Irish Tax Institute

Leaders in Tax

Irish Tax Institute

Post Finance Bill 2012 Submission

20 February 2012

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1. Self Assessment

The proposed "full" self-assessment regime represents a significant shift in the balance between Revenue's powers and responsibilities and the rights and responsibilities of the taxpayer. It is important any such proposals are considered in light of the compliance costs for business and its impact on the efficiency of tax collection. Proper regard must be given to the fairness of the system and a taxpayer's right to due process, for example access to the Appeals process notwithstanding their financial circumstances, the right to express doubt where there is an uncertainty and a robust Revenue internal review process.

A number of key issues must be considered and addressed now in light of these concerns:

- A regulatory impact assessment should be undertaken on the compliance costs arising from the change.
- Investment in educating the public will be essential. The new regime should be supported by a comprehensive Government education campaign involving both online and offline assistance and support.
- The current review of Revenue's Technical Services to agents needs to be finalised and published.
- Similarly, we await the publication of Revenue's revised SOP on Internal/External Review. The Institute have been heavily engaged in representations to improve the current regime.
- Recognition of the right of a taxpayer to "express doubt", where they have a doubt in interpreting the law for their particular circumstances, and without applying an onerous burden in supplying supporting documentation.
- Access to the tax appeals process notwithstanding financial constraints.

Appendix 2 looks at these issues in detail. The flow charts in Appendix 1 look at the practical implications of the new regime for a self-employed person and for a company.

2. Receiverships

Income Tax - Fixed Charge Receiver over individuals' assets

1. Section 96(3)

Section 96(3) provides that
"Where the estate or interest of any lessor of any premises is the subject of a mortgage and either the mortgagee is in possession or the rents and profits are being received by a receiver appointed by or on the application of the mortgagee, that estate or interest shall be deemed for the purposes of this Chapter to be vested in the mortgagee, and references to a lessor shall be construed accordingly; but the amount of the liability to tax of any such mortgagee shall be computed as if the mortgagor was still in possession or, as the case may be, no receiver had been appointed and as if it were the amount of the liability of the mortgagor that was being computed."

It is understood that Revenue has examined the application of this provision to receivers appointed under fixed charges and that Revenue is of the view that the mortgagees must account for income tax on rental income. Essentially the mortgagee would be chargeable to tax as if it was the landlord but that the tax would be calculated as if it was the mortgagor's liability.

Without prejudice as to whether or not Revenue's position is correct or not, the provision appears to be very difficult to apply in practice given the complete absence of any machinery to operate the provision.

Some practical difficulties in regard to the application of this section to consider include:

- Whether the mortgagee in possession (financial institution) needs to register for income tax in order to account for the tax liability arising,
- Whether the mortgagee in possession must pay and file as an income tax payer,
- Whether the mortgagee in possession must account for the USC (individuals)
- Whether the mortgagee in possession can avail of any relief that may be claimable by the mortgagor and the mechanics of making such a claim,
- How the mortgagee in possession should deal with rental deductions such as interest and capital allowances.
- Whether the mortgagee in possession would be entitled to deduct the receivership costs as a rental expense.
- How group relief and/or loss claims that could reduce the income or profits of a mortgagor can be factored into the computations,
- How the receiver can ensure that any group relief if available is claimed/surrendered where they have no control over the filing of the corporation tax returns of either the company in receivership or any loss making group companies which are not in receivership.

- If the mortgagee in possession pays tax how does this interact with the mortgagor's income tax liability, in particular is the tax credited to the mortgagor and what happens if the tax becomes refundable
- What if any forms are to be returned by the mortgagee in possession in respect of the income
- What is the due date for filing of returns
- Will a separate return have to be made for each MIP or one return for all MIPs in a given tax year
- The receiver's obligations (if any)
- The computation of income tax attributable to the rental income will be complicated by the possible application of the high earners restriction, multiple sources of income, joint assessment and the inability to access the information necessary to compute any tax liability. Situations have also arisen where multiple receivers have been appointed to different rental properties owned by the same individual. Information such as the returns to be submitted by the mortgagee in possession in respect of the income, the due date for filing of returns, will a separate return have to be made for each MIP or one return for all MIPs in a given tax year needs to be addressed.

