Minutes of TALC Direct and Capital Taxes Sub-Committee Meeting

Thursday 25 April 2024

Hybrid meeting - New Stamping Building, Dublin Castle & MS Teams

10.30 to 12.00

Item 1: Minutes from meeting of 29 February 2024

The minutes of the meeting of 29 February 2024 were agreed as final.

Item 2: Matters arising from meeting of 29 February 2024:

a. **Clawback of stamp duty relief on merger of a trade – Section 79 SDCA 1999:** Practitioners had previously requested clarity in guidance on the operation of stamp duty relief in section 79 Stamp Duties Consolidation Act (SDCA) 1999, where assets which will naturally be used during the course of a trade (e.g. trading stock, plant and equipment) cannot therefore meet the two-year holding requirement. Revenue noted the Tax and Duty Manual (TDM) 'Part 7: Section 79 - Associated Companies Relief' acknowledges that practical difficulties may be experienced by corporate groups in satisfying the specific conditions set out in subsection (7A) and Revenue is prepared to extend the practice as requested. Revenue is amending the TDM and will circulate the draft for feedback to ensure there are no unintended consequences.

b. **Form CT1 – Panel 15.1 – Dividend Withholding Tax:** Revenue circulated a response, outlined below, to a query raised by practitioners whether the additional information required to be returned in Panel 15.1 of the Form CT1 for accounting periods ending in 2021 would only be required to be completed where the distribution is paid to a connected person within the meaning of section 10 Taxes Consolidation Act (TCA) 1997. All agreed to remove this item from the agenda going forward.

   Revenue response:

   Revenue can confirm that the "Tax Reference Number" and "Amount Paid" cells in Panel 15.1 will only require completion where the distribution is made to a connected person within the meaning of Section 10 TCA 1997. The reference to "or to a beneficial owner or participator" can be disregarded. The CT1 Form will be updated to reflect this change as will the CT1 guidance as soon as it is practicable to do so.

c. **EU Mobility Directive (Directive (EU) 2019/2121) – claim for capital allowances under section 291A TCA 1997:** Practitioners had requested confirmation that a converted company can make a claim for capital allowances under section 291A TCA 1997, provided all other conditions are satisfied, upon its conversion into Ireland. Revenue circulated questions in advance of the meeting. Practitioners confirmed it is not new for companies to migrate residence and their understanding is that the 12-month requirement under section 291A could not apply. Practitioners confirmed companies would generally submit a letter to Revenue within the 12 months of migrating residence to Ireland and entering the charge. It was noted that there may be different views amongst practitioners. Revenue noted it has not considered the issue in the context of s291A previously.

   Revenue welcomed views from practitioners on how they would envisage the other provisions of section 291A, other than the 12-month requirement, applying. Practitioners agreed to provide further detail to Revenue. Ultimately, Revenue is open to updating the guidance to provide clarity on the point but is keen to understand and consider the matter fully in advance of potentially doing so.

d. **Special Assignee Relief Programme (SARP) calculation in tax equalisation cases classification**
   In advance of the February meeting, practitioners sent a detailed note to Revenue noting recent changes to Revenue's TDM on SARP in December 2023, which inserted a new sub-paragraph 7.1 on the calculation of SARP in tax equalisation cases. Revenue responded to the detailed note in writing noting the TDM reflects Revenue's position on the calculation of SARP in tax equalisation cases. Practitioners noted their disagreement with Revenue's position. Revenue's response is included in Appendix I. All agreed to remove this item from the agenda going forward.

e. **Capital Allowances for intangible assets**
   Practitioners were to provide a note to Revenue relating to a discussion previously held at TALC on deferred consideration for Revenue to consider reflecting this in the relevant TDM. This item will remain on the agenda for the next meeting.

Capital Taxes:

No items raised at the meeting.

