Joint Meeting of Main TALC and the TALC Direct and Capital Taxes Sub-Committee Finance Bill 2021 meeting – 1 November 2021

Combined list of queries raised in advance of the meeting

Capital Taxes

Capital Gains Tax – Part 1, Chapter 6

Section 37 – Transfers arising from certain mergers under Companies Act 2014

Irish Tax Institute:
We note that Section 37 of Finance Bill 2021 proposes the introduction of a new S617A to apply to domestic mergers by absorption to which Companies Act 2014 apply. We would like to clarify whether this section is intended to take precedence over Section 633D which can also apply to domestic mergers by absorption?

We would also like to confirm how the provisions of Section 617A / 633D interact with Section 626B TCA 97. In the case of a merger to which the provisions of Sections 617A or 633D apply, the merger is not treated as involving a disposal by the parent company of the share capital which it held in the subsidiary company. We understand that the provisions of Section 626B can therefore have no application. We note that this is distinguishable from the reorganisation provisions where it is specifically stated in s626B(1)(b)(iii) that "in determining whether the treatment provided for in ss(2) applies, the question of whether there is a disposal shall be determined without regard to section 584 or that section: and, to the extent to which an exemption under ss(2) does apply in relation to the disposal, section 584 shall not apply in relation to the disposal".

Law Society:
Section 37 - proposes to introduce a new section 617A with the effect that mergers "by absorption" that take place under the Companies Act 2014 will no longer give rise to a disposal for capital gains tax purposes of shares by a "parent" company in a wholly owned subsidiary company

This is sensible amendment as it preserves, in principle, the tax neutrality of wholly domestic mergers. However, it is unclear to us why this proposed provision, in its current form, is limited to situations involving mergers "by absorption". It appears therefore that there is currently a gap in the proposed new section 617A as the same principle (namely, to preserve the tax neutrality of wholly domestic mergers) holds in relation to other types of mergers permitted under the Companies Act 2014, eg, mergers "by acquisition".

This could be rectified by re-designating the current proposed wording in the new section 617A as sub-section (1) and introducing a new sub-section (2) as follows.

> "(2) The transfer of all of the assets and liabilities of a company which is the sole shareholder of another company (in this section referred to as the "parent company") to a wholly owned subsidiary as a consequence of a merger by acquisition to which Chapter 3 of Part 9 of, or Chapter 16 of Part 17 of, the Companies Act 2014 applies shall not be treated as involving a disposal by the parent company of the share capital which the parent company held in the subsidiary company immediately before the merger."

Stamp Duties – Part 4

Section 55 – Stamp duty on certain acquisitions of residential property

CCAB-I:
When is the effective date of section 55 - does this apply to acquisitions on or after 20 May 2021?

Section 62 – Amendment of section 40 of Principal Act (free use of property, free loans, etc.)

Irish Tax Institute:

(i) Section 40 CATCA 2003 provides that a person is deemed to take a gift each year where the person is allowed to have the use, occupation or enjoyment of any property other than for full consideration. At present, the value of this benefit is calculated by reference to the difference between the open market value for use (i.e. the best price which would be obtainable for such use in the open market) and the amount of any consideration which is paid by the beneficiary.

In relation to an interest free loan, the "the best price obtainable in the open market" is taken to mean the income from the investment of the cash, which would be the best bank deposit rate obtainable in the open market on such a sum. This valuation method is clear and easy to calculate and generally free from any misinterpretation.

The amendment in section 62 of the Finance Bill changes the calculation of the benefit taken on interest free loans to the best price obtainable for borrowing an equivalent amount of money in the open market. The new calculation method creates some uncertainty over how to value the benefit and also seems to create some anomalies which may not have been intended. This is best explained by way of an example (see below). Generally speaking, the vast bulk of interest free loans are from parents to their children who are looking to purchase a family home. Under the proposed rules, you could have a situation where a parent is very wealthy and/or the beneficiary has significant assets and, in this case, the beneficiary may be able to negotiate a low mortgage interest rate on the open market, because of their personal wealth or because their wealthy parent is prepared to go guarantor on the mortgage. In contrast, where a child does not have a wealthy parent or significant assets the best rate obtainable for them in the open market might be significantly higher than the previous scenario. Therefore, you could have situations where differing rates apply to loans for the same purpose.

