Minutes of Joint Meeting of Main TALC and the TALC Direct and Capital Taxes Sub-Committee

1 November 2021

Teams conference call at 2:30pm

These minutes should be read in conjunction with the materials for the meeting.

The purpose of this meeting was to discuss the measures announced in Finance Bill 2021 (as initiated) (the "**Bill**") on which queries had been 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

- Practitioners noted that section 37 of the Bill proposes the introduction of a new section 617A TCA to apply to domestic mergers by absorption to which Companies Act 2014 apply, and queried whether this section is intended to take precedence over section 633D TCA (which can also apply to domestic mergers by absorption). Revenue noted that the application of section 633D TCA to domestic mergers was an administrative practice, provided for under section 637 TCA, which section 617A TCA now puts on a legislative basis. Practitioners queried whether taxpayers should continue to make submissions to Revenue under section 637 TCA so as to apply section 633D TCA to domestic mergers by absorption until the Bill has been enacted, and Revenue confirmed that such submissions would be required in the interim period.

- Practitioners also requested confirmation in respect of the interaction of sections 617A / 633D TCA and section 626B TCA, noting that in the case of a merger to which the provisions of sections 617A or 633D TCA 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, and the provisions of section 626B TCA can therefore have no application. Practitioners noted that this is distinguishable from the reorganisation provisions where it is specifically stated in section 626B(1)(b)(iii) TCA 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*". Revenue confirmed that where the conditions of either sections 617A or 633D TCA are met, section 626B TCA will not apply.

- Practitioners noted that while this is sensible amendment as it preserves, in principle, the tax neutrality of wholly domestic mergers, it was unclear why this proposed provision, in its current form, is limited to situations involving mergers "by absorption". Practitioners informed Revenue that it appeared that there is a gap in the proposed new section 617A TCA 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" particularly the merger of a parent into a subsidiary. Practitioners suggested that 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."

  Revenue queried whether other mergers (by formation or acquisition) needed to receive relief under the proposed section 617A TCA, as they can qualify for relief under section 615 TCA if the conditions therefor are met. Practitioners stated that in certain situations, such as where there is a downwards merger by acquisition, an action must be taken to cancel or surrender the shares in the transferor, and the relief would not apply to those shares. Revenue requested that practitioners submit the example discussed in writing for their consideration.

Stamp Duties – Part 4

Section 55 – Stamp duty on certain acquisitions of residential property

- Practitioners requested confirmation in respect of the effective date of section 55, and whether it would apply to acquisitions on or after 20 May 2021.

  Revenue stated that section 55 would apply to all acquisitions on or after 20 May 2021, and the intention of section 55 was to clarify the intention of the legislation. Practitioners noted that there was an assumption among practitioners and taxpayers that section 55 would not be in force until the Bill is enacted. Revenue clarified that the existing Tax and Duty Manual set out Revenue's interpretation of the law, and the legislative amendments are ensuring that the position is in line with the Tax and Duty Manual. Practitioners noted that notwithstanding Revenue's comments in respect of the existing interpretation, section 55 would not be in force until the Bill is enacted.

Capital Acquisitions Tax – Part 5

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

- Practitioners queried the date of commencement of section 62, and sought clarity on how the Bill will interact with the definition of a relevant period in section 40(1) CATCA 2003, if it is enacted before 31 December 2021. Revenue stated that while strictly speaking, the amendment could be in force for a small number of days at the end of 2021, Revenue will continue to accept the pre amendment rules until the end of 2021 and the amended legislation will apply for the 2022 relevant period and each subsequent relevant period thereafter. Revenue noted that this would be confirmed in written guidance.

- Practitioners also queried how 'open market value' can be used in situations where a taxpayer cannot secure finance on the open market, or could be charged a high interest rate due to their personal circumstances, noting that in relation to an interest free loan, the "best price obtainable in the open market" is currently 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. Practitioners noted that the amendment in section 62 of the 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.

  Revenue noted that section 40 CATCA does not differentiate between the parties involved, or the financial situations of the parties. It was confirmed by Revenue that the wording of the proposed new subsection isn't specific to the recipient, and the parties may consider the rates published by each of the leading Irish financial institutions on their websites for unsecured and secured loans, and select the lowest available rate.

- Practitioners then requested confirmation from Revenue in respect of the level of proof required to prove the borrowing rate applied to the loan, querying whether it would be necessary for a beneficiary to actually apply for a mortgage or loan to ascertain the appropriate level of interest. Revenue confirmed that 'appropriate documentation' would include loan documents, a printout of the financial institution's webpage showing the borrowing rate, and detail of the interest paid by borrower.

