

## **Minutes of TALC Direct / Capital Taxes Sub-Committee Meeting**

**20 June 2017**

**Office of the Revenue Commissioners, Dublin Castle, Dublin 2 at 2:30pm**

### **Item 1: Review of minutes from meeting of 10 May 2017**

- The minutes were approved.

### **Item 2: Matters arising**

- It was noted that there was a number of matters arising from the 10 May 2017 minutes.
- In relation to Revenue confirmation that copies of Forms CG50 and supporting documentation can be submitted and that originals are not needed, it was noted that the material on the Revenue website was due to be updated. Revenue confirmed that an instruction had issued to staff in respect of this and that the position was in operation.
- It was noted that, whilst Guidance Notes on the new Section 110 provisions and IREFs had been removed from the agenda, practitioners would welcome any updates on these Guidance Notes if and when available.
- It was also noted that it was agreed at the last meeting of the Sub-Committee that a number of items would be referred to other Sub-Committees or to Main TALC. It was confirmed that these items had been so referred.

### **Item 3: Capital Gains Tax – Section 176 trade benefit test**

- At the previous meeting, practitioners had expressed a view that there was a lack of consistency across districts on what matters would meet the trade benefit test.
- Revenue advised that where practitioners had sought an opinion concerning Section 176 from RTS, the overwhelming majority had received a positive response.
- Revenue outlined a number of common reasons for companies failing to meet the test as follows:
  - Where financing a share buy-back could render the company insolvent;
  - The inclusion of a notional goodwill figure;
  - Failure to use the appropriate market valuation methodologies set out in Part 21 of the CAT Manual;
  - Failure to value the impact of the stake of the minority interest;
  - Failure to provide for a “complete break” with the departing shareholder. Revenue will generally accept a period of up to 6 months for this to occur.
- Practitioners raised the fact that it seemed that there was a particular issue in relation to financing a share buy-back with borrowings. Revenue advised that there was no general prohibition on borrowings but that it would examine the potential impact of borrowings on the business.
- Revenue stressed that the judgement of these cases is based on a combination of all factors involved.
- It was agreed that this item would remain on the agenda.

### **Item 4: Capital Gains Tax – Section 626B disclosure in Form CT1**

- Practitioners had queried whether it was possible for Revenue to accept the accounting measure of the exempt chargeable gain under Section 626B for inclusion on the Form CT1, given the time and cost it takes to calculate the chargeable gain in line with taxation principles, if

this information was required for statistical purposes only. This was proposed on the basis that there would be few circumstances where there would be any difference between the two figures.

- Revenue confirmed that the calculation of the exempt chargeable gain under Section 626B for inclusion on the Form CT1 is required and that the inclusion of the accounting measure of the gain is not sufficient.
- Revenue indicated that the calculation of the exempt chargeable gain is required for statistical purposes in order to ensure that the exemption can be evaluated from a policy perspective.

#### **Item 5: Section 597AA entrepreneur relief**

- Revenue confirmed that the application of this relief on liquidation of a company cannot apply in the case of a holding company which holds shares in a company carrying on a qualifying business, indicating that the relief is only available to the company which is actually carrying on the qualifying business.

#### **Item 6: Capital Acquisitions Tax – Benefits passing to a charity / trust and evidence of improvidence**

- It was noted that Revenue had circulated draft guidance for comment in advance of the meeting, with a request for written comments by 30 June 2017.
- Practitioners indicated that they were concerned that the draft guidance published implies that improvidence must relate to a medical issue. Practitioners explained that often improvidence is not connected to any medical issue and that medical incapacity, for which medical substantiation can be obtained, comes under other elements of the test in Section 17 CATCA, being physical, legal or mental incapacity. Practitioners indicated that the requirement of a doctor's certificate is not one for improvidence nor is a certificate one that could be easily obtained from an uncooperative beneficiary and furthermore the requirement of compulsion is not appropriate in various circumstances.
- Practitioners also noted their concerns with the stated requirement that management of financial affairs must have been taken away from the person in advance of establishing the trust, explaining that the trusts in these cases are usually established to prevent the need for a person being made a ward of court so that they do not become possessed of the money for which you would seek the protection of a wardship. Similarly in this regard, practitioners noted that an enduring power of attorney would never be executed by the type of individuals which these trusts are usually set up to protect and the only enduring power of attorneys that may apply in such a case are those executed by parents of such individuals to ensure their affairs are managed in accordance with their practice of maintaining their children in a certain manner.
- Practitioners suggested that the examples in the draft practice note appeared to be prescriptive insofar as it stated clearly the person "*must also have a compulsion to spend*" and a "*requirement for such medical evidence*" and "*it would be expected that responsibility for managing the individual's financial affairs would have been taken away from him or her in a formalised legal arrangement*".
- Practitioners further suggested that an improvident who is likely to spend will only spend what is available to him/her such that an improvident may appear to be recovered until a benefit is made available, so the trust is established to protect such a trigger even if, at the time the trust is created, the improvident is not manifestly showing incapability.
- Practitioners raised a query specifically in relation to drug addicts and whether a recovered drug addict could fall within the concept of improvidence.
- Revenue advised that, in order to qualify for the relief under Section 17 CATCA, the trust must be established for the reason that the person is incapable of managing his or her affairs because of improvidence. On that basis the improvidence must be established prior to the setting up of the trust and clear evidence should be available of the condition/behaviour and steps taken to manage this. Revenue re-iterated the view that it would be likely that such a