Also, it is unclear what level of proof would be required to prove the borrowing rate applied to the loan. Would it be simply the case of keeping a record of mortgage interest rates, or would it be necessary to actually apply for a mortgage to ascertain the appropriate level of the mortgage? The latter would be very onerous for beneficiaries.

A clearer method of calculating the benefit would give beneficiaries of such loans more comfort over their CAT exposure. We would be grateful if this matter could be reviewed further by Revenue / Department of Finance and for consideration to be given to appropriate amendments to the Finance Bill.

(ii) Section 40 CATCA 2003 provides that a gift is deemed to be taken on 31 December if subsection 4 does not apply. The value of this gift is determined by reference to the date the gift is deemed to be taken, i.e., 31 December. As this amending provision comes into force on passing of the Finance Bill into law, usually in late December, this could have the effect of valuing the use of money under the new provision for the whole of 2021. To prevent retrospective application of this new provision and provide certainty to the taxpayer, we believe that section 62 of the Finance Bill should be amended to include a commencement date of 1 January 2022.

Law Society:

Section 62 amends section 40 CATCA 2003. This proposes a material change and raises numerous issues. It has the potential to give rise to significant uncertainty for taxpayers. It does not consider, nor address, considerations which would impact on an applicable interest rate such as the potential term of any loan, the potential security, the amount thereof, and the circumstances of a 'borrower'. From a certainty of law perspective, it would be preferable to retain the status quo in this regard.

What is the date of commencement of Section 62? If the Finance Bill is enacted before 31 December 2021, how will this interact with the definition of a relevant period in section 40(1) CATCA 2003? Presumably there will be no retrospective taxation on loans for this year? If a change is to be made, for ease of administration it would be preferable if any change was to apply from 1 January 2022 only.

It would be good to understand the situations where Revenue would seek to impose the charge. The TSG papers focused on aligning the treatment of interest free loans with benefits of providing free use of a house or a car. In

other words, focused on domestic and family arrangements. Can we obtain confirmation that this is where it is to apply and not to more commercial arrangements?

CCAB-I:
What is the date of commencement of section 62? Where the Bill is enacted before 31 December, how will this interact with the definition of a relevant period in section 40(1) CATCA 2003?

How can open market value be used in situations where a taxpayer cannot secure finance on the open market?

Direct Taxes

Income Tax – Part 1, Chapter 3

Section 3 – Deduction in respect of certain expenses of remote working

CCAB-I:
Will Revenue require a formal agreement to be in place between the employer and the employee under which the employee is required to work from home for the purposes of the new section 114A TCA 1997? Subsection 6 says that evidence must be submitted on making a Remote Working Relief claim. Does this requirement apply to self-assessed taxpayers? If yes, this is contrary to self-assessment.

Revenue's Budget Summary 2022 notes that Remote Working Relief can be claimed in real-time. How will this work?

Section 18 – Non-resident landlords

Irish Tax Institute:
This section provides for several amendments to bring companies not resident in the State that are in receipt of Irish source rental income within the charge to corporation tax in place of the income tax charge which currently applies. The change was expressly introduced in conjunction with the introduction of ATAD interest limitation rules, to ensure that non-resident corporate landlords will also be subject to the new rules from introduction.

As non-resident companies will be subject to corporation tax with effect from 1 January 2022, such companies will also be subject to the other restrictions on interest deductions contained within the corporation tax rules. In particular, Section 840A TCA 1997 applies *"in computing the amount of the profits or gains to be charged to corporation tax under Schedule D".*

Many non-resident landlords would have acquired commercial and residential property portfolios from vendors selling corporate entities or other holding structures. A number of those landlords would then have transferred the properties out of that existing vehicle into their standard commercial holding structure for such properties. This standard holding structure is generally mandated by overall group banking security arrangements, or by legal requirements for holding of assets by regulated type entities (e.g. pension funds).