- Practitioners queried the motivation for the amendment. Revenue noted that, for the purposes of section 40 this change will bring the CAT treatment of the free use of money in line with the existing treatment for the free use of other property such as a house whereby the value of the free use is determined by reference to the value of the benefit to the person receiving the gift rather than the cost to the person making the gift.

- Practitioners questioned whether a low interest rate for a ten-year loan can be selected by a borrower and lender for ten years, without revisiting the rate in the interim and Revenue confirmed that this was correct, once the loan would be made for a period of ten or more years. Revenue further confirmed that if different rates were available for secured and unsecured loans, it is appropriate to consider the purpose of the loan. Revenue confirmed that if the purpose is one which would normally require a secured loan (for example, in relation to the purchase of a house), then the secured rate could be applied by the parties to an unsecured loan. Revenue confirmed that in the context of the 'appropriate documentation' mentioned above, security documentation would not be required to apply the secured rate.

- Practitioners queried the position in respect of cross-border loans and whether Irish or foreign rates should be used. Revenue noted that this situation would be covered by their guidance, which would also confirm the matters discussed at the meeting.

Direct Taxes

Income Tax – Part 1, Chapter 3

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

- Practitioners queried whether Revenue will 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. Revenue stated that the purpose of the new section 114A TCA was to move away from the 'wholly, exclusively, and necessarily' conditions, so once the conditions for relief are fulfilled, the individual will qualify.

- Practitioners also sought confirmation on whether the requirement to submit evidence on making a Remote Working Relief claim will apply to self-assessed taxpayers, and noted that this would be contrary to self-assessment. Revenue noted that directors who are self-assessed taxpayers are not required to submit receipts when claiming the relief.

- Practitioners also noted that Revenue's Budget guidance stated that Remote Working Relief can be claimed in real-time, and queried how this would work. Revenue noted that PAYE taxpayers can claim certain health and family reliefs in real-time using MyAccount, and that the intention is that Remote Working Relief would also be claimed via MyAccount in 2022.

- Practitioners then queried whether PAYE workers must provide receipts to claim the relief, unlike self-assessed taxpayers. Revenue confirmed that this is the case, and agreed to consider whether the legislation should be amended to differentiate between the position for PAYE and self-assessed taxpayers.

- Practitioners noted that the legislation provides a formula under which a figure, represented by 'D' is deducted, and queried the tax treatment if an employer reimbursed the figure represented by 'D' in the formula. Revenue stated that the Remote Working Relief applies to light, heat and broadband only, whereas an employer could reimburse an employee without tax for broadband, and could also pay each employee an allowance of €3.20 per day without tax. Revenue noted that the €3.20 allowance should cover an employee's light and heat, so technically an employer could reimburse an employee for these expenses rather than the employee claiming the relief.

Section 18 – Non-resident landlords

- The comments herein also concern the impact of section 36 of the Bill (discussed separately below).

- Practitioners noted that 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, and 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.

  Practitioners noted that, 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, practitioners noted that section 840A TCA 1997 applies "in computing the amount of the profits or gains to be charged to corporation tax under Schedule D".

  Practitioners noted that 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 (eg, pension funds).

Practitioners stated that 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 (the date of the publication of the 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, and practitioners also noted that the conditions of section 840A(7) TCA 1997 are generally regarded as difficult to satisfy.

Revenue noted that an interest deduction would not be denied for related-party borrowings under section 840A(7) TCA, and queried why practitioners felt that section 840A(7) TCA would not apply in the example provided if the company that provided intragroup finance is a treasury company with bank debt. Practitioners highlighted that the requirement for the entity's 'sole business' to be on-lending of bank debt is restrictive, and that many treasury companies have other functions such as a cash-pool function (whereby they receive funds from related parties). Revenue questioned whether it would be possible for groups to carry out restructurings to ensure that section 840A(7) TCA would apply and practitioners noted that while it would be possible for some taxpayers, it would be very burdensome and extremely difficult for others.

- Practitioners noted that 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.

  Practitioners requested that consideration be given to amending section 18 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 1 January 2022 (when section 18 becomes effective), or at least 21 October 2021 (the date of the publication of the Bill).

