TALC Direct and Capital Taxes Sub-Committee Meeting (by Teams)

Thursday 1 December 2022

2.30 pm – 4:30 pm

Minutes

1. Minutes of meeting of 1 September 2022

The minutes were agreed as final.

2. Minutes of meeting of 27 October 2022

The minutes were agreed as final, with a minor correction agreed via email following the meeting.

3. Matters arising from the meeting of 1 September 2022

a) Revenue to report on the technical analysis leading to the withdrawal of Precedent 28.
The subgroup met on 22 November to discuss amendments introduced in Finance Bill 2022. The amendments introduced in Finance Bill 2022 were discussed and Revenue shared a paper with the group outlining the technical basis for the treatment of foreign pension lumps. It was agreed that the paper would be included as an addendum to the minutes of the meeting of 1 September 2022 as it pertains to matters relevant to the discussions which have taken place at this group over the last number of months.

Practitioners noted that, at the meeting of the TALC Precedent 28 subgroup, Revenue said it would provide an opportunity for feedback on the paper circulated at that meeting which outlines Revenue's position on the tax treatment of foreign pension lump sum amounts which are paid to individuals who are resident in the State for tax purposes. Revenue has noted that it intends treating legacy cases in a manner consistent with the incoming legislation.

It was agreed that the item will remain on the agenda for now.

b) Revenue to provide an update on the concerns raised in relation to ePSWT and the implications (if any) of the recent TAC case 01TCAD2022 on the employment status of locums.
Revenue to update the group following discussions with stakeholders, as mentioned at the last meeting.

Revenue informed the group that the matter comes down to the nature of the contract between the HSE and the doctors providing services under the GMS contracts, as opposed to an issue with the ePSWT system itself. Revenue has requested a meeting with the Department of Finance and the Department of Health. Revenue noted that they requested a meeting but had not received confirmation on when that meeting will take place. Revenue has noted the issue arises from the contracts in place and the terms of same.

Practitioners have set out their position clearly and so, would greatly welcome a meeting between the various bodies outlined above.

c) The draft TDM on the classification of foreign entities for Irish tax purposes was circulated by Revenue for discussion in advance of the meeting (see attachment).
Practitioners followed up with Revenue since the last meeting who advised that, due to capacity constraints, a meeting will not take place until some time in 2023.

The Chair noted that a proposed agenda has been circulated. Revenue acknowledged the proposed agenda and noted that the matter is under review. The matter has not progressed since the last meeting due to capacity constraints arising from diversion of resources to Finance Bill related matters. There is a meeting planned within Revenue to progress this matter, and Revenue is hopeful a date will be arranged prior to the Christmas break, albeit that the meeting itself may take place in 2023.

d) Revenue to provide an update on the proposed review of its TDM Review Process.
Practitioners met with Revenue officials on 19 October 2022.

Practitioners noted that at the recent meeting, it was clear that the review process was very much commencing. Practitioners acknowledged that the meeting was essentially an overview of the proposed review process rather than a detailed discussion of options to progress the review. It was noted that further meetings with Revenue would be helpful once the scope and proposed direction of the review has been fully considered by Revenue. The item will remain on the agenda, particularly as the matter is of serious importance to practitioners and taxpayers.

e) Practitioners agreed at the last meeting to provide examples to Revenue to assist in determining criteria for whether an offshore fund is equivalent to an Irish fund.
Practitioners are awaiting an update from Revenue following the discussions which took place at the September meeting.

Revenue noted that this guidance is under review and should issue in the coming weeks.

f) Revenue to consider the potential interaction of Tax and Duty Manual 04-09-01 – "Section 110: entitlement to treatment" and Schedule 24 TCA 1997 in the context of group formation for Interest Limitation Rule purposes.
Practitioners explained that there are significant issues arising in relation to section 452 elections as some section 110 entities had made such elections based on previous guidance which had been issued but it now appears that those elections are invalid.

Practitioners requested clarification as to when guidance will issue on the treatment of legacy cases. Revenue noted that there will be no concession for legacy cases. The new position will apply from the time guidance issues, which is expected to be soon.

g) Uncertainty regarding when a CG50 is required.
Revenue was to clarify the concept of "greater part of value" is arrived at. Is it a gross asset test? A net asset test? An off-balance sheet test?

