Minutes of TALC Direct and Capital Taxes Sub-Committee Meeting

2 September 2021

Skype conference call at 2:30pm

These minutes should be read in conjunction with the agenda, notes and materials for the meeting.

Item 1: Review of minutes from meeting of 24th June 2021.

The minutes were agreed.

It was noted by Revenue that at the previous meeting, practitioners queried how the updates to TDM Part 27-01A-03 – "Exchange Traded Funds (ETFs)" would affect taxpayers filing returns for 2020 or 2021, and Revenue stated that the previous guidance wasn't intended to cover any products introduced to the market since 2014. Revenue clarified that subsequent to the meeting, it was confirmed that the updated guidance will apply for tax returns due for filing in 2022 and subsequent tax years.

Item 2: Matters arising from meeting on 24th June 2021.

Matters arising were as follows:

a. **Section 980 – Update on the software functionality enhancement planned for July.**

Revenue noted that the planned functionality enhancement had gone live at the end of July, and the TDM has been updated accordingly. If an agent applies for a section 980 certificate via the eCG50 system, a soft copy of the certificate will be issued to the agent's ROS inbox, while a hard copy will continue to be sent to the client.

Revenue also stated that two further updates are expected to be made available over the coming months. Certificates will no longer state the market value of the asset at date of acquisition, and an option will be included where an asset is sold for non-monetary consideration. Revenue noted that these changes are anticipated to go live on 4th September and 4th October respectively, but may be delayed, and that these fields would continue to be mandatory until then.

Practitioners queried whether there had been a discussion regarding a functionality enhancement to allow agents to register and link to eCG50 applications only, rather than for CGT as a whole. Revenue noted that while they appreciated the practical aspect of such a query, an update of that nature would need to be part of a larger project, and would be fed back to the relevant team within Revenue.

b. **Letters of no-audit (LONA) – Status following sub-group discussions.**

Revenue noted that the sub-group had met on 23rd June and more significant progress has been made in respect of this matter. A new TDM will be published, and the intention is for a draft TDM to be finalised and new procedures to be implemented as soon as possible.

c. **Update from Revenue on matters where submissions have been made.** - Addressed as part of agenda item 3.

d. **Update from Revenue on Revenue Guidance**. - Addressed as part of agenda item 11.

e. **CAT returns & PPS Numbers – Status on matters raised at previous meeting.**

Revenue stated that a Zoom meeting with practitioners was scheduled for 28th September to discuss the CAT issues arising as part of this item, and the SA2 issues arising as part of item 2(h).

f. **Sections 31C and 31D SDCA 1999 related queries. Status? – has Revenue received the further information from practitioners in relation to the interplay with section 80 SDCA 1999?**

Revenue noted that no further information had been received to date.

g. **Negative interest on deposit bank accounts. Status? – has Revenue had an opportunity to consider this further?**

Addressed as part of agenda item 12.

h. **CAT and Form SA2 related queries - Status on matters raised at June meeting**

Addressed as part of agenda item 2(e).

i. **Sections 31E SDCA 1999 related queries. Status – has Revenue had an opportunity to consider the queries raised in advance of the June meeting and to comment thereon?**

Revenue noted that the TDM in respect of section 31E SDCA had been published today, and most queries raised at the previous meeting had been addressed therein. Certain queries are still being considered and Revenue acknowledged that practitioners may not yet have reviewed the TDM and that further queries may arise.

j. **Anything else**

There was nothing further from the previous meeting.

Item 3: Update from Revenue on various matters.

3.1 Submissions on the Stamp Duty – Associated Companies Relief TDM

Revenue confirmed that the submission from the Law Society had been received, but not yet reviewed by them. It is intended to review and respond over the coming weeks.

3.2 The draft TDM on the treatment of certain gains and losses on Foreign Currencies for corporation tax purposes.

Revenue stated that the submissions from practitioners had been reviewed, but that Revenue didn't agree with the interpretation of the legislation. While Revenue acknowledged that there was a genuine issue, an updated TDM wouldn't necessarily be an appropriate mechanism for addressing such issue.