  Revenue noted that these proposals were quite wide-ranging, and expressed concern that it would open opportunities for section 840A TCA to be circumvented. Revenue stated that from a policy point of view, any proposals would need back-up to support the proposed changes.

- Practitioners further noted that as a general matter, it would be unusual for a typical non-resident corporate landlord to have a treasury company in their structure and highlighted that their main concern related to the retroactive application of the legislation. In this respect, practitioners noted that anti-avoidance legislation would typically only apply to loans drawn down on or after the date of the relevant Finance Bill and questioned whether there had been a conscious effort for the scope of these amendments to be as wide as possible. Revenue confirmed that it was the intention that the amendment proposed to section 840A would close loopholes being exploited in the section. With regard to the impact on non-resident corporate landlords, Revenue queried whether this issue would be prolific and practitioners noted that while it wouldn't be considered prolific, there could be high sums of money impacted in structures that would not have been required to consider section 840A TCA previously.

- It was also queried whether the intention of section 18 of the Bill was to catch the refinancing of loans originally drawn down before 21 January 2011, and Revenue said that the amendments aim to close off loopholes impacting the effectiveness of section 840A TCA. Practitioners noted that the provision was potentially very penal as loans drawn down before 21 January 2011 were not previously within the scope of section 840A and requested clarification as to whether because of this amendment, such loans and any refinancing of such loans would be captured by the amended section 840A from 1 January 2022. Revenue stated that the amendment proposed should be read as not applying to the refinancing of a pre-21 January 2011 loan, as such refinancing is not one to which subsection (a) applies.

- Practitioners expressed their concern that a cohort of investors have invested in Ireland Inc based on certain legislation and tax provisions, and that the introduction of sections 18 and 36 of the Bill 'shifts the goalposts' for those investors. It was noted that such changes could attract negative attention, and that practitioners strongly believed that the amendments to section 840A TCA should only be effective in relation to loans and re-financings from the date of publication of the Bill (or 1 January 2022, for taxpayers impacted by section 18 of the Bill). Revenue explained that very strong policy rationale would be required to justify such a position, and that it would be a matter for the Department of Finance to decide on.

- Revenue stated that if practitioners wished to make submissions on either sections 18 or 36 of the Bill, it should be done very soon before the Bill reaches the committee stage.

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

- Practitioners requested 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), and Revenue confirmed that a qualifying investment fund may invest in any company.

- Practitioners then noted that the new section 508IA(2)(b)(iii) TCA requires that funds to be invested in eligible shares must be invested without undue delay, and sought clarity on how 'undue delay' will be determined. Revenue stated that the concept of 'undue delay' already exists for funds, so it would be appropriate to look at the timeframe for investments in the normal course of business and decide whether the timeframe is outside the norm. Revenue noted that this requirement has not been fallen foul of by designated funds to date.

- Practitioners also requested confirmation from Revenue that under the new section 508IA TCA, a 'qualifying investment fund" does not (unlike a 'designated fund' under s508I(1)) need to be pre-approved by Revenue, which Revenue confirmed.

- Practitioners queried whether it would be possible for the legislation or guidance to expand on the definition of 'eligible shares' under section 494 TCA 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 section 500 TCA) 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.

  Revenue noted that this is a consideration that anyone making an investment would have, and there is no intention to make any changes to the definition of 'eligible shares'. Revenue will review the position for limited partnerships and investment limited partnerships, and consider whether any concerns are apparent in the future.

- Separately, practitioners noted that section 26(b) of the Bill reintroduces a condition relating to increased employment / R&D, despite this condition being previously removed following the removal of second stage relief for shares issued after 8 October 2019. Practitioners sought clarity on the rationale for the introduction of this rule given that section 496(2)(a) TCA specifically states that EIIS is for the creation <u>or maintenance</u> of employment.

  Revenue stated that there was never an intention for this condition to be removed, and it had been an error, so section 26(b) of the Bill was simply bringing the conditions back in line. Revenue noted that by meeting either the employment or R&D condition, a company can demonstrate the creation or maintenance of employment. Practitioners queried how the removal of this condition could have been an error, given that the intention at the time was to remove unnecessary conditions. In particular, practitioners noted that introducing additional conditions which were tied to headcount plus remuneration was uncommercial, particularly in light of COVID-19. Revenue stated that they would discuss practitioners' comments with the Department of Finance.