person would have had the day-to-day management of financial affairs taken away and that there should be evidence to this effect. Revenue noted that the examples included in the draft guidance were not intended to comprise an exhaustive list and Revenue confirmed that it was not intended that the published manual would contain an exhaustive list of acceptable evidence. Revenue invited practitioners to make any further submissions in writing and that it will consider these when finalising the manual.

- In response to a written query Revenue noted that Section 84 CATCA relates to permanent incapacity and will be addressed separately to Section 17.
- It was agreed that this item will remain on the agenda.

#### **Item 7: Discretionary Trust Tax – Initial charge on trusts with Irish investments**

- Revenue confirmed that the initial 6% charge to discretionary trust tax is payable by non-Irish trusts that invest in Irish property on the proportion of the assets of the trust which are Irish situate property, even where none of the disponent, the beneficiaries or the trustees have been resident, ordinarily resident or domiciled in Ireland, where the Irish property becomes subject to the discretionary trust on initial set-up of the trust (where the disponent is dead and the principal objects are over the age of 21).
- Revenue further confirmed that the initial 6% charge would not arise if the Irish assets were purchased after the trust was set-up and, in the same circumstances, i.e. where the disponent is dead and the principal objects are over the age of 21. Revenue stated that the annual 1% charge would apply to the Irish assets in those cases.

#### **Item 8: Stamp Duty – Relief on Irish mergers under Section 87B**

- Revenue confirmed that the TALC Companies Act sub-group had met and following legal advice obtained by Revenue, Revenue had concluded that Irish mergers under the Companies Act 2014 are conveyances on sale.
- In respect of relief, Revenue confirmed that it was its position that Section 87B relief cannot apply to Irish mergers but applications in respect of mergers by absorption may be made under Section 79 SDCA and applications in respect of mergers by absorption and mergers by acquisition or formation of a new company may be made under Section 80 SDCA.
- Practitioners queried whether stamp duty numbers for the company which no longer exists after the merger can still be used for stamp duty purposes. Revenue confirmed that they could.

#### **Item 9: Corporation Tax – Section 452 elections - Form CT1 and elections in writing**

- Revenue confirmed that ticking the box available on the Form CT1 for the purpose of notifying Revenue of a Section 452 election is sufficient and a separate notification in writing to Revenue is not required.

#### **Item 10: Corporation Tax - Section 452 elections – Section 110 companies**

- Practitioners queried whether Section 110 qualifying companies could make a Section 452 election. Revenue noted that language in Section 452 is similar to the language used in other provisions of the Tax Acts which advisors may not have historically thought of as applying to Section 110's.

**Item 11: R&D Credit Discussion Group - update**

- Revenue confirmed that a meeting of the R&D Credit Discussion Group had taken place on 9 June, focusing on the food and beverage industry. The focus of the discussion was issues faced by this particular industry, for example scaling, and the participants of the Group are going to submit further examples to Revenue for guidance. Industry-specific guidance will then be published.
- Revenue indicated that the intention is that many of these industry-specific Guidance Notes will be drafted following subsequent meetings. It confirmed that the next industry meeting would be on software.
- Revenue confirmed that the minutes of the Group will be published on the Revenue website.

**Item 12: Film Tax Credit – Eligible Expenditure**

- Revenue presented the draft updated manual on the Film Tax Credit – Eligible Expenditure, circulated in advance of the meeting, which it indicated was intended to clarify and rectify the manner in which the film tax credit is being applied. Revenue stated that it intended that this draft manual would apply to all applications for the film tax credit which had not yet completed the compliance stage. A robust discussion followed.
- Practitioners accepted that some clarification on eligible expenditure was to be welcomed but they expressed concerns as to the difficulties which would arise in circumstances where budgets had been previously submitted to Revenue and production was already underway, in particular where line items had been included in budgets which Revenue now proposed would be disallowed in their entirety.
- Following lengthy submissions by practitioners on the draft manual, it was agreed that a separate meeting should be held between Revenue and practitioners working in the industry to discuss the draft further and in particular to consider any transitional measures that could be applied in respect of the eligible expenditure clarifications and the proposed inclusion of a condition in certificates issued under Section 481(2A) which requires producer companies to take steps to ensure employees, contractors and service providers comply with their respective obligations under, amongst other statutes, the Tax Acts. It was agreed that Revenue and practitioners would report back to the Sub-Committee once this meeting is held.
- Revenue confirmed, in response to a query, that generally upfront financing costs constitute eligible expenditure but that interest on financing does not.

