

This technical query paper was submitted to Revenue via the TALC Direct/Capital Taxes sub-committee following a discussion on the matter at the June 2020 TALC Direct/Capital Taxes sub-committee meeting. Revenue responded to this submission on 15 April 2021 and the response is included in this paper as an appendix.



## 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.

**Appendix: Response received from Revenue on 15 April 2021 to the Institute's submission seeking further clarification on Revenue's Stamp Duty Manual: Section 79 - Associated Companies Relief**

Irish Tax Institute

April 2021

I refer to your letter of 5 August 2020 in relation to Revenue's TDM "Associated Companies Relief" and apologise for the long delay in replying. I will address the issues in the order they were raised.

- (a) You are seeking to expand the scope of paragraph 9.4.2 of the TDM which currently states that the two-year holding requirement does not apply in the case of certain transferred property that, by its nature, ceases to exist over time. The TDM refers to book debts and loans that are paid down and shares that are redeemed. Revenue is not prepared to expand this treatment to include loans which are waived, forgiven, or cancelled or are capitalised into shares. Such loans would not constitute property that, by its nature, ceases to exist over time. The waiving etc. of loans can be clearly distinguished from the natural way of ceasing loans which is to pay them down.
- (b) Confirmation is sought that the two-year holding requirement extends to the ultimate underlying property. If the underlying property is a loan that, by its nature, ceases to exist over time then it can also benefit from the "ceases to exist" treatment. For other assets the two-year holding requirement applies to the ultimate underlying property. In situations where there are a number of companies in the corporate structure, each owning the other, and there a number of intra-group transfers of an asset, any subsequent liquidations by associated companies will not result in a clawback of the relief provided the underlying asset remains in the group for two years from the date of the most recent intra-group transfer. As previously stated, the two-year rule does not apply to loans or book debts that, by their nature, cease to exist over time.
- (c) While Revenue accepts that Irish limited and general partnerships may be 'looked through' when establishing the bodies corporate comprising a group for stamp duty purposes, it does not accept that section 79 relief may apply for transfers of property between partnerships. The legislation clearly specifies that relief applies to transfers between associated bodies corporate. To allow transfers between partnerships would require a legislative amendment. It appears there may have been confusion previously regarding requests for confirmations

related to 'looking through partnerships'. The TDM will be further amended to make it clear that the relief can only apply to transfers between bodies corporate.

- (d) This issue appears to centre around entities which may constitute bodies corporate for the purposes of the legislation but do not have an issued share capital or its equivalent. The purpose of the revised TDM was to provide clarity in relation to the stamp duty treatment of transactions between related entities for the purpose of section 79. The legislation is very specific in that the relief applies for transfers between bodies corporate that are associated by virtue of one body corporate owning at least 90% of the ordinary share capital, or its equivalent, in another body corporate. Any other interpretation would require a legislative amendment.

Subsection (9) of section 79 provides that *"This section will apply notwithstanding that a body corporate referred to in this section, is incorporated outside the State and such body corporate, corresponds, under the law of the place where it is incorporated, to a body corporate which has an ordinary share capital within the meaning given to it in subsection (3A)...."*. Subsection (3A) provides that *"'ordinary share capital', in relation to a body corporate, means all of the issued share capital (by whatever name called) of the body corporate, other than capital the holders of which have a right to a dividend at a fixed rate, but have no other right to share in the profits of the body corporate."* In general, Revenue does not see how a partnership interest, even in one that is a body corporate, can correspond to ordinary shares. However, it is open to practitioners to make the case for different treatment depending on the individual facts and circumstances and the nature of the shares/interests/units in the particular body corporate.

The "Associated Companies Relief" TDM is being revised to reflect the contents of this letter.