In the course of these post acquisition re-organisations, it is often the case that the new holder of the property uses related party borrowings to acquire the assets. These companies were not previously impacted by Section 840A TCA 1997. With effect from 1 January 2022, it would appear that no interest will be deductible on such loans even where the loans to acquire the properties were drawn down before 21 October 2021 (date of the publication of the Finance Bill). This is the case notwithstanding that the interest on the debt was previously deductible for income tax purposes. In many of these cases, the external debt of the owner is held at a different level in their corporate structure and so Section 840A(7) TCA 1997 will not provide any relief.

Many non-resident corporate landlords anticipated that they would be impacted by the ATAD rules with effect from 1 January 2022 and managed their banking and other payment obligations on the basis that the 30% EBITDA limitation rules would apply. However, such landlords did not expect that the interest relief on their borrowings would be reduced to zero by virtue of a rule that did not apply to them when they acquired the properties.

In the event that they are not entitled to tax relief up to 30% of EBITDA, it is likely the tax liability arising on gross rents will in many cases exceed their total profits arising from that property.

In our view, consideration should be given to amending section 18 Finance Bill 2021 to ensure that either section 840A TCA 1997 will not apply when calculating the profits or gains subject to corporation tax of a company not resident in the State that is chargeable to tax under Case V of Schedule D or alternatively that Section 840A TCA 1997 shall only apply to a company not resident in the State that is chargeable to tax under Case V of Schedule D for loans drawn down after 21 October 2021 (date of the publication of the Finance Bill).

In addition, subsection 18(d) of the Bill makes reference to section 959AS. Should this reference be to s959AR?

Section 26 – Amendment of Part 16 of Principal Act (relief for investment in corporate trades)

Irish Tax Institute:
Clarification would be welcomed on the following points:

- A 'designated fund' which under s508I(3)(a) must have as its 'sole purpose' investing in qualifying companies. We would be grateful for confirmation that a 'qualifying investment fund' can invest in companies that are not qualifying companies.
- Section 508IA(2)(b)(iii) states that *"the funds to be invested in eligible shares are to be invested without undue delay"*. We would welcome guidance regarding the interpretation of 'undue delay'.
- Is a 'qualifying investment fund" under s508IA required to be pre-approved by Revenue?

1. Section 26(b) reintroduces a condition relating to increased employment / R&D. This condition was previously removed following the removal of second stage relief for shares issued after 8 October 2019. We would like to understand the rationale for the introduction of this rule given that Section 496(2)(a) specifically states that EIIS is for the creation **or maintenance** of employment.
2. In Section 26(d) with reference to "the limits set out in section 503(3) in any other case" can Revenue please provide clarity. For example, does the €250K limit apply to everyone even if the limit was €150K when the investment was made? Or is there an upper limit of €500K for everyone in the years following investment?
3. Can Revenue clarify the effective date of Section 26? Other than where specifically mentioned, Part 1 takes effect from 1 Jan 2022. How does this tie in with the removal of the 30% spend rule? For example, if a company issues shares on 20 December, it can issue the Statement of Qualifications anytime in the period from the date 30% of the funds raised are spent on a qualifying purpose and 31 December 2023. However, if s26 has effect from 1 Jan 2022, Statement of Qualifications cannot be issued later than 4 months after the date the shares were issued, being 20 April 2022, and the RICT return must be filed by that date. The FB does not specifically state s26 applies to shares issued on or after 1 Jan 2022 (other than the new clawback rule mentioned in point 1 above), it states Part 1 takes effect from 1 Jan 2022.
4. The 4-month period post the end of the year of assessment provided for in Section 26 is too short and we believe that consideration should be given to increasing it to 10 months post tax year end, to align with investors filing their tax returns.
5. Subsection (h) replaces Section 508F(2)(d) with "the date the conditions set out in s508B(4)(a) are satisfied" which are the requirements to increase employment/R&D. They cannot be satisfied before 3 years post share subscription. This means that an investor cannot make a claim for their relief before these conditions are satisfied, notwithstanding that the company has to self-certify within 4 months of the end of the tax year in which the shares were issued. Given the SQ process was intended to address the delays in getting certificates to investors so they could claim their relief in a timely manner it would appear that may be an unintended error that will require an amendment.
6. Qualifying investment funds (the new S508IA(2)(b)(ii)): Can Revenue clarify if such funds can invest in shares or assets other than EIIS eligible shares, given the condition that "pending investment in eligible shares, any moneys subscribed for the purchase of shares are to be placed on deposit"?

