**2 August 2022**

**Response to Revenue's queries of 19 July on the Institute's feedback on the draft section 6 of the Transfer Pricing TDM**

**Feedback on draft Section 6 of the Transfer Pricing TDM (submitted 24 June 2022)**

**6.4.5 Meaning of Consideration Receivable / Consideration Payable**

We note the requirement for an arrangement to fall within the exclusion in section 835E, where the consideration payable under the arrangement is less than an arm's length amount. The consideration payable in respect of the chargeable period must be within the charge to income tax or corporation tax under Schedule D for the Supplier for the relevant accounting period. This places an excessive and unnecessary burden on the parties involved to ensure that the consideration is in fact paid by the acquirer before the end of the relevant chargeable period if the supplier is taxable on that consideration on a receipts basis.

Given that section 835E now provides that no transfer pricing adjustment is required where no consideration is payable (and the relevant conditions in section 835E are met), it would be helpful if the guidance made clear that in practice, Revenue will accept that there is no requirement to actually pay the consideration before the end of the relevant chargeable period.

**Revenue query (emailed 19 July 2022):**

Can you please provide further details as to why this "places an excessive and unnecessary burden on the parties involved to ensure that the consideration is in fact paid by the acquirer before the end of the relevant chargeable period if the supplier is taxable on that consideration on a receipts basis"? Are there specific examples or scenarios in mind?

We note the request for Revenue to accept "that there is no requirement to actually pay the consideration before the end of the relevant chargeable period." Would it be possible to expand on this request please? Is it requested that this be applied in all cases or in certain specific circumstances? When is it envisaged that such consideration would actually be paid?

**ITI Response:**

This comment echoes the point noted below regarding in Example 6.4.5.1. In the example of an interest bearing loan, interest not paid during the chargeable period is subject to transfer pricing. Interest may not be paid during the chargeable period due to a number of reasons, such as cashflow issues, administrative oversight, IT issues, all potentially giving rise to late payment or no payment. The consequence for the loan provider for not receiving the interest payment is deemed taxable interest income equivalent to the market value of the interest on the loan. This appears disproportionate when compared to an equivalent loan that is interest free which would not be subject to transfer pricing where there is late payment of capital.

**2 August 2022**

**Feedback on draft Section 6 of the Transfer Pricing TDM (submitted 24 June 2022)**
**Example 6.4.5.1 – No interest paid in the chargeable period**
Does part-payment of interest disapply an exemption?

Does an administrative delay in payment disapply an exemption (assuming interest taxed on a receipts basis)? Even if it does, what are the consequences?

In Example 6.4.5.1, it would be helpful if the consequences of the exemption not applying are explained. If the exemption does not apply in that example because there is no chargeable income at all, why would section 835C be relevant at all to Investment Company? What happens in the second year when the consideration is paid? If the trade is ongoing presumably the trading company is a qualifying person in year two with respect to the ongoing arrangement so that the exemption will be available in that second year? The Tradeco itself will never benefit from section 835E anyway.

Clarification on this would be welcome.

**Revenue query (emailed 19 July 2022):**
Would you be able to clarify what is meant by "an administrative delay" please? What types of scenarios are envisaged by this?

Would you be able to expand on the comment "If the exemption does not apply in that example because there is no chargeable income at all, why would section 835C be relevant at all to Investment Company?" please? What is the basis for this comment?

**ITI Response:**
The point we are raising here is that there are any number of reasons why a payment that would ordinarily be made before the year end could be made after the year end. This could be caused by banking delays or internal approval paperwork.

Interest is normally taxed on an arising basis. Practitioners may well take the view that interest has not arisen if it is not paid. An analysis of when interest arises is presumably outside the scope of this TDM but the questions are directed at a situation where a taxpayer correctly takes the view that the interest has not arisen and thus is not chargeable to tax in that period. We recall this timing issue was raised during TALC discussions on previous iterations of section 835E without the matter being addressed.

For example, if a taxpayer borrowed €1m at 6% but only paid 20k of the 60k by period 1 year end, is the taxpayer within section 835E? If the taxpayer is regarded as having had '**the**' consideration receivable under the arrangement directly taken into account in that chargeable period, then the 20k received would be within section 835E and is not subject to section 835C. It would not be necessary to consider the other 40k at that point.