Practitioners queried whether 'money' included bank accounts and Revenue confirmed that neither bank accounts nor debtors were included, which does give rise to a genuine issue. Practitioners expressed concern that a narrow interpretation of 'money' could have a knock on effect, and was contrary to the view held by practitioners for a long period. Revenue noted that as section 79 TCA is a CGT provision, it would not affect other tax provision, and that the published Revenue guidance had always excluded 'debtors' from the provisions of section 79 TCA.

Practitioners noted a view that legislative change was required to address the issue.

3.3 The draft TDM on the classification of foreign entities for Irish tax purposes.

Revenue noted that the draft TDM continues to be worked on and would be circulated in draft form in due course, but stated that it has been delayed as it is lower in priority as a new TDM, and there is a desire to review recent case law before finalising the draft TDM.

3.4 The TDM on the payment and receipt of interest and royalties without deduction of income tax, regarding annual payments and difficulties experienced getting the US tax authorities to stamp the self-certification form.

Revenue noted that following the previous meeting, they had concluded that it wasn't feasible to address the treatment and withholding tax requirements of annual payments outside of interest and royalties, given the potential amount of payments, but were happy to consider specific annual payments in respect of which practitioners sought clarity.

Practitioners requested confirmation in respect of the treatment of non-patent royalties, and Revenue agreed to review the position and provide a further update.

3.5 TDMs Part 27-01a-02 – "Investment Undertakings", Part 27-01a-03 – "ETFs and ETCs" and Part 27-02-01 – "Offshore funds".

Revenue noted that e-Brief 164/21, issued on 1 September 2021, provided notification of the key updates to the relevant TDMs.

Practitioners queried how the updated guidance, which stated that previous Revenue confirmations in respect of the treatment of ETFs would no longer apply from 1 January 2022, would impact someone acquiring an interest in an ETF in 2020 or 2021. Revenue noted that the updated guidance will only apply as of 1 January 2022.

Practitioners further queried whether there had been any updates to the guidance to assist advisors in determining which treatment would apply to investment products. Revenue confirmed that the recently published TDMs had been updated to provide general guidance on ETFs and ETCs in as far as possible, but that there was very little assistance that Revenue could provide to simplify such a complex area of legislation, and that each product is unique and needs to be considered on its own merits.

Practitioners referred to the submission made in July, and Revenue noted that the suggestions therein didn't have general applicability and that absent a complete overhaul of the offshore funds regime, there was no way of simplifying the tax treatment for investors or advisors. Revenue further noted that the manual is intended to be a general guide, and that the submissions in respect of the remittance basis and how it could apply to offshore funds would not be addressed in this TDM.

It was agreed that this item would remain on the agenda and Revenue encouraged submissions relating to areas where TDMs could be updated to provide additional general guidance.

3.6 Queries raised at the June meeting in relation to entrepreneur relief on liquidations and Employment Investment Incentive Scheme (EIIS).

Practitioners had requested an update to the TDM to reflect the commercial reality that liquidators tend to be appointed when a trade is wound down rather than when it is still trading, and seeking confirmation that relief will not be denied in these instances. Revenue noted that following their request for non-COVID-19 related examples, the examples submitted continued to relate to inability to trade due to public health measures. Revenue further confirmed that this requirement had not been raised at TALC or via RTS previously, so was not necessarily an ongoing issue.

Practitioners had also previously raised the issue of whether requiring a business to be trading at the time of a disposal / appointment of a liquidator was contrary to the legislation, noting that in practice, businesses which are in the position to trade up to the date that a liquidator is appointed will keep a small part of their trade going merely to comply with legislation. They noted that the legislation doesn't require that chargeable business assets are being used for a trade at the time of disposal for a sole trader, so this seems to be an additional requirement for companies. Revenue stated that a 'chargeable business asset' is one that is used for a qualifying business, which excludes investments, etc, meaning a trading business.