7. Subsection (m) dealing with capital redemptions.

   (i) Can Revenue explain why SCI and SURE claimants are excluded?
   (ii) Can Revenue also clarify that subsection (b) of that new provision means that the company cannot raise any Part 16 funds 12 months after the redemption from any investors and that subsection (c) means that the individual whose shares were redeemed cannot reinvest in that company for another 5 years?

   It would be helpful if Revenue also please explain the rationale for these restrictions given that there is a limited pool of potential investors for companies to going to market and there are not enough investors to obtain new ones every time they raise funds.

   Investors are more likely to follow their money to support a venture they have already invested in, and it is more cost and time effective for companies to seek funds from existing investors rather than have to go out and find new ones each time. It also adds unnecessary burden to funds (designated or the new qualifying investment funds), who will need to check all their individual investor lists every time they reinvest in a company to see if this rule is breached.

CCAB-I:

EII rules on partnerships

- Confirmation that under the new s508IA a 'qualifying investment fund" does not (unlike a 'designated fund' under s508I(1)) need to be pre-approved by Revenue.
- Confirmation that a 'qualifying investment fund' can invest in companies that are not qualifying companies (unlike a 'designated fund' which under s508I(3)(a) must have as its 'sole purpose' investing in qualifying companies).
- New s.508IA(2)(b)(iii) requires funds to be invested in eligible shares must be invested without undue delay. How will 'undue delay' be determined?
- Would it be possible to include something here about the definition of 'eligible shares' under s494 to cater for 'shares' that blend some of the characteristics of equity and loans. The risk is that investors who claimed EII on an original equity investment might lose that tax relief (under the 'connected persons' rules under s500) if they later invest for a different type of equity that does not attach EII relief. Depending on the typical design of the post initial funding round 'equity'. investors might be left with a choice of either following their money (but losing EII) or opting out of future investment rounds in order to preserve their EII relief.

Section 27 – Transfer Pricing

Irish Tax Institute:

In respect of section 835E (3), clarification would be welcomed as to why there is a requirement to be both an eligible person and a qualifying person when both definitions are similar in nature.

Clarification is also sought as to the type of transaction section 835E (7) this is seeking to address.

Law Society:

Will Revenue be issuing updated guidance on foot of this amendment which draws back from the more detailed, prescriptive guidance which was issued last year?

It appears that in a group lending situation that the 'qualifying person' rule may be restrictive. Take a situation where a group company transfers a rental asset to another group member and leaves the consideration outstanding. Is it the case that the 'borrower' will not be a qualifying person (as the interest, were it charged, would not be deductible under s840A)?

In respect of section 835E(1):
What is the intention/rationale behind the condition in paragraph (b)?

The requirement in paragraph (b) for the supplier or acquirer to be "chargeable to income tax in respect of the profits or gains or losses arising from that arrangement" does not have a corresponding carve-out as found in respect of paragraph (a) (eg, the condition in paragraph (a) can be satisfied where there is no consideration, as detailed under subsection (2). It would seem logical for this same carve-out to cover paragraph (b). For instance, subsection 2 (a) and (b) could be amended to read "…1(a)(i) and 1(b)" and "…1(a)(ii) and 1(b)".