If the reference to **'the'** consideration is to the full 6% then as the full amount payable is not directly taken into account in that chargeable period, the 20k received might not be within the scope of section 835E and thus could be within scope of section 835C transfer pricing rules. However, it does not accelerate the tax liability on the remaining 40k not received, as that interest is still considered to have not ''arisen".

One would then need to consider what happens in the subsequent year when the interest is paid as there would not be a corresponding deductible payable in that period.

This follows from the observation that to the extent that interest does not arise in a chargeable period, section 835C seems irrelevant for that period as respects any amount not received. This is because the transfer pricing rules do not make something chargeable to tax that would not otherwise be chargeable.

For example, if there was no payment of interest in period 1, then the amount of consideration receiv**able** is irrelevant if a company is taxable on a received basis until the amount is actually received. This is entirely logical because even if interest had been computed at full market rates a liability would not arise until the interest arises, assumed to be when it is received for the purpose of this example.

We would not agree with Revenue's position as set out in Example 6.4.5.1. The requirement in Example 6.4.5.1 to pay the interest before the end of the accounting period is very unusual, particularly given that the transfer pricing exclusion can apply if no consideration is actually charged. It would appear from the example that by charging something (for example, a nominal amount) that a taxpayer is in a more onerous position than having charged nothing. The issue with Example 6.4.5.1 could be resolved if receivable/payable were interpreted as equating to received/paid (and thus taken into account) in a s835E context. In our view, to do otherwise raises questions as to whether s835C is effective at all for transfer pricing on non-trading transactions.

If something is actually charged but it is non-arm's length (i.e. there is a nominal charge) then it is still only "consideration receivable". It is not clear how it could ever be "taken into account" in a non-trading context until received. However, the guidance appears to imply that it needs to be received for the provision to engage.

Was the intent in drafting the legislation that it only has scope to engage in "receivable" situations, which in practice would be Case V scenarios (as that is the only non-trading scenario of relative frequent occurrence that would be taken into account on a "receivables" basis)? I.e., was it intended that it would not to apply to Case III or Case IV scenarios? If it is not accepted that the terms "consideration receivable" and "consideration payable" take the same meaning in s835C and s835E then in our view there would appear to be inherent difficulties with section 835C for non-trading scenarios.

**Feedback on draft Section 6 of the Transfer Pricing TDM (submitted 24 June 2022)**

The guidance would benefit from clearer comments on the issue of paid/received and payable/receivable.

Also, as alluded to above, the guidance would benefit from a full example involving an IFL to a trader which sets out the full analysis, instead of the current approach of an IBL example above and then separate comments here adapting the IBL example to an IFL one.

**Revenue query (emailed 19 July 2022):**

Are there specific issues or examples that you would like covered regarding the "paid/received and payable/receivable" point?

**ITI Response:**

Please note our comments above on Example 6.4.5.1. We do not have any further comments on this point at present.

**Feedback on draft Section 6 of the Transfer Pricing TDM (additional feedback)**
**Paragraph 6.1 – Overview**

The draft TDM at paragraph 6.1 states "*Where, in relation to an arrangement, the exclusion applies to a supplier or an acquirer, the transfer pricing documentation requirements in section 835G (see section 8) will not apply to the supplier or acquirer in respect of that arrangement. However, the supplier and acquirer are required to maintain such records as may reasonably be required for the purposes of determining whether the requirements for the application of the exclusion are met (see section 6.7).*"

We would be grateful for clarification as to the meaning of this paragraph, i.e., does it mean that the documentation requirements do not apply to a supplier or acquirer (only) or does it mean that the arrangement itself is carved out from the documentation requirements if the conditions for the transfer pricing exclusion are satisfied?

The operative part of the exclusion in s835E(3) specifies that "section 835C shall not apply in computing the amount of profits or gains or losses arising to the eligible person from the arrangement" and therefore seems to be disapplying s835C(2) as opposed to entirely disapplying the whole section or at the very least s835C(1) which is referenced in s835G. Confirmation would be welcomed as to whether it is intended that there would be some easing of documentation requirements where the exclusion applies. We believe that legislative clarification may be required to put this issue on a firmer footing.