- Practitioners requested clarity in respect of the reference to "the limits set out in section 502(3) in any other case" in section 26(d) of the Bill, querying whether the €250k limit applies to everyone even if the limit was €150k when the investment was made, or whether there is an upper limit of €500k for everyone in the years following investment. Revenue confirmed that the limits are as set out in section 502 TCA for the period in which the investment was made.

- Practitioners queried whether the effective date of section 26 of the Bill is 1 January 2022 and if so, how that would tie in with the removal of the 30% 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 section 26 of the Bill has effect from 1 January 2022, the 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. Practitioners highlighted that the Bill states that Part 1 takes effect from 1 January 2022, but does not specifically state that section 26 applies to <u>shares issued</u> on or after 1 January 2022 (other than the new clawback rule). Revenue confirmed that it would apply to shares issued on or after 1 January 2022, but its interaction with the 30% rule would need to be considered separately.

- Practitioners stated that the 4 month period post the end of the year of assessment provided for in section 26 is too short, and requested that consideration be given to increasing it to 10 months post tax year end, to align with investors filing their tax returns. Revenue explained that the State must file a return in respect of State aid granted within 6 months of year end, so there was no scope for the 4 month period to be extended.

- Practitioners noted that 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. These conditions cannot be satisfied before 3 years post share subscription, which 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. Practitioners queried whether this was an unintended error, given that the Statement of Qualification process was intended to address the delays in getting certificates to investors so they could claim their relief in a timely manner.

  Revenue stated that this provision always existed, but the requirement was merely to provide the date on which the second-stage investments were made (for investments before 8 October 2019). Practitioners noted that if the Statement of Qualification requires the date on which the conditions are met, no claim can be made until the conditions are met. Revenue agreed to revisit this section again in relation to shares issued on or after 8 October 2019.

- Practitioners requested that Revenue explain why SCI and SURE claimants are excluded from the provisions relating to capital redemptions. Revenue explained that SCI is available to family and friends, and SURE is for those investing into their own company. Capital redemptions are for third parties who have no relationship with the company. Practitioners also queried whether subsection (b) of the new provision means that the company cannot raise <u>any</u> Part 16 funds 12 months after the redemption from any investors and subsection (c) means that the individual whose shares were redeemed cannot reinvest in that company for another 5 years. Revenue confirmed that both of these queries were correct.

- Practitioners also requested that Revenue explain the rationale for these restrictions, given that there is a limited pool of potential investors for companies going to market and there are not enough investors to obtain new ones every time they raise funds, as 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. Practitioners stated that the restrictions also add an 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.

  Revenue noted that when these amendments were drafted, the limited pool of investors was considered, and the five-year limit was introduced in order to find a balance between the limited number of investors and a situation where a company is buying back its shares despite needing further investment from those investors. Revenue also noted that any burden on funds wasn't particularly onerous.

- Practitioners queried whether the limits referred to in section 503(3) TCA meant the limits when the shares were subscribed for, or the year the relief is carried forward to. Revenue clarified that it meant the year the shares were subscribed for, and noted that the Form 11 is set out this way. Practitioners noted that it would be helpful if the legislation could make this clear, as it has been flagged as confusing by multiple practitioners and taxpayers.

- Finally, practitioners queried the significance of section 26(c) of the Bill. Practitioners stated that it is an anti-avoidance measure intended to close a gap in the legislation, as an individual could earn income that isn't chargeable to tax which is above the limit.

Section 27 – Transfer Pricing

- Practitioners queried whether Revenue would be issuing updated guidance on foot of this amendment which draws back from the more detailed, prescriptive guidance which was issued last year. Revenue confirmed that updated guidance would be published, and would be circulated to practitioners in advance of finalising and publishing it.

- In respect of the amendment to section 835E(1) TCA, practitioners queried the intention/rationale behind the condition in paragraph (b). Revenue noted that it mirrors the version of section 835E provided for in Finance Act 2019 and stated that the definition of 'qualifying person' requires that if a person is chargeable to income tax in respect of profits or gains or losses arising from the arrangement, they must be resident in the State in order to be regarded as a qualifying person in relation to that arrangement.

- Practitioners noted that 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)". Revenue disagreed and stated that the requirements provided for by paragraph (b) relate to the residence of the person only (which is the condition that is to be satisfied in paragraph (b)), and as paragraph (b) follows (a), a person will be considered to be chargeable under paragraph (b) if they are considered to be chargeable under paragraph (a).

- Practitioners recommended that references to consideration being "receivable" in section 835E(2)(a) TCA 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), and corresponding adjustments 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", and corresponding adjustments should also be made to section 835E(4)(b), in the context of an acquirer's ability to be an 'eligible person'.