In respect of section 835E(2)(a):
We recommend that references to consideration being "receivable" be replaced with "received or receivable" in order to eliminate all doubt of recognition mismatches arising during the same chargeable period (eg, a Case III receipt vs a Case I deduction). Corresponding adjustments should also be made to section 835E(4)(a), in the context of a supplier's ability to be an 'eligible person'.

Similarly, in respect of section 835E(2)(b), references to consideration being "payable" should be replaced with "paid or payable". Corresponding adjustments should also be made to section 835E(4)(b), in the context of an acquirer's ability to be an 'eligible person'.

In respect of section 835E(2)(b)(i):
This provision details how an 'acquirer' can be regarded as chargeable to income tax or corporation tax under Schedule D in respect of the arrangement. There is a carve-out in section 835E(2)(b)(ii) for acquirers who cannot satisfy paragraph (i) but we think the language here requires further clarification. For instance, the parameters of how notional profits/gains/losses of an acquirer that arise "directly or indirectly from the relevant activities" can be recognised and taken into account is not completely clear.

Does the legislation permit taxpayers to envisage hypothetical circumstances in which taxable profits/gains/losses could conceivably arise for the acquirer or must we confine the review to asking whether, as a matter of fact, the acquirer's actual relevant activities are capable of generating profits/gains/ losses? It may be possible to clarify this position in Revenue guidance, rather than through an amendment to the Finance Bill text itself.

Section 30 – Amendment of Part 5C of Principal Act (implementation of Council Directive (EU) 2016/1164 of 12 July 2016 as regards hybrid mismatches)

Irish Tax Institute:

Section 30(1)(a) of the Finance Bill changes the definition of entity in section 835Z. It widens the definition of entity to include an association of persons recognised under the laws of the territory in which it is established as having the capacity to perform legal acts. It is our understanding that this definition was widened so that partnerships would be in scope of reverse hybrids.

However, due to its definition being amended in section 835Z, it consequently amends the definition of enterprise, and associated enterprise (contained in section 835AA). The definition in associated enterprise is not confined in its use to hybrid provisions contained in Part 35C, TCA 1997. Since its introduction, it has started to be relied upon by other sections in the TCA, e.g. the ILR.

Whilst a partnership is not a separate legal entity, the courts have recognised that commercially, it can perform certain acts in its capacity as a partnership. Given the extent to which the term entity is used directly or indirectly (enterprise) in both hybrid mismatch provisions and ILR, it is not clear that the substantial implications arising from a partnership now being considered an entity are intended. The application of several provisions in Part 35C are dependent on whether the payment is to an entity/enterprise.

We believe that consideration should be given to confining the amended definition of entity to include partnerships to the reverse hybrid provisions until there is an opportunity to consider the implications of applying it more widely.

Law Society:

Section 30 – amended definition of "entity" in Section 835Z – Does this change bring partnerships which do not have legal personality under the laws of the territory in which they are established within this definition? The explanatory memorandum refers to amending the definition of "entity" so that it is more consistent with ATAD but "entity" is not defined in ATAD so grateful if any other background to this change could be provided.

Section 30 – definition of "reverse hybrid entity" refers to profits or gains "arising or accruing to the hybrid entity on its own account" – please clarify what is meant by the term "on its own account". Does this refer to an entity with separate legal personality?

CCAB-I:

For section 30, are current structures impacted?

The revised entity definition within section 835Z now includes partnerships – how will this impact collective investment vehicles under the acting together carve out?