Direct Taxes:

Item 3: RCT and application of reverse charge VAT on certain property-related transactions:

Practitioners raised an issue relating mainly to approved housing bodies (AHB) and local authorities purchasing completed houses from developers. Practitioners noted that AHB/local authorities are continuing to use previous rulings received from Revenue Districts regarding the application of RCT, even in cases where RCT may not apply. Practitioners queried if there is any proposed guidance for AHB and local authorities being developed.
Practitioners also highlighted that VAT on these property-related transactions is being considered at the TALC Indirect Taxes Sub-committee. Revenue noted that the VAT treatment follows the RCT treatment.

Revenue confirmed that there are no plans to publish specific guidance, as there are no specific RCT rules for these scenarios, the application is determined by the facts and circumstances. However, Revenue noted that it will consider specific issues that are submitted, but emphasised that it needs to look at the contractual arrangements between the parties as the answer is dependent on the facts in each case. Practitioners agreed to provide a note to Revenue with examples of the contracts where disagreement on the RCT treatment is arising. Revenue agreed to work with colleagues in the TALC Indirect Taxes Sub-committee to provide some clarity, where appropriate.

Item 4: Interaction of the Debt Warehousing Scheme and individuals impacted by Section 997A TCA 1997:

Practitioners sought clarification from Revenue on its approach to the payment of warehoused debt where a company has warehoused Employer PAYE and a director/employee with a 'material interest' in the company (under section 997A TCA 1997) has warehoused Schedule E liabilities under section 1080B TCA 1997. Practitioners queried how double taxation could be avoided if the company has to discharge its warehoused Employer-PAYE and the individual director also has to pay their warehoused Schedule E liability (from 1 May 2024).

Considering directors/employees impacted by section 997A are credited last with PAYE paid by their employer, and it could be several years before an employer has fully paid their warehoused liability, practitioners also sought clarity on the application of the '4-year rule' for claiming a refund of income tax or credit for PAYE paid, in these situations, considering the timeframe a company may need to clear the warehoused PAYE.

Revenue Legislation Services (RLS) has liaised with the Collector-General's Division and confirmed their view that at a legislative amendment is not required. The position remains that there is a liability on the company and the individual and there needs to be meaningful engagement with Revenue by 1 May. In cases where the company has entered into a PPA with Revenue for the warehoused debt, the director can request a payment break. Revenue confirmed it is intended that the credit will be given to the director/employee once the liability has been paid in full by the company, even outside of the usual 4-year time limit. Revenue noted there are less than 1,000 cases where a director/employee is impacted.

Item 5: Revenue Guidance:

(i) Draft Tax and Duty Manual 26-00-02 – 'Taxation of Life Assurance Companies - Old Basis Business and New Basis Business: Revenue is reviewing feedback from the Life Assurance Industry and plans to circulate the updated TDM in advance of the next TALC Direct and Capital Taxes Sub-Committee meeting.

(ii) Draft Tax and Duty Manual 34-00-01 - Provisions relating to residence of individuals: Revenue noted the update to this TDM is ongoing and will include guidance on treaty residences, tie-breakers and the factors to be considered. Revenue also plans to introduce guidance regarding how someone can satisfy the intention test to claim Split Year Treatment. Revenue will circulate this aspect of the draft TDM for feedback in due course.

(iii) Guidelines to assist businesses to determine correct employment status classification: Following the February meeting, Revenue circulated a draft TDM titled, 'Revenue Guidelines for Determining Employment Status for Taxation purposes', for review. The draft TDM aims to assist businesses and practitioners to determine the correct employment status classification when applying the five-step framework in the Supreme Court judgment relating to the employment status of "Domino's Pizza" delivery drivers in the Revenue Commissioners v. Karshan (Midlands) Ltd. t/a Domino's Pizza case.

Revenue thanked practitioners and other stakeholders for providing feedback on the draft TDM. Revenue is currently working through the detailed feedback received and confirmed there will be changes to the draft based on the feedback. Revenue confirmed it will engage with practitioners in relation to the feedback provided, but that it is the intention to publish the TDM as soon as possible.