  Revenue stated that this point could be dealt with in guidance, rather than amending the legislation. Practitioners queried why Revenue were reluctant to make the recommended change, if it would clarify the legislation and make the interpretation thereof more straightforward. Revenue stated that it may not be straightforward, as while in circumstances where there's no consideration, the position is clear, it is not as clear in a case where there is actual consideration and there are mismatches in timing, as it would need to be considered whether a person is a qualifying person for that period, or potentially not until they receive the consideration.

- Practitioners queried whether "receivable" could also be interpreted as "received" on the basis that the transfer pricing legislation is interpreted in this manner anyway. Revenue confirmed this, but noted that the timing point remained outstanding, and that there would be an initial meeting of the TALC BEPS sub-committee in December to discuss the required guidance.

- Practitioners noted that there is a carve-out in section 835E(2)(b)(ii) for acquirers who cannot satisfy paragraph (i), which details how an 'acquirer' can be regarded as chargeable to income tax or corporation tax under Schedule D in respect of the arrangement, but queried whether the language could be further clarified. 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.

Practitioners asked Revenue whether the legislation permits taxpayers to envisage hypothetical circumstances in which taxable profits/gains/losses could conceivably arise for the acquirer or should a review be confined to asking whether, as a matter of fact, the acquirer's actual relevant activities are capable of generating profits/gains/losses. Practitioners noted that it may be possible to clarify this position in Revenue guidance, rather than through an amendment to the Finance Bill text itself. Revenue agreed that the second carve-out does need to be in reference to the acquirer's actual activities, but that the definition of 'relevant activities' was broad, and was further broadened by the inclusion of 'directly or indirectly'. Revenue agreed that they will look to clarify the parameters in guidance but for the avoidance of doubt, noted that unlike the equivalent provision in Finance Act 2020, for arrangements involving the provision of a loan, there was no need to trace through the loan to ultimate use of the funds, as it was the relevant activities of the acquirer that would need to be considered.

- Practitioners sought clarity from Revenue in respect of why there is a requirement to be both an eligible person and a qualifying person under section 835E(3) TCA, when both definitions are similar in nature. Revenue noted that while the definitions are similar, they aren't the same and it was only required that either the supplier or acquirer is an 'eligible person' (and the exclusion would apply to that person) whereas both parties must be qualifying persons.

- In respect of section 835E(7), clarification was sought by practitioners as to the type of transaction this is seeking to address. Revenue stated that section 835E(3) TCA won't apply where a deduction or relief is available to the acquirer where such deduction or relief exceeds the actual consideration, and noted that it was introduced to counteract the use of certain interest-free loan arrangements.

- Practitioners noted that it appears that in a group lending situation, the 'qualifying person' rule may be restrictive, and queried whether in a situation where a group company transfers a rental asset to another group member and leaves the consideration outstanding, it will be the case that the 'borrower' will not be a qualifying person (as the interest, were it charged, would not be deductible under s840A). Revenue stated that this would depend on the facts and circumstances, but that it should come under the exception in 835E(2)(b)(ii) TCA if it was charged under Case V in the case of rental income.

- Revenue confirmed that the amended section 835E is a broad exclusion, which is supplemented by anti-avoidance measures. Revenue also noted that compliance interventions on the FA19 provisions were paused pending settlement of the policy position, and confirmed that the FA19 provisions (which apply for 2020 and 2021) will be interpreted in light of how the policy was settled in FA21 and Revenue will interpret these provisions broadly to align with that position. Revenue also noted that it won't apply to those who aren't chargeable to tax in Ireland, or cross-border arrangements ie, areas not currently coming within the scope of the section 835E exclusion. Revenue confirmed that, provided the necessary conditions are met, loans to fund dividends or undertake share buybacks should come within the scope of the exclusion.

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

- Practitioners noted that the revised entity definition within section 835Z now includes partnerships and queried whether this change would 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 practitioners requested additional background to this change. Practitioners also noted that the definition being amended in section 835Z would consequently amend the definition of enterprise, and associated enterprise (contained in section 835AA), even though the definition of 'associated enterprise' is not confined in its use to hybrid provisions contained in Part 35C, TCA.

  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. Practitioners noted that given the extent to which the term entity is used directly or indirectly (enterprise) in both hybrid mismatch provisions and the ILR (interest limitation rule), it is not clear that the substantial implications arising from a partnership now being considered an entity are intended, and the application of several provisions in Part 35C are dependent on whether the payment is to an entity/enterprise.