Section 31 – Interest limitation

Law Society:

- Section 835AY(3) TCA provides that "A word or expression which is used in this Part and is also used in Directive (EU) 2016/1164 has, unless the context otherwise requires, the same meaning in this Part as it has in Directive (EU) 2016/1164". Does this apply to mean the term "interest equivalent" should be interpreted in line with the ATAD definition of "borrowing costs", notwithstanding that the phrase "borrowing costs" is not used in Section 835AY TCA?
    - For example, where a company (non-qualifying company for the purposes of s.110 TCA) is paying profit dependant interest to a qualifying company (within the meaning of s.110 TCA) this would seem to be covered by the definition of "borrowing costs" which refers to interest payable on a profit dependent loan. However, the interest is a distribution in the hands of the qualifying company. Is this still "interest equivalent" on the basis of interpreting "interest equivalent" in line with the ATAD definition of "borrowing costs" or is this a distribution and so not within the scope of "interest equivalent"?;
- Section 835AY TCA - Definition of "legacy debt" is too narrow, and does not provide clarity on modifications to that debt, i.e. what minor modifications are allowed so as not to bring legacy debt within the ILR.
    - ATAD envisages modifications to the "terms" of a loan, not to borrowing costs. Therefore, only modifications made to the terms of the loan agreement itself should be relevant here.
    - Although changes to a legacy loan should be examined on a case-by-case basis, it would be useful if Irish taxpayers were provided some examples of what is considered (and what is not) a "modification" in the context of legacy loans. We note that the Belgian tax authorities, for example, have provided a number of helpful examples of minor changes which are not considered "modifications", e.g. change of interest rate or duration of loan (where that change is originally provided for in the loan), minor administrative changes, the drawdown of funds on a pre-existing facility. Will similar clarity be provided by Revenue/Finance?
    - As drafted, there is a possibility that the drawdown of funds on a pre-existing facility, e.g. where a facility is for 100, 80 has been drawn down already and the borrower is now seeking to draw down the final 20, would be caught by the ILR. This is not how the rules should operate (in respect of term facilities, not revolving facilities).
- Section 835AY TCA – In the definition of "taxable interest equivalent", what is the purpose of the language "including a reversal of deductible interest equivalent"? Does this mean where a deduction is reversed in a subsequent period or is something else envisioned here? If it is a deduction reversed in a subsequent period, could the reference to 'deductible' be replaced with 'deducted' to make that clearer?;

- Section 835AY TCA - Definition of "large scale asset" for the purposes of a "long-term infrastructure project" – could this be broadened? Certain projects are not be covered (e.g. in respect of electronic / tele communications) and bringing them within the scope of "large scale assets" down the line would require the Minister to make regulations (per Section 835AAA) to that effect. It would be preferable for the definition to be broader in that regard
- Section 835AAG(2) (single company worldwide group) adjusts for any transactions with associated enterprises (not just interest equivalent transactions). Is that intentional and if so, why?
- Section 835AAI(2) TCA– This sub-section increases the amount of equity in the ratio of equity over total assets by an amount equal to the "amount" owed by the relevant entity to its associated enterprises. Can it be confirmed that "amount owed" here means "amount of debt owed"?
- Section 835AAK TCA – definition of "interest group" applies to entities which are "within the charge to corporation tax in the State". How would this apply where an ICAV is grouped with certain companies – should this be "resident in Ireland" instead? Please confirm whether this will be addressed (perhaps in Revenue Guidance?)
- Section 835AAK - Section 411 Interest Groups – Confirmation required that a qualifying company in Section 110 holding 75% or more of the shares in another Irish company will not be prohibited from forming an interest group because of S.411[[(c)(i)(I) or (II) because deemed to be carrying on trade in those shares. So for example one Section 110 company which is the parent of another Section 110 company could still be part of a S.411 interest group even though any gain on those shares would be deemed to be taxed under Case I principles.
- The operation of the 'de minimis' amount as a cliff-edge, rather than the ILR just applying to the excess, as envisaged by ATAD. This should be amended.

1. The cliff edge on the €3m de mininis. We understand that the Department of Finance believes that ATAD I requires a cliff edge, and references the recitals as supporting that view. We don't agree. The recitals talk about "it may be appropriate to provide a safe harbour rule so that net interest is always deductible up to a fixed amount" and says that this could be done "to reduce the administrative and compliance burden of the rules without significantly diminishing their tax effect".