2. Is the Receiver required to apply for a separate PPS number in respect of all receiverships or does the Receiver use the PPS number of the individual over whose assets the Receiver is appointed?

3. In relation to completion of Form 8-2 -Return of Third Party Information by Persons in receipt of Income of Others

    a. In some cases, on appointment as receiver over specified assets of a borrower the Receiver will apply for a new tax reference number. In such cases this will be the reference number that will be included on the Form 8-2. However the receiver does not always apply for a separate pps, in these cases how is the Form 8-2 to be completed?

    b. Form 8-2 requests details of the income of others received by a third person (e.g. the receiver); however the form does not request details of the expenditure incurred by that person (the receiver) in connection with that income. Is the Receiver required to include details of the expenditure associated with that income as an appendix/attachment to Form 8-2?

4. In cases where the Receiver has applied for new tax reference numbers on appointment as receiver, they have received pay and file reminder notices. Confirm that, as Receivers, they are not required to file a Form 11 in respect of the specified assets over which they are appointed?

5. What obligations, if any, do the financial institutions have in respect of preliminary income tax e.g. where rental income will be received over a period of years?

6. S890, S1050 & S52 TCA 1997

Section 1050(2) TCA 1997 appears to provide protection for receivers in respect of such situations. It provides that:
"An agent or receiver of any person resident in the State, other than an incapacitated person, shall not, if that agent or receiver makes a return as required by section 890 of the name, address and profits of that person, be required to do any other act for the purpose of the assessment of that person, unless the Revenue Commissioners require the testimony of the agent or receiver pursuant to the Income Tax Acts."

Where a receiver files a return as required by section 890 TCA 97 (i.e. Form 8-2) in respect of the income from e.g. property sales and interest received, is the receiver relieved from any obligations under section 52 TCA 97?. That section extends the definition of persons chargeable to persons 'receiving income'.

In the interest of clarity, the above issue is not addressing the question of the tax treatment of rental income received by receivers appointed under fixed charges under S96(3).

Capital Gains Tax (CGT) - Receiver over individuals' assets

Under S571 (7) TCA 1997 the CGT is assessable on the Receiver as an income tax assessment under Case IV at the standard rate of tax.

As income tax/corporate tax appears to be applied to any gains arising, it would seem that payment of such tax would fall in line with normal income tax rules, i.e. payment and return of details for 2011 must be filed and paid by 31 October 2012 and not under the tax and filing due dates for capital gains tax, which are different. On the basis that income tax under Case IV is assessed, it would appear that the relevant form is the Form 1.

Where the borrower has capital losses forward or current year losses, these may be available for offset against any gains that may arise on the sale of properties. Again a lack of information on the borrower's circumstances leads to difficulties in determining the tax exposure, if any.

3. Employment / Innovation Incentives

(a) Special Assignee Relief Programme (SARP)

(i) 30% deduction

The new SARP offers a deduction of 30% of earnings in excess of €75,000, whereas its predecessor offered a deduction of 50% of earnings in excess of €100,000. Accordingly, while the scope of the incentive has been widened, the quantum of the deduction is less beneficial under the new SARP for those earning in excess of €100,000. See examples below – from KPMG *Taxing Times Finance Bill 2012*.

In light of the fact that the relief does not apply for the purposes of the USC or PRSI, the effective tax rate for individuals availing of the relief could be up to 35%. This gives us a competitive issue when you consider the effective tax rate under the expatriate regimes offered by some of our competitor jurisdictions.