Practitioners 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. Revenue noted that the definition of “entity” had been drafted on the basis of a number of submissions that said it was a mistake to limit the reverse hybrid rules to entities that had a separate legal personality. In particular, Revenue stated that it had always been intended that the hybrid rules would apply to partnerships, and the relevant Tax and Duty Manual gives examples involving partnerships.

Practitioners expressed concern that the definition of entity didn’t achieve the result intended by Revenue, and Revenue requested that any concerns be submitted in writing. Practitioners also queried whether the concept of partnerships with legal personality could be confusing matters, and noted that this change will have great impact, and all previous analyses based on previous legislation would need to be reviewed.

Practitioners noted that the definition of “reverse hybrid entity” refers to profits or gains “arising or accruing to the hybrid entity on its own account” and requested clarity on what is meant by the term “on its own account”. Does this refer to an entity with separate legal personality? Revenue stated it was trying to describe a taxable person that was an opaque entity, and comes from the definition of a “hybrid entity” in Part 5C, and that language had been provided by the OPC (office of parliamentary counsel).

- Revenue informed practitioners that section 835AVA TCA would be amended to include the words ‘directly or indirectly’, and the wording in respect of common contractual funds in section 835AVD TCA would be reworked also.

Section 31 – Interest limitation

- Practitioners noted that the €3 million de minimis applies only where the net borrowing costs are less than €3 million, and practitioners were of the view that the directive applies to the excess, whereas the Irish legalisation appears to provide for a cliff-edge effect. In addition, practitioners noted that the legacy debt carve out is practically of no use and queried whether it could be reconsidered.

  Practitioners also noted that the Department of Finance believes that ATAD I requires a cliff edge, and references the recitals as supporting that view, which practitioners disagreed with. 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”, while this cliff edge could result in a company having €250k more in taxes just by having €10 more in interest expense. Practitioners provided an example of 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 safe harbour. 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 and an additional €10k of interests costs has resulted in €223k in additional tax.

  Revenue stated that the policy has been considered by the Department of Finance, but that they remain open to submissions on it and interpretations. Practitioners requested that Revenue relay the strong views of practitioners to the Department of Finance, noting that if taxpayers are kicked into material additional tax just by being a small bit over the limit, it will hurt Ireland Inc.

- 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/EBITDA and group equity ratios, respectively. Practitioners queried whether an exclusion for arms’ length amounts owing for services rendered and other non-interest/debt amounts could be introduced, as the point of this requirement is to ensure that associated entities are not being paid <u>interest (or interest equivalent)</u> in a way that side-steps the rule, whereas if they are being paid other amounts (not interest in disguise), that should not be problematic. For example, practitioners noted that 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 and such fees should not 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). Revenue noted that the single company worldwide group is designed to deal with scenarios where a single company does not meet the definition of a standalone entity to avail of that exemption, but also cannot benefit from the interest group provisions. In light of submissions made, a committee stage amendment was being considered in respect of s835AAI (Equity Ratio) but that the calculation of the Group Ratio, as it applies to a single company worldwide group, would continue to disregard transactions with associated enterprises such that the position was comparable to interest groups.

- Practitioners requested guidance regarding what derivatives related to borrowing are included within 'interest equivalent'. In particular, practitioners queried whether a currency hedge (dollars/euro), hedging the principal amount owed, pays out euro at the end, because the capital amount in dollars has decreased, should be included as 'interest equivalent'. Revenue requested further information on this, and practitioners noted that if a 'weak' currency is part of a currency hedge, and there is a very high interest rate that is neutralised, there is an interest element which should be considered.

- 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". Practitioners queried whether this applies 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, and noted that for example, where a company (a non-qualifying company for the purposes of section 110 TCA) is paying profit dependant interest to a qualifying company (within the meaning of section 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"?

  Revenue stated that terms should always be interpreted in line with the Directive and noted that the treatment of interest should be considered from the perspective of both the borrower and lender, and there should be symmetry, eg, if deductible for the borrower, it should be taxable when received by the lender. Revenue also noted that the example provided was complex and required further consideration, if a more complete example can be provided. It was agreed that as a legislative amendment was not being proposed, the query should be tabled for future technical discussion (either at this or the TALC BEPS forum), and practitioners agreed to make a written submission.