Following the meeting of 1 September where this matter was raised in addition to the agenda items dealt with on that date, Revenue contacted the relevant representative group seeking further details to allow consideration of the matter. However, the detail was received relatively shortly in advance of the meeting. Revenue noted the matter appears to have wider application that that outlined in the

details provides, in particular where shares in a company derive their value from specified assets. The item will remain on the agenda for further discussion and comment at the next meeting.

h) Guidance on the deductibility of certain Digital Services Taxes (DSTs)
Revenue advised that a DST is not a tax on income, in contrast to the position in relation to withholding taxes.

It was agreed that this item can come off the agenda.

i) Draft guidance on "Leasing Ringfences – Sections 403 and 404 TCA 1997".
A subgroup was convened on 14 September to discuss the proposed guidance. The group subsequently met on 20 September, 18 October, and 25 October. The various parties continue to consider the proposed changes.

Revenue had no update on the progress of the subgroup. Practitioners queried where the matter is at, whether there was an actionable point. Revenue noted that members were to consider the State Aid implications of the matter.

It was agreed that the item would remain on the agenda.

j) Irish Real Estate Investment Funds (IREF) filing issues.
Revenue explained the reasons for the late updates and advised further changes are not anticipated in the next round of IREF filings.

It was agreed that this item could come off the agenda. Revenue did note some minor changes were expected prior to the upcoming filing deadline, but nothing substantive.

k) Requirements of Section 845C TCA 1997 – Additional Tier 1 instruments.
Revenue clarified the treatment afforded to AT1 instruments.

This item will be discussed later in the meeting.

l) DAC6 – Relevant taxpayer – duty to disclose Arrangement ID in tax return(s).
Revenue was to consider this matter further but also requested further information on some points. If information has not yet been provided, the matter can be considered at the next meeting.

Revenue's understanding is that further information was to be provided regarding transactions where a tax advantage no longer arose or was no longer recurring. Revenue would welcome examples.

The item will remain on the agenda.

m) Electric cars & Benefit-in-Kind (BIK).
Practitioners were to provide Revenue with a reasonable basis for determining business miles for electric cars where private electricity is used to power the vehicle.

Practitioners acknowledged a submission has not yet been made. It was noted as the changes are coming in January, it makes sense that the item can come off the agenda and if it needs to be revisited in later months, it can be raised again. This was agreed as a reasonable approach for now.

n) Travel to a temporary place of work – application of the "lower of" rule for business travel.
Revenue is partaking in the OECD Working Party II under the Committee on Fiscal Affairs. As it stands, where an employee chooses to work remotely, then his/her normal place of work is the employer's office.

Revenue has no update for now but noted it is part of a wider discussion surrounding blended working arrangements. It will remain under review.

It was agreed that the time could come off the agenda as the likelihood of a substantive update in the near future is unlikely. It can be revisited in due course.

o) Stamp duty on share buy-backs.
Revenue was to provide an update on whether the comments in this year's Tax Strategy Group Papers in relation to share buy-backs meant a change in practice should be expected.

Revenue noted a change in practice was not expected but noted the Minister's comments that it could be looked at in the context of Finance Act 2023. Practitioners would like to keep the matter on the agenda for now.

4. Matters arising from the Finance Bill meeting of 27 October 2022 (ITI) (Note 2)

a) Section 112B: Practitioners understand further information regarding assets provided as benefits to employees was sent directly to Revenue for consideration.

Practitioners welcomed comment from Revenue following a submission made by practitioners in advance of the meeting. Revenue noted it has not had time to consider the submission in detail in time for the meeting. Revenue noted that the changes are perhaps wider than initially thought by practitioners. Whether a scheme would be within the remit of section 112B is to be determined on a case-by-case basis. Revenue cannot provide clarification on a global basis regarding when the provision of assets would be in or out of scope of section 112B.

b) Finance Bill amendment regarding employers' PRSA contributions: Revenue update on queries sent by ITI to Revenue following the above meeting:

Clarification would be welcomed as to whether the removal of the current BIK charge on employer contributions has unintentionally classified an employer funded PRSA as an unapproved retirement benefit scheme, as a result of which a BIK charge would arise under Section 777(1) TCA? Given the policy intention is to remove the charge to BIK on employer contributions to PRSAs, it is assumed that this is not the intention.

Revenue noted that the intention of the legislation is to remove a BIK charge, rather than apply one. Its view is that employers are already allowed to make contributions to PRSAs so it was not clear how removing the BIK charge changed the status of the product. Revenue was not aware that the amendment brought contributions with section 777((1) TCA 1997.

