ITI Submission to Revenue Seeking Further Clarification on Revenue's Stamp Duty Manual: Section 79 - Associated Companies Relief

05 August 2020

At the TALC Direct/Capital Taxes meeting on 25 June 2020, the recently updated Tax and Duty Manual (TDM) "Associated Companies Relief" was discussed and it was agreed that practitioners should make submissions to Revenue on any additional matters or outstanding matters requiring clarification in the TDM.

Over the past few weeks, we have consulted with our representatives and we are now setting out some points for your consideration.

a) Paragraph 9.4.2 at page 13 of the TDM notes the position that the 2 year holding requirement does not apply where the assets transferred are the type of assets that, by their nature, will cease to exist over time. The TDM states: *"These are book debts and loans that cease to exist when they are paid off and redeemable shares that cease to exist on redemption"*. Confirmation is sought that this exception also includes loans which are waived, forgiven, or cancelled or which are capitalised into shares, for example.

b) The 2 year rule is also relaxed in the case of transferred property comprising shares in a company that is liquidated or dissolved resulting in the extinguishment of those shares, but where the value of those shares was attributable to property held by the company at the time of transfer, that property must continue to be retained within the corporate group. In cases where these circumstances prevail, it would be helpful if the TDM confirmed that when the underlying property is a loan, this can also obtain the benefit of the 'ceases to exist' rule.

   In particular, confirmation is sought that the relaxation of the clawback rule extends to the ultimate underlying property, namely, if the company being transferred owns another company, which owns another company, etc., and if all of the companies are subsequently liquidated, then there is no clawback as long as the ultimate underlying property is retained within the group for at least 2 years (but, as mentioned above, the requirement for the underlying property / ultimate underlying property to be retained within the group in respect of such a share transfer should be disapplied where the underlying property / ultimate underlying property is the type of property that, by its nature, ceases to exist over time).

c) The commentary at paragraph 5 on page 8 of the TDM to the effect that Irish partnerships can be looked through for the tracing of association is helpful and welcome. As discussed at the TALC Direct/Capital Taxes meeting on 25 June, it would also be very welcome if it could be confirmed in guidance that you can look through an Irish partnership such that where the partnership holds an asset, you can treat that asset as being held by the corporate partners in the partnership for the purposes of claiming relief on a transfer of the asset by the partnership to another group company. And vice versa, that you could treat a transfer to a partnership from a group company as a transfer to the corporate partners in the partnership. These matters have been confirmed by Revenue in a number of rulings in the past.

d) At paragraphs 5.1 and 5.2 on page 8 of the TDM, reference is made to entities which do not have issued share capital and the potential difficulties which may arise in accessing Associated Companies Relief as a consequence. In practice, based on the content of the TDM, difficulties will arise with foreign bodies corporate that do not have a share capital such as US LLCs, UK LLP's, Scottish limited partnerships, companies limited by guarantee, etc. The TDM indicates that Revenue are of the view that one company cannot hold the share capital in these entities so we could not, for example, claim relief on a transfer from a corporate parent of the foreign body corporate to the foreign body corporate, or, more alarmingly, cannot trace ownership through such an entity for the purposes of claiming Associated Companies Relief even where the transferor and transferee are Irish companies. Where these transactions are occurring within a group that is 100% held by some top company, we would request that Revenue permit the treatment of the membership interest as being equivalent to share capital. Revenue have provided rulings in this area in the past, particularly in the context of US LLCs and we believe that it contravenes the spirit of the relief to have this issue with foreign bodies corporate that do not have a capital structure.

   The opening sentence in the guidance (on page 3) states: *"Section 79 provides for a stamp duty exemption (known as associated companies relief) where property is transferred between two companies whose association is so close that the transfer is effectively little more than a change in the nominal ownership of the property, with the underlying control remaining the same."*, therefore, we do not understand why the existence of a body corporate that does not have a share capital but is part of the same close association potentially should impact upon the availability of the relief.

   Associated companies relief is a group relief for transfers within a group that is ultimately at least 90% owned by one company so the expectation would be that the relief should be available on any transfers within the group, regardless of whether there are partnerships that are legally look-through or bodies corporate that have separate legal personality but do not have a share capital structure. We would therefore request Revenue to allow the relief whatever the nature of the various entities within the group.