Practitioners noted that this is a matter of interpretation, as other relieving provisions explicitly state that the condition must be met "at the date of disposal" and disputed that an asset which isn't being used for a trade is therefore held for investment purposes.

Revenue stated that it would be unusual to amend the legislation in light of temporary COVID-19 issues, and that they required evidence that this is an ongoing issue. Revenue confirmed that they would review any further submissions with non-COVID-19 examples.

Revenue noted that practitioners had previously requested confirmation on whether an anti-dilution clause would render a shareholder a 'connected person' under section 500 TCA. In this regard, Revenue stated that someone is 'connected' if they have an interest in capital and an entitlement to capital ,and an anti-dilution clause could potentially render someone connected. In particular, Revenue noted that guaranteeing an investor a return of their original investment or allowing for an exit preference could lead to a risk reduction, and the position would need to be considered on a case-by-case basis.

Practitioners offered to submit standard clauses for anti-dilution and exit preferences to Revenue, to allow Revenue to give an opinion on the wording used in such clauses, as there seems to be a gap in the legislation and guidance. Revenue agreed that this would be helpful in a review of the position, but noted that the position may remain unchanged.

Item 4: Sections 31E SDCA 1999 related queries.

Practitioners noted that section 31E(8) SDCA disapplies the 10% stamp duty rate where a person acquires a residential unit and on the same day as the residential unit is acquired by that person, that person enters into a housing authority lease in respect of the residential unit, for the purpose of the provision of social housing support. It was noted that purchasers may acquire houses which are already leased to a housing authority, and therefore meet the exemption albeit there is a timing issue. Accordingly, practitioners sought confirmation from Revenue as to whether section 31E(8) SDCA applies to acquisitions of properties that are already subject to the requisite housing authority leases.

Revenue stated that section 31E was designed specifically to interact with the "mortgage to rent" scheme. Practitioners noted that Revenue guidance (issued that day) seemed much narrower than the legislation which doesn't refer to this scheme, and stated that purchasers are entering transactions to provide social housing based on their reading of the legislation and assuming that the 10% rate will not apply to their acquisition. Revenue noted that those purchasers can avail of the stamp duty refund scheme but welcome any submissions or comments on the TDM. Revenue noted that while the guidance states that the 10% rate of duty will apply where a relevant residential unit is acquired with an existing local authority lease in place, they would consider this.

Practitioners also noted that in section 31E(13) SDCA, there is a reference to a change in ownership of a company, IREF or partnership that results in a change of control of an interest in a 'residential unit' which could bring a change of control of a company that owns apartments within the ambit of the new legislation. Revenue confirmed that subsection 13 relates to a change in ownership of company for the purpose of subsection 12, and subsection 12 then deals separately with residential units and relevant residential units. Revenue noted that the wording in the initial financial resolution had been updated (in the subsequent legislation) to ensure that stamp duty was correctly charged on the change of control of a company that owns apartments, and the TDM reflects this.

Item 5: Administrative requirements on Foreign Companies requiring a TRN purely to file a stamp duty return.

Practitioners noted that the process for foreign companies applying for a stamp duty number is currently set out in section 1.5 of the stamp duty TDM, and requires the following:

- Official documents (e.g. Trade registry extract or the company's constitution) showing the company's:
  - Name
  - Date of incorporation
  - Registered address; and
- Confirmation that the company is not already trading in Ireland, has no taxable source of income in Ireland and is not already registered for tax in Ireland.

Practitioners further noted that for recent applications, Revenue have requested confirmation as to "*whether the company for which you require a Tax Registration number is associated with any companies already registered in Ireland and if so, please provide the registration numbers of those companies*", and stated that this "*is a new requirement. Our procedures with regard to requests for Tax Registration numbers for foreign entities is currently under review and an amended TDM will be available in due course.*"

The reason for this requirement was requested, with confirmation of whether Revenue require details of all associated companies with any form of Irish registration, and an explanation of what "associated" means for these purposes.

