Tax and Corporation Tax refunds and assessments.

b) **Section 25 - Amendment of section 1041 of Principal Act (rents payable to non-residents):**

Query: As discussed at the meeting in October, we believe the reference to "to" in the updated S1041(1B)(b)(ii) should be "by", i.e., payments "due to a non-resident person which [are] made to…" the agent, etc. [emphasis added]. The change would ensure that withholding tax operates on the payment by the agent to the landlord (and not on the payment to the agent by the tenant).

Response: Practitioners queried whether the amendment to section 1041 TCA in section 25 Finace (No. 2) Bill 2023 would oblige a tenant to deduct withholding tax from a payment made through a collection agent to a non-resident landlord.

Section 238(2) TCA provides that, on the payment of an annuity or other annual payment charged to tax under Schedule D (which includes payment of rental income), "the person by or through whom any such payment is made" shall deduct and remit 20% withholding tax from the payment; section 238(3) provides that the withholding tax deducted shall be remitted to Revenue. Section 238 therefore applies to these payments because they are made by the tenant through the collection agent to the non-resident landlord.

Section 1041(1) TCA provides that where a tenant pays directly to a non-resident landlord, section 238 applies, and the tenant must deduct and remit withholding tax. Where the tenant pays the rent via a collection agent, the new section 1041(1B)(b)(i) disapplies section 1041(1) TCA, which means the tenant is not obliged to deduct and remit withholding tax. The new section 1041(1B)(b)(ii) specifies that in these circumstances section 238 applies to a collection agent, who is therefore obliged deduct withholding tax from the payment which is due to the non-resident person – that is, the gross rent – and remit it to Revenue.

Practitioners had suggested that, rather than applying to "a payment… which is made to the [collection agent]" as the provision reads, it should apply to "a payment due to a non-resident person which is made by the [collection agent]". This could mean that withholding tax would be deducted from the rents net of any commission payable to the agent, rather than from the gross rents, as would be the case if the tenant paid directly. We are satisfied that the tenant is not obliged to withhold tax in these circumstances (by virtue of section 1041(1B)(b)(i), as outlined above) and the collection agent is obliged to deduct and remit the tax from the gross rent (by virtue of section 1041(1B)(b)(ii)).

c) **Section 47: Amendment of section 599 (disposals within family of business or farm):**

Query: Section 47 of the Bill amends section 599 and increases the upper age limit from 65 years to 69 years. It also applies a new cap of €10 million to claims for retirement relief where the individual disposing of the assets to a child is aged from 55 to 69 years. Therefore, in principle, the current €3 million qualifying consideration threshold for someone aged 66 is increasing to €10 million, where a person makes a gift after 1 January 2025, before they have attained the age of 70. However, concerns have been raised regarding the way that the new rules operate where an individual makes a disposal subject to the old limit having reached the age of 66 and then makes a disposal subject to the new limit before they reach the age of 70.

For example, say you are 66 today and transfer part of a business to the value of €4 million to your child. €3 million of the deemed consideration is exempt and €1 million of the deemed consideration is subject to CGT today. You then transfer €7 million of value in 2025 when you are aged 69. While you might expect that the additional €7 million should be exempt, given that you only used up €3 million of exemption previously, the law seems to operate in a different way. It would appear that the taxable element of the pre-2025 consideration of €1 million is deemed to have taken up part of the €10 million exemption threshold available from 2025. This is due to the interaction of paragraph (a)(v) (at the top of page 78 of the Bill) and paragraph (b)(2)(b) (towards the bottom of page 78). This result would seem equitable and would not seem to be the policy intention, given that if one disposed of only €3 million pre-2025 and €7 million post 2025, overall relief of €10 million would be allowed (rather than the €9 million in above example).

Response: Following a review of the submission in respect of the then section 47 amendment to section 599 TCA 1997, and discussions with officials from the Department of Finance regarding the matters outlined in the submission, it was noted that the impact of the amendment, as then drafted, which was highlighted by the submission was not in line with the policy intent underpinning the proposed amendment to section 599 TCA 1997. As a result, a Dáil Report Stage amendment will be introduced. The updated amendment to section 599 TCA 1997 will be fully in line with the policy intention underpinning same.

d) Section 12 – Taxation of rights to acquire shares or other assets:

Query: Section 985A(4B) TCA 1997 was introduced in Finance Act 2012 following the introduction of PAYE on share awards. We understand that the rationale for the change at that time was to put beyond doubt that the employer has a statutory entitlement to 'sell to cover' in situations where share awards were being made to an employee and that individual has not otherwise made good the amount to tax required to be remitted to Revenue via PAYE. The wording of the legislation is, in our view, not sufficiently broad to capture section 128 TCA 1997 rights insofar as it is limited to instances where the "*employer pays emoluments....in the form of shares...*". This is because, section 128 liabilities are triggered by the employee exercising a right to acquire shares.

As discussed at the meeting in October, we believe that in addition to the existing amendments to section 985A outlined in Finance (No. 2) Bill 2023, section 985A (4B) should also be amended to put beyond doubt that there is a statutory entitlement on employers to sell to cover where a section 128 gain arises and is required to be subject to PAYE.

Collection of PAYE, USC and PRSI

Paragraph 2.5 of Revenue's TDM *Chapter 2 - Restricted Stock Units (RSU)* confirms that where the RSU is share settled (i.e. shares are issued to the employee/director) and an employee wishes to sell their shares to fund the tax, USC and PRSI due, Revenue is prepared to delay collection of tax, USC and PRSI until the date on which the shares are actually settled, provided that the settlement date is within 60 days of the vesting date. In those circumstances the TDM confirms that PAYE, PRSI and USC should be remitted with the payment for the month following the month in which the settlement date (or the 60th day following vesting) occurs. As discussed at the meeting in October, it would be important that a similar approach is adopted by Revenue for options which are exercised but not necessarily settled in shares until a date post exercise and indeed practitioners would envisage that a slightly extended timeline would be necessary in the case of assignees (i.e. for option gains where a non-Irish tax resident element is present during the vesting period).

In addition to the above, we would welcome clarification as to whether it is intended that the employees remain chargeable persons in respect of the share options.

Response: Revenue have reviewed the point regarding s985A(4B) and are of the view that the measure will operate as intended and that it will allow for the 'sell to cover' mechanism operate with regard to share options.

In relation to the point raised about the 60-day concession available to RSUs, there is no intention to extend this treatment in respect of this measure (share options).

By virtue of the changes to s128 the individual will no longer be a chargeable person with regard to the exercise of share options from 1 January 2024.