The following was provided by way of clarification in email dated 14 December 2022 from Liam Smith (Revenue):

"As mentioned, we were unclear how the removal of the BiK charge on employer contributions to PRSAs had this effect – since the introduction of PRSAs employers could make contributions to them on behalf of employees, but there may be some nuance we have overlooked. We regard PRSAs as being dealt with by Part 2A of Chapter 30 TCA rather than Part 1 of that chapter (and it is Part 1 which contains section 777). And as indicated it was not the intention that the removal of the charge should have this effect."

If an employer is only funding for an employee or director through a PRSA, clarification would be welcomed as to whether that employee/director is then deemed to be in non-pensionable employment and entitled to tax relief in respect of premia paid under a Section 785 policy?

Revenue noted that a PRSA to which an employer was making contributions should be considered a "sponsored superannuation scheme" for the purposes of section 783 TCA and therefore the employee/director would be deemed to be in "pensionable employment" for the purposes of Part 2 Chapter 30 TCA 1997.

Revenue stated it would respond in writing to the queries received.

The following was provided by way of clarification in email dated 14 December 2022 from Liam Smith (Revenue):

"Pensionable employment" is defined in section 783(2) TCA (for the purposes of Chapter 2 of Part 30, which also contains section 785) as "service in an office or employment to which a sponsored superannuation scheme relates" (with some exceptions, not relevant for the purpose of this question). A "sponsored superannuation scheme" is defined in section 783(1)(a) TCA as "a scheme or arrangement relating to service in particular offices or employments and having for its object or one of its objects the making of provisions in respect of persons service in those offices or employments against (i) future retirement or partial retirement". It appears to us that a PRSA receiving funds from an employer is an "arrangement" which is covered by the definition of "sponsored superannuation scheme" and therefore the employee or director in that position would be deemed to be in "pensionable employment"."

5. Levy on windfall gains in the energy sector

A consultation process is underway. The Department of Climate noted there will be a single piece of legislation and will be put before the Oireachtas next year. The detail of the process will need to be worked through carefully. Revenue will not be involved. The following noted was provided by Revenue:

> The Department of the Environment, Climate and Communications are developing legislation to implement Council Regulation (EU) 2022/1854, therefore these queries should be posed to the Department via the consultation process they are currently undertaking with impacted stakeholders.

The Department informed us in advance of today's meeting that there will be one piece of primary legislation for the Temporary Solidarity Contribution and the Market Cap on Revenues. The legislation will likely go before the Oireachtas next year and the Department is hoping to get a general scheme of the bill approved and published before Christmas. However, some aspects of the Regulation are complex to implement and the detail of the process will need to be worked through carefully.

It should be noted that it is not intended for Revenue to have any involvement in the Market Cap on revenues in the electricity sector.

The Department have provided the following contact details for queries from stakeholders –

Temporary Solidarity Contribution – Laurena Leacy laurena.leacy@decc.gov.ie

Market Cap on Revenues – Evan Walker evan.walker@decc.gov.ie, Sam McArdle samuel.mcardle@decc.gov.ie

6. Tips paid by electronic means

Note provided in advance of the meeting

Practitioners would welcome clarity regarding the reporting/withholding requirements (if any) for employers in respect of electronic tips paid directly to employees by patrons. An example of the fact pattern on which clarity is sought would be as follows:

- An employer operating in the service industry allow employees to utilise a tipping software app in their place of business. The purpose of the app is to allow patrons to tip employees directly.
- The app is provided by a third-party company and there is no agreement between the employer and the third-party provider.
- Any agreement and terms and conditions is between the employees and third-party app provider.
- Any monthly/transaction fees are payable by the employee and the employer does not bear any cost associated with the arrangement.
- Patrons may scan a QR code provided by the employee directly or a sign at the POS desk.
- Employees will withdraw the funds from their wallet to their personal bank accounts directly.
- Payments will be made via electronically by the patron via Applepay, Googlepay or by the patron using their bank card.

In the UK, HMRC have issued guidance which appears to suggest that in a similar fact pattern to that outlined above, it is the employee who is responsible for declaring the tip income on their personal income tax return and paying the associated taxes to HMRC, in which case, an employer withholding/reporting obligation does not arise.

Discussion which took place at the meeting

Revenue noted it is mindful of incoming legislation and the latest technologies. There is a meeting with the Personal Division next week. Following that meeting, Revenue will consider any updates to guidance at that point.

The item will remain on the agenda for the next meeting.