- Practitioners noted that in section 835AY TCA, the 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. Practitioners stated that ATAD envisages modifications to the "terms" of a loan, not to borrowing costs and therefore, only modifications made to the terms of the loan agreement itself should be relevant here and 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. Revenue noted the Department of Finance's policy is that open ended facilities with no specific purpose, eg, a revolving credit facility is not intended to be covered by the legacy debt carve out.

  Practitioners commented that it would be very hard to know where to start and stop with modification, and when a legacy debt becomes a 'new' debt, noting that other tax authorities have given examples to taxpayers. In particular, practitioners noted that as drafted, there is a possibility that the drawdown of funds on a pre-existing facility would be caught by the ILR and this is not how the rules should operate in respect of term facilities. Revenue stated that where there is no increase in the amount deductible, such a modification won't be in scope of the ILR, whereas if it will increase the amount that would be deductible, only the amount of increase will be in scope. Revenue also noted that guidance will make it clear that where an interest rate such as LIBOR has been changed and replaced with a similar reference rate, interest rates that increase by reference to LIBOR or that reference rate won't come within the scope.

- Practitioners queried the purpose of the language "including a reversal of deductible interest equivalent" in the definition of "taxable interest equivalent" under section 835AY TCA, and particularly whether it refers to where a deduction is reversed in a subsequent period and if so, whether the reference to 'deductible' could be replaced with 'deducted'. Revenue noted that the aim was to clarify that a deductible interest equivalent that is reversed will be taxable, and 'deductible' was used rather than 'deducted' because of the interpretation clause, but this would be considered further.

- Practitioners questioned whether the definition of “large scale asset” for the purposes of a “long-term infrastructure project” in section 835AY TCA could be broadened. Revenue noted that the Department of Finance would welcome any engagement on this definition, so if any specific projects with public interest are envisaged, the Department should be informed with details of how it meets the public interest test.

- Practitioners noted that section 835AAG(2) adjusts for any transactions with associated enterprises, not just interest equivalent transactions, and queried whether this was intentional. Revenue stated that the ‘single company worldwide provision’ aims to hit a perceived gap for a company that isn’t a standalone entity, but also can’t avail of the group relieving provision, and it was important to consider how the provision will be used in the context of BEPS. Practitioners queried why different treatment applies to the group ratio and equity ratio, and Revenue stated that that the calculation of the group ratio, as it applies to a single company worldwide group, would continue to disregard transactions with associated enterprises such that the position was comparable to interest groups.

- Section 835AAI(2) TCA 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. Practitioners asked if it could be confirmed that “amount owed” means “amount of debt owed”, and Revenue stated that to the extent that amounts owing would not give rise to taxable interest equivalent or deductible interest equivalent a Committee Stage amendment would be considered such that an adjustment to the equity ratio would not be required.

- Practitioners noted that the definition of “interest group” in section 835AAK TCA applies to entities which are “within the charge to corporation tax in the State”, and queried how this would apply where an ICAV is grouped with certain companies. Revenue noted that while section 739C provides an exemption from tax for investment undertakings, investment undertakings are taxable on first principles, so can be considered “within the charge to corporation tax”.

- Practitioners requested confirmation that under section 835AAK TCA, 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 section 411(c)(i)(I) or (II) because it is deemed to be carrying on a trade in those shares. Revenue confirmed that a company within the charge to Case III taxed based on Case I principles which is not carrying on a trade of selling shares should be able to form a 411 group where the necessary ownership conditions are satisfied and the companies can therefore form a section 411 interest group.

Section 33 – Digital games relief

- Practitioners noted that these provisions are subject to State aid approval and sought clarity on the likely timeline for such approval. Revenue noted that the design parameters for digital games are not set out, and State aid approvals are decided on a case by case basis. It was noted that a previous application for State aid approval for a digital games tax relief made by another jurisdiction took over a year to be approved. While Revenue were hopeful that there would not be such a delay in respect of the legislation proposed by section 33. Revenue also noted that it is not possible to give a more detailed response in terms of timing at this stage.

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

- See also the comments above on section 18 of the Bill (discussed separately above).

- Practitioners noted that the revised definition of a loan within section 36 of the Bill applying to section 840A TCA represents a significant change, and sought confirmation on whether current arrangements would be impacted. Revenue confirmed that existing arrangement do come within the scope of the changes, as there were excessive loopholes impacting the effectiveness of section 840A.