	Scenario 1		Scenario 2		Scenario 3	
	Old SARP €	New SARP €	Old SARP €	New SARP €	Old SARP €	New SARP €
Remuneration	100,000	100,000	250,000	250,000	500,000	500,000
Tax/USC	37,100	34,000	78,400	87,600	147,100	176,800
Tax up/(down)		(3,100)		9,200		29,700
Effective tax rate	37%	34%	31%	35%	29%	35%

(ii) Grand-fathering

Section 13 of the Bill provides that section 825B TCA 1997 (i.e. the previous Special Assignment Relief Programme) shall not apply for 2012 or any subsequent year of assessment. Meanwhile, under section 14 of the Bill, the new SARP only applies to individuals arriving in the State in any of the tax years 2012, 2013 or 2014.

It appears that individuals who qualified for the previous incentive in 2011 may not qualify under either the previous system or the new system in 2012 or any subsequent year.

(iii) 30-day rule

Under section 14(2)(b) of the Bill, individuals wishing to avail of the relief cannot spend more than 30 work days outside the State in any tax year. We have received feedback that this restriction may cause issues for multi-nationals interested in relocating key staff to Ireland, particularly in the first year of an assignment. It is likely that assignees would need to travel back to the head-office jurisdiction of their employer quite frequently throughout the year, in order to attend meetings and carry out other functions directly related to their assignment.

With a view to enhancing the attractiveness of the incentive to multi-nationals, some thought may be given to extending this 30 day period.

(iv) Exclusion of "new hires"

Section 14(2)(a)(i) of the Bill requires that an individual must have been a full-time employee of the company for the 12 months immediately preceding the individual's arrival in the State. This precludes the possibility that a newly-hired individual may claim the relief. Again, we would like it some consideration could be given to removing this requirement and opening up the incentive to new hires.

(b) Foreign Earnings Deduction (FED)

(i) Qualifying days abroad

Under section 12(1)(a) of the Bill, all trips to the BRICS countries must involve at least 10 consecutive days spent in one of the countries. We note that travel time is not included in this 10-day requirement. The territories covered by the relief are ones for which significant travel time may be incurred in visiting, and this may affect an individual's ability to claim the relief for a particular trip. For example, if an individual undertakes a trip to Brazil for 10 working days, and 2 of those days are taken up with travel time, then that trip will not count towards the 60-day threshold.

In light of this limitation, and the territories involved, some consideration may be given to relaxing this requirement.

(ii) Relevant states

The provisions, as currently drafted, limit the scope of the FED to assignments to the BRICS countries. As we noted in our pre Finance Bill submission, feedback from our members would indicate that there is currently a lot of activity among Irish companies in the emerging economies of the Middle East and Africa. We would welcome the extension of the programme to assignments in those regions.

(iii) €35,000 limit

As currently drafted, the deduction available under the scheme is capped at €35,000. In many cases, Irish companies will want to dispatch their most senior, and highest-paid, employees to represent their company in foreign markets. The €35,000 cap on the relief limits the benefit of the incentive for such employees and the ability of companies to incentivise their employees to avail of it. Some consideration may be given to removing this cap, and simply allowing the deduction on a time-apportionment basis.

(c) Research & Development (R&D) tax credit

The amendments to the R&D tax credit are very positive and are likely to be of significant assistance in boosting the knowledge economy and promoting investment in quality research and development by Irish companies. The Institute welcomes, in particular, the option for companies to use the credit to reward key employees, which is a very innovative proposal.

We have, however, a number of comments in relation to the provisions in the Bill as initiated:

(i) Exclusion of loss-making companies

Section 26 of the Bill contains, inter alia, the provisions allowing companies to surrender a portion of their R&D tax credit to key employees who have been involved in the R&D process.

The new subsection (2A)(b) to be inserted in section 766 TCA 1997 provides that the portion of the credit surrendered cannot exceed the amount of corporation tax that the company would be paying in the absence of the R&D tax credit claim. This means that the company must be in a tax payable position in order to avail of this surrender option. Loss-making companies are therefore excluded.