Revenue stated that this is a new requirement for compliance purposes, in order to ensure that conditions for relief such as associated companies relief have been fulfilled for the relevant time period. Practitioners noted that this additional requirement would give rise to additional cost and an increased administrative burden for clients for a self-assessed tax, particularly where no relief is being claimed and the company has no nexus to Ireland.

Revenue stated that the information was used by Revenue to ensure that there is a record of transactions for compliance purposes. Practitioners noted that the transaction documents and stamp duty certificates would provide a record of the transaction, and Revenue would receive all relevant information as part of the stamp duty return.

Revenue confirmed that the TDM is being reviewed and additional guidance will be provided in respect of practitioners' concerns. It was queried whether this additional requirement could be put on hold until the guidance is published to avoid unnecessary delays, and Revenue noted that they will consider this.

Item 6: Definition of a close company and its relevance to charities.

Practitioners raised the issue of a registered charitable company which is a company limited by guarantee potentially being considered a close company, and requested Revenue confirmation that this would not be the case. Practitioners noted that a CLG is a company that does not have a share capital, so its members are not shareholders and do not have a distinct economic interest in their capital. However, the definition of participator for close company purposes includes any person who possesses or is entitled to acquire share capital or voting rights in the company. As the members of a CLG do have voting rights, a CLG could fall into the definition of a close company, albeit there is no share capital, and the voting rights can't be exercised in any way to profit members.

It was noted that while this may have limited impact on the CLG itself, if the CLG had organised its profit generation activities into a subsidiary company for corporate governance reasons, the subsidiary company would be considered a close company, which seems unintended and contrary to the position in the UK.

Revenue confirmed that an issue could arise, and noted that it would be useful for practitioners to provide examples demonstrating the practical impact. Revenue noted that they will give the issue consideration.

Item 7: Discussion regarding the updated Tax and Duty Manual Payments on Termination of an Office or Employment or Removal from an Office or Employment.

Practitioners noted that Revenue had issued an updated TDM Payments on Termination of an Office or Employment or Removal from an Office or Employment (Part 05-05-19) in July, updating paragraph 2.3 to provide additional clarification regarding the tax treatment of 'fire and re-hire' scenarios.

The TDM states:

"*Where it is considered that a redundancy has taken place, any lump sum payment made by the employer will be chargeable to tax under s123 TCA 1997 and will qualify for the reliefs available in accordance with s201 and Schedule 3 TCA 1997. …*

Where it is considered that a redundancy has not taken place, any lump sum payment made by the employer will be chargeable to tax under section 112 TCA 1997. In such circumstances, as the payment will not be chargeable to tax under s123 TCA 1997, the reliefs available in accordance with s201 and Schedule 3 TCA 1997 do not apply.

… A redundancy will generally not be regarded as taking place where there is a 'fire and re-hire' agreement in place at the time of the termination, or there is otherwise an expectation or understanding by either party that an offer of re-hire would be made at some point in the future (irrespective of the terms of such an offer or the length of time between the fire and the re-hire)."

Practitioners noted that the legislation refers to 'termination' rather than 'redundancy', and queried whether the guidance could be updated to clarify that where an employment is terminated and, at the time of the termination there is no fire and re-hire agreement in place and no other expectation/understanding that an offer of re-hire would be made, but the employee is subsequently rehired by the employer, the question as to whether or not a termination has occurred will depend on the facts and circumstances of the case.

Revenue stated that it would be useful to understand practitioners' specific concerns and be provided with specific examples.

Practitioners agreed to provide Revenue with further information, and also noted that as section 123 refers to payments made in connection with changes in functions of employment, it would be helpful if Revenue could provide guidance or an indication of Revenue views on where such payments could arise.

Item 8: Local Property Tax position of properties which were originally residential premises but which are currently being used as offices.