   This cliff edge could result in a company having €250k more in taxes just by having €10 more in interest expense. Take for an example a trading company with taxable revenues of €10m, operating expenses of €4m and interest expenses of €3m. Its taxable profits (pre-ILR) are €3m and its tax due is €375k. If interest rates creep up so that its interest expenses become €3.01m, it loses the benefit of the safeharbour. Its taxable profits are now €4.79m (after an add-back of €1.8m interest expense, being the interest expense above 30% EBITDA), so that the tax due is now €598k. In other words, an additional €10k of interests costs has resulted in €223k in additional tax. As a matter of fairness and proportionality, that does not seem correct.

   The operation of the de minimis amount should be amended.

2. In the 'single member' worldwide group rules, there is currently a requirement to disregard/add-back any amounts payable/owing to associated entities, when calculating the group interest/EBTIDA and group equity ratios, respectively. We think there needs to be an exclusion for arms' length amounts owing for services rendered and other non-interest/debt amounts. The whole-point of this requirement is to ensure that associated entities are not being paid interest (or interest equivalent) in a way that side-steps the rule. If they are being paid other amounts (not interest in disguise), that should not be problematic. For example, associated entities could include investment managers (in the context of s110 companies) being paid a normal investment management fee, or the owners of a 50/50 JV company being paid a salary or service fee. We don't think these fees should be disregarded/added-back, because if they are, they mean that the single company worldwide group relief has a lot less effect (and the equity ratio rule in particular has no effect).

3. Practitioners will need guidance regarding what derivatives related to borrowing are included within 'interest equivalent'. In particular, what about a currency hedge (dollars/euro), hedging the principal amount owed? If the hedge pays out euro at the end, because the capital amount in dollars has decreased, we think that ought to be included as 'interest equivalent', but it should be confirmed as a priority, as this will be relevant to a lot of corporates.

CCAB-I:

We note that the €3 million de minimis applies only where the net borrowing costs are less than €3 million. The directive applies to the excess, whereas the Irish legalisation appears to provides for a cliff-edge effect – can this be reconsidered to align with the Directive.

The legacy debt carve out is practically of no use – can this be reconsidered?

Section 33 – Digital games relief

Irish Tax Institute:

We note that these provisions are subject to State aid approval and we would like to understand the likely timeline for such approval.

Section 36 – Amendment of section 840A of Principal Act (interest on loans to defray money applied for certain purposes)

Irish Tax Institute:

Section 36 of FB 2021 makes amendments to section 840A which denies an interest deduction for interest on related party borrowings used to make acquisitions from related parties. Practitioners would welcome clarification from Revenue as to rationale for the introduction of these amendments and, in particular, what types of transactions are sought to be captured within the scope of the amended provisions going forward.

Section 840A currently only applies to loans entered into on or after 20 January 2011 (unless a loan is made in connection with a binding written agreement made before that date). Corporate groups may have drawn down loans to acquire assets before 21 January 2011 (i.e. before Section 840A was introduced) and those loans may have been refinanced as part of normal commercial restructurings post 21 January 2011.

As drafted, section 36 "comes into operation" on 1 January 2022. Based on this construction, where section 840A is applicable, the amendment would appear to have retrospective effect as any interest on a loan / debt which came into existence prior to 1 January 2022 would not appear to be deductible and any interest on a loan/debt which was refinanced prior to 1 January 2022 would similarly appear to be non-deductible.

We would have expected the legislation to only impact on new loans/debts put in place after the date of the Finance Bill amendment but this does not appear to be the case. We would welcome Revenue's comments in relation to this and the policy intention as regards the effective date of application.