This limitation is likely to disproportionately affect smaller innovative companies which are still in the start-up phase and have yet to become profitable.

(ii) Exclusion of directors / employees with a "material interest"

The definition of "key employee" in section 8 of the Bill excludes directors and employees who have a shareholding of more than 5% in their employer or in an associated company. Many early-stage start-up companies may wish to offer skilled individuals an equity stake in order to attract them to work in their business. Such employees would be precluded from claiming the relief.

(iii) Clawback of the relief

Section 26(1)(k) of the Bill provides that where an R&D tax credit claim is ultimately unsuccessful, the company may be charged to tax under Case IV of Schedule D in an amount equal to 4 times the payment made to the company or amount surrendered to the key employee. In situations where an R&D tax credit claim ultimately proves to be only partially successful, it appears that this provision, as currently drafted, could give rise to a clawback of the full amount of the claim, rather than the portion ultimately denied. We would welcome a review of this provision, in order to ensure that only the amount denied may be clawed back.

In addition, the possibility, as provided for under section 8(7) of the Bill that the surrender may, in certain circumstances, be clawed back from the employee reduces the attractiveness of the scheme for employees. Some consideration may be given to reviewing this provision and possibly limiting the clawback to the company, with a view to offering greater certainty to key employees.

(iv) Year of claim and surrender

Under section 8(2)(a) of the Bill, a "relevant employer" may surrender an amount of its R&D tax credit to a "key employee" in order to allow that employee to reduce the income tax arising on his "relevant emoluments" for a tax year.

Accordingly, the employee may only use the relief in respect of "relevant emoluments" – defined as emoluments paid by a "relevant employer" to a "key employee". A "relevant employer" is, in turn, defined as a company which is entitled to relief under section 766(2) and that employs a "key employee".

As currently drafted, the provisions appear to preclude the relief operating in the following circumstances:

1. The company incurs significant R&D expenditure in the accounting period ending 31 December 2012, makes a valid R&D tax credit claim for that year and then ceases to conduct R&D.
2. The company wishes to surrender a portion of the claim to one of their key employees, to reduce the employee's income tax for the tax year 2013.

The reason that the surrender appears to be precluded in the above scenario is that, in 2013, the employee will not have any "relevant emoluments" (emoluments paid by a relevant employer). This is because it appears that the employer will not satisfy the definition of "relevant employer" for 2013, i.e. it will not be entitled to relief under section 766(2) for that year, as it will not be conducting any R&D.

We would be grateful for clarification of the position in the above scenario, and a revision of the provisions, if considered necessary, in order to ensure that the relief will apply.

4. Capital Gains Tax

Capital Gains Tax Initiative – shares deriving their value from land / buildings

As currently drafted, the new capital gains tax initiative contained in section 62 of the Bill applies only to land and buildings. We would welcome an extension of this initiative to include shares deriving their value from Irish land and/or buildings. This would allow taxpayers the flexibility of entering into share deals instead of being limited to asset sales.

5. VAT

Reverse charge for supplies of construction services

Section 74 of the Bill contains provisions to extend the reverse charge basis of accounting for VAT to supplies of construction services where the supplier and the recipient are connected parties. This measure is to apply as of 1 May 2012.

This is quite a significant change and we would welcome a longer lead-in time in order to ensure that taxpayers are fully prepared for correct implementation of the new system. We would therefore suggest an effective date of 1 July 2012. This would also give Revenue time to prepare guidelines on the application of the provisions after the passing of the Finance Act.

6. Revenue Powers

(a) Section 111 – Security for certain taxes

Under section 111 of the Bill, the Collector-General is given the power to require a person carrying on a business to give security for certain fiduciary taxes where those taxes are not paid within 30 days of the due date. The section makes it an offence for a person served with such a notice to engage in business until that security is provided. These provisions are quite far-reaching, particularly as they extend to connected parties, and there is concern that they could potentially close down a business to which they are applied. The 30-day time limit is also quite a short period of time.