**Item 13: Partnership returns and Brexit**

- Practitioners queried whether it would be permissible for professional service firms seeking to set up Irish operations in light of Brexit to, where a permanent establishment is triggered, submit one partnership return (Form 1) as opposed to all partners needing to submit individual returns (Form 11).
- Revenue indicated that it did not think that this approach would work as there would be no notice of assessment issued in respect of the individual partners in those cases and so those partners would have no evidence of their entitlement to claim an Irish tax credit.
- There was further discussion as to whether a separate Irish partnership could be formed where the filing requirements could only be in relation to the Irish partners. This would be in full compliance with the law. It was pointed out there would probably be equalisation arrangements entered into in such a scenario.

**Item 14: Revenue Opinions and Confirmations**

- It was noted that practitioners are to submit general opinions to Revenue to be examined and, if

appropriate, refreshed, in advance of the 30 June deadline.

- Revenue indicated that few opinions had been received for refreshing to date but it was expected that more would be received in advance of the deadline
- It was noted by practitioners that the January eBrief link to the submission information for opinions and rulings was not working on the new Revenue website. Revenue indicated that it would raise this internally for correction.

## AOB

- **Section 955 – Updated Revenue manual**

- Practitioners raised the contents of example 4 of the recently published Revenue manual on Section 955 expressions of doubt. They noted that the example suggested that the fact of prior engagement with a Revenue official who issues an opinion on a matter meant that a genuine doubt could no longer exist, even in circumstances where the taxpayer who sought the opinion disagrees with the opinion on a reasoned basis. They raised the fact that this would penalise those who engage with Revenue to seek opinions in advance of filing as they could not receive the protection from penalties and interest offered by the expression of doubt provisions. It was also noted by practitioners that it is not possible to appeal an opinion and so the only way to get a matter to appeal stage once an opinion with which you disagree has been issued is to file a return, wait for Revenue assessment and then appeal this assessment.
- Revenue noted that example 4 in the Revenue manual had been in a Revenue eBrief since 2003 and the new manual consolidated eBriefs on the section.
- Revenue indicated that if a taxpayer receives an opinion that they disagree with, the proper forum to contest this opinion is to go back to the Revenue office that issued it initially setting out the taxpayer's reasoned objections. Revenue noted that the Expression of Doubt facility follows the same review process as seeking an opinion and a similar analysis would be done so the facility could not be available to taxpayers who simply dislike the first opinion they receive and are seeking a second chance at obtaining a differing view from Revenue. Revenue confirmed that if a genuine disagreement continued to be expressed after proper engagement with the Revenue office that issued the opinion, an official could accept an Expression of Doubt as genuine but the prior engagement with the Revenue office, including the issue of the opinion, must be disclosed when making the Expression of Doubt.
- Revenue also noted that a new manual on the current Expression of Doubt process under Section 955P is being drafted and that practitioners' comments from this meeting would be fed back into that process.

- **Revenue website**

- Revenue confirmed that all pre-2012 material is contained in the "Historic materials" section of the Revenue website because it is more than 5 years old. Revenue reiterated that it will not stand over any generic opinion given by it which is more than 5 years old and that this includes eBriefs, Tax Briefings and other guidance notes.
- Revenue noted that there is a destination table within the historic materials section which indicates the sections of the manuals setting out Revenue's position on the areas addressed in historic Tax Briefings and / or eBriefs.
- Practitioners raised concerns that not everything from eBriefs or Tax Briefings is always captured in the manuals and that it is not realistic that it would be. Revenue indicated that manuals were being updated continuously and that practitioners are welcome to identify any areas of the manuals where they have concerns with regard the interpretations of treatment set out. Practitioners should rely on Revenue manuals only as statements of Revenue practice in an area, with the webtext on the Revenue website aimed at non-practitioners.
- Practitioners queried whether a sitemap could be drawn up to explain the location of the various resources on the website under each tax head, which could be for practitioners' use only.
- Revenue noted that it welcomed feedback on and ideas for improvement of the website.
- Revenue noted forms are generally presented on the website (although not generally in pdf

form) along with material setting out the on-line options for the relevant return, payment etc and that this is part of a strategy to encourage people to use the Revenue's on-line services. Practitioners queried whether these could be made available in webtext form for training purposes.

- It was agreed that this matter would remain on the agenda.

#### Attendees at the meeting of 20 June 2017

##### **Revenue**

- Bruno Simoes
- Catherine Murray
- Mary Hughes
- Brian Boyle
- Michael Buckley
- Sharonne O'Reilly
- Alan Kelly
- Áine Hollingsworth
- Paul Walsh

##### **CCAB-I**

- Kimberley Rowan
- Peter Vale

##### **Law Society**

- Caroline Devlin (Chair)
- Maura Dineen
- Aileen Keogan
- Padraic Courtney
- Gavin McGuire
- Elaine Mooney

##### **ITI**

- David Fennell
- Elaine Gill
- Mary Healy
- Beryl Power
- Patrick Buttimer
- Stephen Ruane
- Sharon Burke

Apologies: Cróna Brady (CCAB-I).