Practitioners requested that Revenue provide a view on the Local Property Tax (LPT) position of a property which was originally a residential premises, but is now in use as an office or for some other 'non-residential' purposes. Section 1 of the LPT Act defines “residential property” as any building or structure which is in use as, or is suitable for use as, a dwelling, and the Revenue website states that “If you own a commercial property that is fully subject to commercial rates, it is not considered liable for LPT.”

However, practitioners noted that while there is an exemption from LPT for property that is used as a dwelling but is subject to commercial rates, there is no such exemption for a property that was residential, and is no longer used as a dwelling. Practitioners requested Revenue confirmation on whether such a property is considered to be ‘suitable for use as a dwelling’.

Revenue confirmed that a property which is fully subject to commercial rates, regardless of the use of the property, will not also be subject to LPT.

Item 9: Section 110 – withholding tax deduction

Practitioners raised an issue arising in maintaining tax neutrality for section 110 companies in the context of foreign withholding taxes. A submission made by practitioners noted that if double tax relief isn’t available for the withholding taxes suffered, this creates an unusual situation whereby a s110 company that suffers foreign withholding tax must pay Irish tax on the foreign tax amount, therefore displacing the intended tax neutrality.

Revenue noted the recent receipt of this submission, and that adequate time was not available to review in detail. However, Revenue stated that their initial view was that this policy issue was more appropriate for the Department of Finance, but that the submission would be considered more thoroughly.

Practitioners highlighted that the submission deals with an interpretation of the legislation and it could potentially be dealt with by way of Revenue guidance, noting that it was causing real issues in practice.

Item 10: Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 and Shares Scheme Manual – Chapter 8 - Restricted Shares

Practitioners noted that Revenue’s Share Schemes Manual - Chapter 8 - Restricted Shares was updated in June 2021, without including the provision in relation to restricted shares in the *Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019*.

Revenue acknowledged that this was an oversight, and that the TDM will be updated accordingly.

Item 11: Section 249 TCA 1997 (Recovery of capital) query

Practitioners noted that the recovery of capital legislation, with regards to share-for-share exchanges, effectively distinguishes between those involving an investing company and those involving a company concerned or intermediate holding companies. An election may be made where either a company concerned or intermediate holding company is issued shares in another company in exchange for shares, but there is no equivalent provision where an investing company is issued shares in another company in exchange for shares.

Revenue stated that this is a policy issue which would require a change in law, and any discussions should involve the Department of Finance.

Practitioners requested confirmation from Revenue on whether they would support a change in policy where there is a gap in the legislation, and Revenue stated that while they appreciated the point being made, they would not be in a position to provide such confirmation as it would require significant consideration.

Item 12: Negative interest rates

Revenue noted that a submission had been received from practitioners, but that it doesn't provide the requested technical analysis in respect of the Case I treatment of negative interest and doesn't clarify the reason for requesting Revenue's review of the matter.

Practitioners noted that the submission had referred to the published minutes of the meeting held on 18th February 2021, which state "*Revenue confirmed that if the negative interest was charged as a bank charge, it would be deductible [under Case I]*", and queried whether Revenue stood by this confirmation. Revenue stated that there was no intention to issue a blanket confirmation in respect of the deductibility of negative interest, and the appropriate question was how the interest would be treated if the company received the interest.

Practitioners noted that taking a position that no relief for an expense incurred by a taxpayer, such as negative interest under Schedule D Case IV, is available on the basis of the legislation's silence in respect of such an expense is to take a position that does not consider the provisions of the legislation as a whole. Revenue clarified that if negative interest came under Schedule D Case IV, such a 'deduction' can only be used against income of the same source, being Case IV interest. On the basis that Case IV interest is subject to DIRT which is non-refundable, Revenue's view is that there is no mechanism for using a Case IV deduction arising from negative interest against Case IV interest income.