We understand that Revenue will issue guidelines outlining the role of this power and we consider these guidelines to be very important in light of such far-reaching provisions.

(b) Section 112 – Order to produce documents or provide information

Section 112 contains provisions enabling an authorised officer of the Revenue Commissioners to apply for a District Court order in relation to the production of documents or information for the purposes of an investigation into a wide range of offences. We note from the Explanatory Memorandum to the Bill that the provisions are targeted at *"serious and complex revenue offences"* and are intended to facilitate the investigation of white-collar crime.

However, section 1078 TCA 1997 is included within the scope of offences covered by section 112 of the Bill. Section 1078 includes matters such as failure to file a return or keep books and records, which seem to be much broader than "serious white-collar crime". We would therefore like to see a more focused remit for this section and we would also welcome the publication of guidelines as to who may be designated an "authorised officer" of the Revenue Commissioners for this purpose.

We fully appreciate the need for Revenue to have sufficient powers to tackle serious white-collar crime, but we would stress the importance of ensuring a balance between adequate Revenue powers and appropriate taxpayer safeguards.

7. Discretionary Trusts

When a trust is a Discretionary Trust i.e. there is no immediate and automatic benefit to beneficiaries under a trust, the assets in the trust are subject to Discretionary Trust Tax (DTT) charges during the lifetime of the trust. An initial DTT charge of 6% applies on set-up of the trust with an annual DTT charge of 1% arising on the property in the trust. Trustees are given an incentive to terminate the trust early through a reduction in the 6% rate to 3% where assets are distributed within a set timeframe.

Section 97 of the Bill brings forward the "trigger date" for the DTT charges by deeming the property in a Will Trust to be subject to the trust on the date of death of the disponer. In practical terms, this means that a liability to tax will arise before the residue of the estate and tax thereon can be accurately calculated and before a trustee has access to the assets to fund the tax payments. The High Court[1] recognised this difficulty in the Irvine case where it found that as a matter of law the estate did not become subject to the discretionary trust until the residue was ascertained. Therefore it was not capable of being chargeable to DTT before this time. In light of the practical considerations and case law we would welcome a review of the Bill's provisions.