Practitioners are also concerned in relation to the interaction of this amendment with the provisions contained in section 18 of FB 2021 that bring non-resident landlords within the charge to corporation tax (rather than income tax). Accordingly, such landlords may not be in a position to claim an interest deduction in respect of interest payable on related party borrowings which were used to acquire properties from connected companies and they will therefore be subject to corporation tax on their gross rents (less any deductible outgoings). The impact of the amendment is therefore quite severe and we would welcome Revenue's feedback as to whether the position was intended to operate in this manner.

Law Society:

In order to ensure that the provision does not have retrospective effect, it would be appropriate that it clarifies that any loan or refinancing of a loan entered into before the date of the publication of the Bill are not adversely impacted. Clearly, to do otherwise, adversely impacts on existing structures, and impinges on the certainty of law to which taxpayers are entitled.

Further, the impact of this provision together with the changes in section 18 of the Bill (in relation to non-resident landlords) should also be considered further. In this context, it would be appropriate that a provision is included in section 840A to provide that section 840A would not apply in respect of any taxpayers to which section 18 of the Bill / section 25(2A) TCA applies in respect of any loan or refinancing of a loan entered into before 1 January 2022.

CCAB-I:

The revised definition of a loan within section 36 of the Bill applying to section 840A represents a significant change. Are current arrangements impacted?

Miscellaneous – Part 6

Section 69 – Amendment of section 1080B of Principal Act (Covid-19: special warehousing and interest provisions (income tax))

Irish Tax Institute:

Clarity would be welcomed on operational aspects of section 69 in light of the upcoming Pay & File deadline, for example:

(i) A company may already have entered into and have been making payments of their warehoused PAYE via a Phased Payment Arrangement (PPA) so that the director could claim some credit on the Form 11 for PAYE deducted from their remuneration (in line with the order of offset in section 997A). When the director is completing the Form 11, is it the full Schedule E balance due for 2020 that is entered on the Form 11 Statement of Net Liabilities (SNL) and selected to be warehoused or the balance due net of payments allocated to the director under the PPA (which may need to be confirmed with Revenue)? Must the company and director contact the Collector General's Office subsequent to filing the income tax return to pause the company's PPA and to determine the balance outstanding that is to be warehoused for the director?

(ii) If a director filed their income tax return early and the director has entered into a PPA with Revenue to pay the outstanding Schedule E liability, provided they submit the requisite declaration to avail of warehousing of the Schedule E liability, does the PPA automatically cease or must they make contact with Revenue?

(iii) If a director qualifying for Schedule E warehousing is paying preliminary tax for 2021 by Direct Debit, is the preliminary tax figure to be entered on the SNL (and to be warehoused) the portion of the preliminary tax related to the Schedule E income net of Direct Debits deducted to date?

Section 71 – Amendment of section 1077E of Principal Act (penalty for deliberately or carelessly making incorrect returns, etc.) and section 72 – Penalty for deliberately or carelessly making incorrect returns or failing to make certain returns, etc.

Irish Tax Institute:

We would welcome confirmation that it will be possible to make a qualifying disclosure in relation to "offshore matters", following the insertion of new section 1077F to replace section 1077E.

Section 77 – Residential zoned land tax

Irish tax Institute:

We believe that a number of technical amendments may be necessary:

- S653M(2)(c) – reference to s653C(4)(d)(i) should this be s653C(4)(e)(i)
- S653M(2)(d) – reference to s653C(4)(d)(ii) should this be s653C(4)(e)(ii)
- S653M(2)(e) – reference to s653C(4)(e) should this be s653C(4)(f)
- S653P(1) – references in the definition of liable person says section 653 (unclear what is supposed to be referenced

Section 79 – DAC 7

Irish Tax Institute:

It would be helpful if Revenue could provide an indication regarding the timelines for the issuing of guidance on the DAC7 provisions.

There is potentially significant upfront front-end work that may need to be undertaken by clients to update their systems to capture relevant information for the purpose of compliance with the DAC 7 provisions. Therefore, early publication of Revenue guidance would be important so that practitioners have an understanding of Revenue's position on the types of entities potentially in scope