The submission further noted that under section 70 TCA, income or profits chargeable under Schedule D Case III are deemed to issue from a single source for the purpose of assessing a liability to income tax and on this basis, negative interest paid in the year of assessment ought to be deductible against other sources of income chargeable to tax under Case III. Revenue stated that as discussed at the previous meeting, there is no Case III loss relief and therefore, there is no merit in considering how negative interest under Case III would be treated.

Revenue agreed with practitioners that a trade under Case III follows the same principles as a trade under Case I, so an analysis in respect of Case I is required. Revenue requested a submission setting out a thorough analysis in respect of the Case I position and where the uncertainty arises.

Item 13: Update from Revenue on Revenue Guidance on:

13.1. Offshore Funds

Addressed as part of agenda item 3.5.

13.2. Removal and Relocation Expenses

Practitioners noted that the updated TDM Part 05-02-03 Removal and Relocation Expenses was published in July without a corresponding eBrief to notify of the update, and requested confirmation that an eBrief will issue when TDMs are updated and published. Revenue noted that while the table of contents had been removed from the relevant TDM, there had been no changes to the body of the manual, so an e-Brief was not required.

13.3. Investment Undertakings

Addressed as part of agenda item 3.5.

13.4. PAYE Exclusion Orders

Practitioners noted that the updated TDM referred readers to the COVID-19 pages on Revenue's website, whereas it had been discussed at a Main TALC meeting that the information in the body of the webpage would be replicated in the TDM, in case the information changes over time. Revenue acknowledged the issue with the TDM referring to a webpage, and confirmed they will pass this on to the relevant team.

13.5. Section 110

Revenue noted that they had received feedback from practitioners and the TDM is effectively finalised and ready for publication. It was confirmed that as the draft TDM had been circulated a number of times for review, it would not be re-circulated before publication.

Revenue E/Brief 169/21 provided notification of the publication of the 110 TDM on 6 September 2021.

13.6. Stock Lending and Repos Transactions

Revenue noted that they had reviewed the feedback on the draft TDM, but the feedback reflected the submission made previously, which had already been submitted to the Department of Finance. The draft TDM will be published soon.

Item 14: AOB.

CAT – Business Relief

Practitioners noted that the CAT Tax and Duty Manual on Business Relief stated that replacement property can qualify for business relief under certain conditions, but expressed concern that section 100(8) CATCA could then operate to disapply relief. It was agreed that this would be placed on the agenda for the next meeting.

Commutation of a Foreign Pension

It was noted that practitioners had made a submission in respect of the basis of taxation on the commutation of a foreign pension which accumulated from contributions out of foreign income. Practitioners stated that Precedent 28 provided that tax-free lump sums from a foreign pension were not taxable in Ireland, although it appears from an analysis of recent examples that Revenue's position may have changed and in some situations such lump sums are being taxed under Case III. Practitioners sought confirmation of the technical basis for this view, given there has been no commensurate change in legislation.

Revenue stated that they had been under the impression that Precedent 28 was no longer used as it is quite old and is not referenced in any TDMs, and practitioners noted that a high number of pensions advisors rely on Precedent 28 in practice, and would be surprised if Revenue's treatment of lump sums in commutation of foreign pensions had changed without any legislative amendment. Revenue confirmed that they would clarify their view as soon as possible.

Item 15: Next meeting

Post Finance Bill 2021, exact date and time TBC in due course.

Attendees at this meeting:

Revenue	ITI	CCAB-I	Law Society
Mark Bradshaw Dave Brennan Alan Carey Maria Doyle Karen Drake Aine Hollingsworth Alan Kelly Norma Lane Sinead McNamara Robert Murphy Keith Noonan John Quigley Declan Rigney Eleanor Smiley	Cillein Barry David Fennell Laura Lynch Tom Maguire Clare McGuinness David Moran Stephen Ruane Lorraine Sheegar	Maud Clear Norah Collender Enda Faughnan Ken Garvey Peter Vale	Padraic Courtney John Cuddigan Maura Dineen Aidan Fahy (Chair) Chloe Power (Secretary)