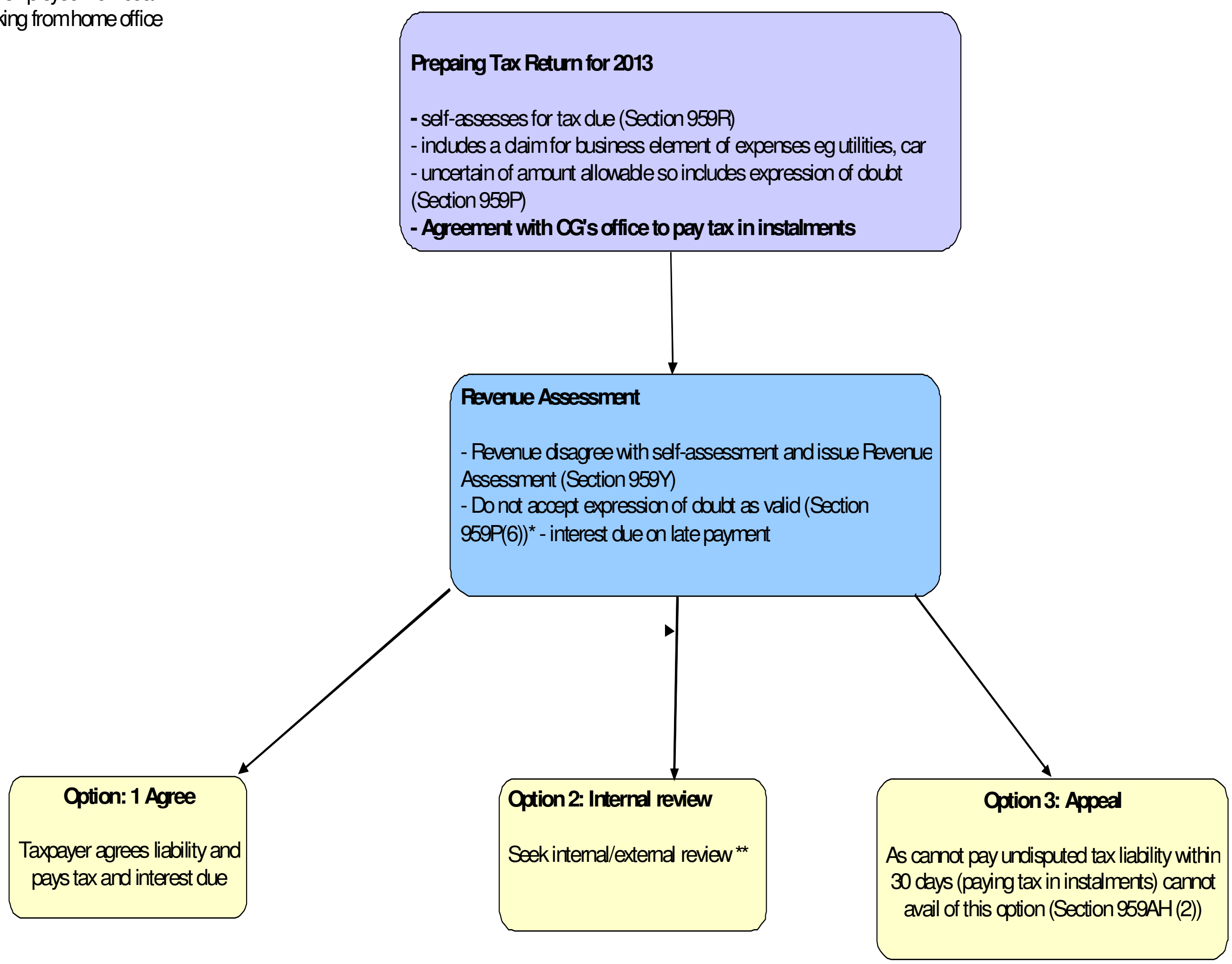
[1] Revenue Commissioners v Cedric Christie and others (executors of the Jeannie Hammett Irvine Will Trust) [2005] No. 172R