7. Section 845C TCA 1997 (ITI) (Note 5)

The following note was provide in advance of the meeting:

Aspects of the requirements under Section 845C TCA 1997 were discussed at the September meeting of the TALC Direct/Capital Taxes Sub-committee meeting. Practitioners would welcome clarity on the following two additional points:

- One of the conditions under the Capital Requirements Regulation is that upon the occurrence of a 'trigger event', the principal amount of the instruments would be written down on a permanent or temporary basis or the instruments would be converted to Common Equity Tier 1 Instruments. For these purposes, a 'trigger event' refers to a formula which includes references to Common Equity Tier 1 Capital and risk weighted assets.

  Practitioners would welcome clarity as to how this criteria is to be applied in a non-banking context for the purposes of Section 845C. Revenue guidance states: *"It would be expected that an 'equivalent' instrument would ….possess the convertible capability associated with AT1 instruments as CoCos, i.e. that the instruments can be written down or converted into equity upon a pre-specified trigger event."* It then goes on to say that "*where a condition prescribed in respect of AT1 instruments are issued by financial institutions, the Article 52 criterion should be adapted or modified as necessary so that a corresponding criterion may be applied to the instrument in a non-financial institutional context*."

  As non-banks neither have Common Equity Tier 1 Capital nor a requirement to risk weigh their assets, can these criteria be dis-applied in the context of a non-bank or how would Revenue expect it to be satisfied?

- Another condition of the Capital Requirements Regulation is that the instrument must rank below Tier 2 instruments in the event of the insolvency of the institution. This test is not directly of relevance for a non-bank but typically such notes would be junior and subordinated to the Issuers senior creditors. Is this sufficient to meet this test?

The following discussion took place at the meeting

Practitioners requested feedback on the above queries, which they hope were clear.

Revenue acknowledged the submissions made and noted that there has not been sufficient resources available to consider. As such, Revenue proposes issuing a paper in the coming weeks if needs be.

8. AOB

8.1. eBrief No. 195/22 on equity funding in the HTB Scheme

Revenue wished to bring the release of this eBrief to the group's attention. The eBrief clarifies that equity funding provided by the State as part of a shared equity arrangement does not meet the legislative definition of a qualifying loan for the purposes of section 477C TCA 1997 and thus does not form part of the Loan To Value (LTV) calculation required by subsection 11. Issued 16 November 2022.

8.2. Section 604A TDM

Practitioners requested publication of the revised TDM. Revenue noted that updates to the TDM had been approved and should be back on the system by the end of the week. Clarity on the interaction with inheritance taxes is now provided, as requested. Revenue confirmed that the reference to consideration in section 604A is to actual consideration, as was previously confirmed to the sub-committee on 19 February 2014.

8.3. BREXIT Whitefish decommissioning scheme

Practitioners noted that there are various elements of the scheme where clarity would be welcome, particularly regarding how payments will be taxed.

Practitioners would welcome circulation of a draft TDM where some indication of how the payments will be taxed could be provided. Practitioners are requesting equality of treatment for different persons (individuals and companies) entitled to a payment in the context of Retirement Relief and Revised Entrepreneurs Relief. There are also concerns where the payment is made to a company and a liquidator is appointed after the boat is decommissioned.. The payments under the scheme are anticipated to total circa €60 million.

Revenue noted that there were income and capital elements to the scheme and that certain parts were subject to State aid approval.

Further, Revenue noted that, regarding any capital element, the provisions regarding retirement relief relating to the holding period and age relate to individuals only. As a result of policy decisions, no amendment was made to Entrepreneur Relief. Only the conditions for Retirement Relief have been relaxed. The fact that companies may hold the licence was flagged and policy decisions were taken.

Revenue noted that a TDM is unlikely to be published in draft. It is nearly finalised and will be published in the near future, likely before Christmas.

Practitioners queried if the Ministerial Commencement Order has issued. Revenue was not aware but will check with officials in the Department of Finance, who have responsibility for the relevant commencement orders, and revert.

Attendees:

Revenue	ITI	CCAB-I	Law Society
Declan Rigney Jacqueline O'Callaghan Mary Breen Áine Hollingsworth Karen Drake Liam Smith Alan Kelly Killian Dirwan Dave Brennan	David Fennell Cillein Barry Laura Lynch Emma Arlow Stephen Ruane Clare McGuinness Lorraine Sheegar	Peter Vale (Chair) Gearóid O'Sullivan (Secretary) Enda Faughnan Ken Garvey Cormac Kelleher Colin Smith	Rachael Hession Caroline Devlin Aidan Fahy David Lawless John Cuddigan