- Practitioners noted that 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. Practitioners noted that 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, whereas it was expected that the legislation would only impact on new loans/debts put in place after the date of publication of the Bill amendment.

  Revenue again noted that the aim of sections 18 and 36 were to tackle loopholes that circumvented the intended application of section 840A TCA and in particular, it was noted that re-financings and promissory notes had negatively impacted its effectiveness. Revenue stated that the amendment proposed should be read as not applying to the refinancing of a pre-21 January 2011 loan, as such refinancing is not one to which subsection (a) applies.

- As discussed earlier, practitioners noted their concern in relation to the interaction of this amendment with the provisions contained in section 18 of the Bill 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). Practitioners highlighted that the impact of the amendment is therefore quite severe and welcomed Revenue's feedback as to whether the position was intended to operate in this manner.

  In particular, practitioners noted that the impact of this provision (section 36) together with the changes in section 18 of the Bill (in relation to non-resident landlords) should also be considered further, and 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.

  Revenue stated that if practitioners wished to make submissions on either sections 18 or 36 of the Bill, it should be done very soon before the Bill reaches the committee stage.

Miscellaneous – Part 6

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

Practitioners requested clarity on operational aspects of section 69 in light of the upcoming Pay & File deadline. In particular, practitioners noted that 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). Practitioners asked whether the full Schedule E balance due for 2020 should be 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), by contacting 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. Revenue noted that in the order of offset, amounts paid by the company via a PPA are allocated to directors and employees with a material interest last and confirmed that the PPA does not need to be paused, and the full Schedule E liability should be warehoused.

Practitioners queried whether a PPA automatically ceases if a director, who has entered into a PPA, filed their income tax return early and submitted the requisite declaration to avail of warehousing of their Schedule E liability. Revenue confirmed the director would have to contact Revenue to request that the PPA be ceased.

Practitioners queried whether 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, and Revenue confirmed that this is the case.

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.

Practitioners requested 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, and Revenue confirmed this.

Practitioners also noted that the increased threshold of €50,000 of tax before publication of any settlement by Revenue was a welcome introduction.

Section 77 – Residential zoned land tax

Practitioners noted that a number of technical amendments may be necessary, and suggested the following amendments:

- S653M(2)(c) – should the reference to s653C(4)(d)(i) TCA be s653C(4)(e)(i) TCA;
- S653M(2)(d) – should the reference to s653C(4)(d)(ii) TCA be s653C(4)(e)(ii) TCA;
- S653M(2)(e) – should the reference to s653C(4)(e) TCA be s653C(4)(f) TCA; and
- S653P(1) – the definition of liable person refers to section 653 TCA, and it was unclear what is supposed to be referenced.

Revenue agreed that these, and other technical amendments, would be made.

Section 79 – DAC 7

Practitioners requested an indication from Revenue regarding the timelines for the issuing of guidance on the DAC 7 provisions, and noted that there is potentially significant upfront front-end work to be undertaken by clients to update their systems to capture relevant information for the purpose of compliance with the DAC 7 provisions. Practitioners highlighted that 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.

Revenue stated that the next steps are for new regulations to be made, but noted that it may be appropriate for DAC 7 to be discussed at the TALC BEPS sub-committee. A meeting of that sub-committee is expected to be held in December.

Attendees at this meeting:

Revenue	ITI	CCAB-I	Law Society
Therese Bourke Brian Boyle Mary Breen Dave Brennan Sarah Cahill Alan Carey Eugene Creighton Jeanette Doonan Karen Drake Ashling Gallagher Maresa Hempenstall Aine Hollingsworth Joe Howley Alan Kelly Tricia Kelly Tom Kiely Norma Lane John McGorry Sinead McNamara Keith Noonan Jacqueline O'Callaghan Barry O'Dwyer Brendan O'Hara Sharonne O'Reilly John Quigley Declan Rigney Yvonne Ruane Eleanor Smiley Liam Smith	Mark Barrett David Fennell Anne Gunnell Laura Harney Mary Healy Laura Lynch Tom Maguire Pat Mahon Clare McGuinness Paul Nestor Stephen Ruane Lorraine Sheegar Kieran Twomey	Maud Clear Norah Collender Paul Dillon Enda Faughnan Ken Garvey Brian Purcell Peter Vale	John Cuddigan Maura Dineen Caroline Devlin Aidan Fahy (Chair) Carl Grenville Aileen Keogan David Lawless Sonya Manzor Chloe Power (Secretary) James Somerville