Appendix 1

Full Self-Assessment - Practical Implications for Taxpayers
Example 1

Taxpayer A

Self-employed individual
working from home office



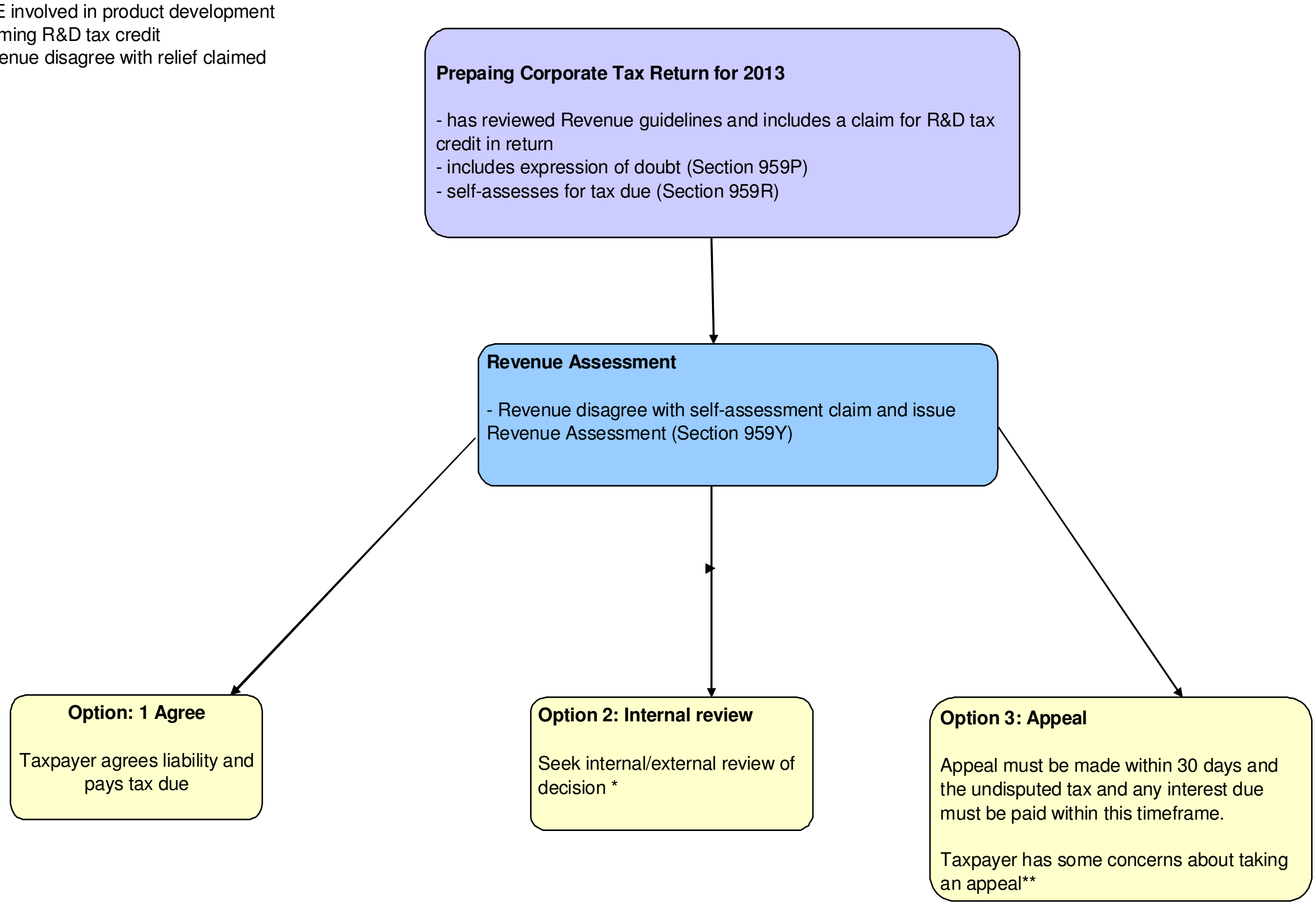
*Revenue can refuse an expression of doubt where Revenue have issued "general guidelines concerning the application of the law in similar circumstances" (Section 959P(6))

** Revenue annual report - Stats on internal/external review
Revenue decisions upheld
2010 60% of cases
2009 80% of cases

Full Self- Assessment –Practical Implications for Taxpayers
Example 2

Company B

SME involved in product development
Claiming R&D tax credit
Revenue disagree with relief claimed



* Revenue annual report - Stats on internal/external review

Revenue decisions upheld
2010 60% of cases
2009 80% of cases

** Taxpayer concerns
Not all decisions are published so cannot see if similar cases were decided on
Costs concern - the taxpayer may need to engage a solicitor and or barrister

Appendix 2

The Proposed "Full" Self-assessment Regime

Under the proposed regime in addition to declaring your income/ gains and claims for the year you must also correctly calculate and declare the tax or refund due. No Notice of Assessment (Revenue Assessment) will issue unless Revenue disagree with your calculations. This gives rise to a number of issues for taxpayers and their agents:

A Shift in the Balance of Responsibility

- Taxpayers who do not engage a tax agent will now have to accurately calculate the tax due. Given the complexity of tax legislation and the volume of Revenue guidance on how the legislation applies this is an increasing burden on the taxpayer. If you do not correctly calculate the liability you can be subject to a fixed penalty.

