



**Feedback on the proposed amendments to draft Tax and Duty
Manuals on:
Investment Undertakings (Part 27-01A-02)
Exchange Traded Funds (ETFs) (Part 27-01A-03)
&
Offshore Funds: Taxation of Income and Gains from certain
offshore states (Part 27-02-01)**

6 July 2021

Introduction

In advance of the TALC Direct / Capital Taxes Sub-committee meeting on 24 June 2021, Revenue circulated updated draft Tax and Duty Manuals (TDMs) on 10 June with proposed changes for discussion in respect of Investment Undertakings (Part 27-01A-02), Exchange Traded Funds (ETFs) (Part 27-01A-03) and Offshore Funds: Taxation of Income and Gains from certain offshore states (Part 27-02-01).

At the TALC Direct / Capital Taxes Sub-committee meeting, the Institute raised concerns with the proposed changes to the draft TDMs and Revenue invited feedback on the points raised.

We have set out our concerns in respect of the proposed changes to the draft TDMs and proposal to withdraw the confirmation currently in place for Exchange Traded Funds (ETFs) and Exchange Traded Commodities (ETCs) below.

Issues for consideration

1. Investments in the current environment can be very complex to understand. A proper analysis is;
 - i. Costly;
 - ii. Time consuming; and
 - iii. Often incomplete due to lack of full information/background.

A proper analysis, for example under section 747B TCA 1997, is challenging and often leads to lack of certainty on the tax treatment (prior to Revenue's confirmation many tax returns were being filed with expressions of doubt). Most taxpayers/investors do not have access to the analysis/tools required to ascertain the correct tax treatment in the absence of Revenue guidance/confirmation.

2. ETFs are widespread and most investment houses/brokers and online platforms provide access to ETFs. They are a common investment across the world and certainty is required on their tax treatment. In our view, the decision tree proposed in the TDM is too simplistic in the context of the analysis of an ETF required e.g., is it a "something else" and therefore not an

offshore fund?

3. The cost of getting the analysis wrong can be very significant for a taxpayer. For example, if the analysis is that an ETF is not an offshore fund and subsequently this is found to be incorrect, the taxpayer is subject to additional tax, interest and penalties and the matter is potentially an offshore matter. Additionally, there is no ability to avail of the benefits of a voluntary disclosure.
4. Timing is a major point of concern in respect of such a significant change in the Revenue's position. In our view, consideration needs to be given to the timing of any such change and the impact on taxpayers/investors to ensure that they are not disadvantaged by a withdrawal of the existing Revenue confirmation. For example:
 - i. Taxpayers will have made investments on the basis of the current/prevaling guidance.
 - ii. Some taxpayers will have filed a tax return for 2020 already and / or paid Capital Gains Tax (CGT) in December 2020 on the basis of the current/prevaling Revenue guidance.

A more appropriate approach would be for a legislative measure included in Finance Bill 2021 to take effect from 1 January 2022, to allow clients and their advisors time to review their portfolios and take appropriate action. Taxpayers have been rearranging their portfolios to access funds that are taxed under first principles; they do not want to invest in offshore funds given the penal tax rates and lack of associated loss relief with them. Offshore funds are not seen as an investment option of choice and taxpayers may have incurred significant costs to rebalance their portfolios out of offshore funds. To find that after incurring that cost they are still within the regime will be unexpected and cause significant concern to taxpayers and advisors alike.

Certainty and consistency is a pillar of our tax code. We believe that if the proposed revised is guidance published, transitional measures must be made available to accommodate taxpayers who have deliberately chosen ETFs and ETCs in the expectation that they are taxed under first principles in accordance with Revenue's published guidance at the time of making the investment.

5. The decision tree does not tie to the analysis required under section 747B TCA 1997 and therefore we would request a more detailed decision tree is provided to give clarity to taxpayers. For example:
 - i. Is the investment similar in all material respects to an investment limited partnership (section 747B(2A)(a)(ii) TCA 1997);
 - ii. If it is a company, is it similar in all material respects to an authorised investment company within the meaning of Part 24 Companies Act 2014 (section 747B(2A)(c)(ii) TCA 1997) etc.;
 - iii. The decision tree does not deal specifically with ETFs/ETCs, could this be provided? What is the starting point for determining whether an ETF/ETC is an offshore fund?
6. The *Offshore Funds: Taxation of Income and Gains from certain offshore states* TDM should clearly state Revenue's position on the taxation of offshore fund income and gains in the hands of non-domiciled individuals who are entitled to the remittance basis of taxation. Our members have experienced differences in opinion on whether income/gains are Case III or

Case IV and outside the scope of Irish tax.

7. In paragraph 7 of the *Offshore Funds: Taxation of Income and Gains from certain offshore states* TDM, "Assistance with decisions on offshore funds", suggests taxpayers should engage with qualified advisors to determine if an investment is an offshore fund. It would be helpful if Revenue could also assist with the decision-making process where necessary as our members have experienced situations where it was difficult to conclude definitively on whether an investment was within or outside the regime. It would also be helpful if Revenue could confirm that they will take a practical and reasonable approach if an investor makes best efforts to apply the correct treatment. Does Revenue have a database of investments where it has been concluded that the investment is / is not an offshore fund and, if so, could this be made publicly available to reduce the cost and administration associated with clients having to do so, similar to the [list of distributing offshore funds](#) published by Revenue?
8. Taxpayers may have capital losses carried forward arising from disposals of non-EU domiciled ETFs/ECTs in prior years and we would like to understand what impact the proposed change will have on their ability to offset these losses against future capital gains?
9. Finally, we would highlight the much wider spread of investors in today's world compared to when the guidance was initially drafted. The rise of meme stocks, low-cost online platforms like Degiro and BUX etc. now mean that a new range of retail investors exist. Many of these investors are individuals who would not usually require the assistance of a tax advisor. The proposed updated guidance will make it extremely difficult for those types of investors to comply with their tax obligations. If the proposed changes are adopted in the updated guidance, we believe that it would be appropriate for consideration to be given to a *de minimis* carve-out permitting investors who hold ETFs below a certain threshold to continue the approach permitted under the old guidance.

Timing

Prior to the circulation of the draft TDM's two weeks prior to the TALC Direct/Capital Taxes Sub-Committee meeting on 24th June, practitioners were unaware that Revenue were considering changing their practice in this area. Given that this is a such a complex area of legislation, adequate time needs to be provided to consider the full impact of the proposed changes to Revenue guidance. We believe that it would be helpful to have a more in-depth discussion with practitioners in advance of the publication of these TDMs to ensure the relevant issues and potential impact of the proposed changes are fully understood. In our view, given the concerns outlined above, consideration should also be given to the timing of the application of any proposed changes in Revenue practice.