Compliance Costs for Business

- The new regime is likely to increase the cost of compliance for taxpayers, as they will need to ensure that they correctly calculate their liability, in addition to declaring all their income sources. Taxpayers who historically filed their own returns may need to engage an agent to gain comfort that the calculation is correct.
- A regulatory impact assessment should be undertaken of these increased compliance costs.
- Revenue will calculate the tax due and issue and assessment to those who file a paper tax return by 31 August in the year it's due. It's important to remember that not everyone has the option to file a paper return. Under the mandatory efiling programme, the categories of taxpayers who must file online is increasing from June 2012 to include taxpayers claiming any types of relief, including pension relief.

Need for Education and Support

- ROS is undoubtedly going to be used more widely by taxpayers calculating their own tax liability. This will mean that taxpayers will need to be educated on how to use ROS so they are using it correctly. A comprehensive education campaign is required.
- Where a taxpayer is uncertain of the tax treatment of a particular expense or claim on the return, they will need to have some assistance in helping them address the issue. This could be facilitated by "plain English" guides on Revenue's website, together with development of information on common errors to avoid in completing returns. The UK has developed "toolkits" on common issues such as use of losses, distinction between capital and revenue expenses.

A Right to Due Process

- The expression of doubt provision in tax law means that where a taxpayer is unsure about the application of tax law they can express doubt about the application of the legislation in their particular circumstances. This right is important. The Bill amends the circumstances where you can express doubt. This amendment means that where "general guidelines" have been issued by Revenue in relation to similar circumstances you cannot make a valid expression of doubt.
- Additional supporting documentation will be required to be submitted with your expression of doubt.
- It will not be possible to make an expression of doubt if the return is filed late.
- Where you have received a Revenue assessment that you do not agree with unless you pay any undisputed tax within 30 days ie the timeframe for lodging an appeal you request for an appeal will not be valid. In addition to paying the undisputed tax you must also pay and interest and collection costs related to the tax. This means that if you are unable to pay the liability in full you will not have access to the appeals system. We understand in the UK it is possible to obtain a Certificate of Hardship which could be used to allow the taxpayer due process where payment difficulties arise.

Flexible Operation of ROS

- Greater flexibility on ROS must be enabled to allow for differing interpretations of legislation. The design of ROS means that only the ROS calculation can be submitted, even where a taxpayer does not agree with Revenue's treatment of an item or expense, as set out in ROS.

Appendix 3

The Current Self- Assessment Regime

Under the current self-assessment regime a taxpayer in their annual returns provides information on the income, gains made in the year and claims for any allowances, credit and reliefs they consider are due to them for the period in question. You sign the form to declare that all the information provided is correct, to the best of your knowledge and belief. The return is then submitted together with the balance of tax you consider you owe for the year.

Once their return is submitted you receive a Notice of Assessment from Revenue, which shows Revenue's calculation of the tax due and what Revenue consider that you owe.

What if you don't agree with Revenue's assessment?

There can be a number of reasons Revenue's assessment does not match your calculation of the tax due. For example where there is:

1. An entry or transposition error
2. Revenue interpretation of the tax treatment of some items on the return differs from yours. You may differ on for example:

a) Whether an expense you incurred was incurred wholly and mainly for the purposes of trade; for example if you operate your business from home how your utilities, phone etc are split between business and non-business purposes.
b) Whether an item of expense is revenue or capital in nature
c) Whether you have expenditure that qualifies for the R&D credit.
d) Whether you are tax resident for the year in question
e) Whether the activity you are carrying out is a trade. This would have a knock on impact on how you can use any losses arising.
f) Whether you are in business on your own account or are an employee.

If you do not agree with Revenue's assessment of the quantum of tax due you write to Revenue noting that you wish to appeal the Notice of Assessment to the Appeal Commissioners. This request must be made to Revenue appeal within 30 days of the date of the Notice of Assessment.

While waiting for the appeal to be determined you do not have to pay the tax that is subject to dispute. In general, the tax that is not the subject of the dispute is paid before the appeal is heard.

If the Appeal Commissioners find that Revenue's assessment is correct, the taxpayer has a right to appeal it on a point of law to the High Court.