(iv) Leasing guidance: Revenue acknowledged the delay in circulating updated draft guidance and confirmed plans to circulate draft guidance on section 299 scenarios where the lessee bears burden of wear and tear and draft guidance on section 403 and 404 ringfences in the next couple of weeks. Revenue confirmed draft guidance on section 76E TCA 1997 Qualified Financing Companies will be circulated shortly.

(v) Tax and Duty Manual Part 16-00-02: Revenue confirmed the expected circulation of the draft updated TDM Part 16-00-02 'Relief for investment in corporate trades' has been postponed as a particular matter is under consideration. Practitioners noted several uncertainties are arising from the recent legislative changes that need clarification in guidance as a result of which investment in companies is being deferred until the new guidance is published. Practitioners noted a key issue which is causing uncertainty in practice is what is considered initial risk finance where a company has a business plan showing a need for State Aid and the funds are raised in tranches. The current version of the TDM acknowledges that funds can be raised in tranches and qualify for the relief. Whilst this did not have a material impact before Finance Act (No. 2) 2023, from 1 January 2024 if a tranche was regarded as follow-on investment it could result in tax relief on a tranche being at the rate of 20%. Practitioners submitted that if a business plan showed a need for State Aid in the form of initial risk finance and those funds were raised in tranches, each tranche should be treated as initial risk finance and not follow-on investment until the amount of initial risk finance provided for in the business plan has been received. Revenue agreed to consider providing guidance on this issue in advance of the updated draft TDM being circulated given the impact it is having on companies' ability to raise funds whilst this certainty exists.

(vi) Tax and Duty Manual Part 04-06-13 Tax Treatment of Stocklending/Sale and Repurchase (repo) Transactions: Practitioners noted TDM Part 04-06-13 'Tax Treatment of Stocklending/Sale and Repurchase (repo) Transactions' is not currently available on Revenue's website and requested when the updated TDM will become available. Revenue confirmed the TDM will be updated in the next few weeks, but the leasing guidance is taking priority given the Finance Act changes.

Item 6: AOB:

a. **CT1 form - Transfer Pricing documentation requirements for an Irish Branch:** Practitioners sent a note to Revenue in advance of the meeting requesting clarity regarding how to answer questions on CT1 regarding local file/master file requirements in context of an Irish branch of a foreign company.

   Revenue noted it would need time to consider the matter and may circulate questions to practitioners in advance of the next meeting.

b. **Retirement Relief Tax and Duty Manuals:** Practitioners noted that the TDMs Part 19-06-03 'Disposals of business or farm - on retirement' and Part 19-06-03b 'Retirement Relief - Disposals within family of business or farm' are currently unavailable on Revenue's website and requested when the updated TDMs will become available. Practitioners noted it would be helpful if these important TDMs could remain online while being updated. Revenue agreed to follow up on this to confirm when the TDMs are expected to be online. Subsequent to the meeting, Revenue advised that the TDMs should be restored to the website within 3 weeks.

Attendees at this meeting:

Revenue	ITI	CCAB-I	Law Society
<u>In-person:</u> Tom James Dave Brennan Catherine Duffy John Kelly Eleanor Smiley <u>Via MS Teams:</u> Lynda O'Keefe Áine Hollingsworth Anne Dullea Liam Smith John Quigley Tanya Grausam Anita Cassidy David MacCauley	<u>In-person:</u> Laura Lynch (Chair) Lorraine Sheegar Clare McGuinness <u>Via MS Teams:</u> David Fennell Stephen Ruane Cillein Barry Tom Maguire	<u>Via MS Teams:</u> Ken Garvey Gearóid O'Sullivan	<u>Via MS Teams:</u> Caroline Devlin Aidan Fahy David Lawless Maura Dineen Padraig Courtney John Cuddigan

Appendix I

TALC Direct and Capital Taxes Sub-Committee Meeting - 29 February 2024
Revenue response to Note 5

Note 5 – Special Assignee Relief Programme (SARP) calculation in tax equalisation cases
Revenue eBrief No. 265/23 dated 20 December 2023 inserted a new sub-paragraph 7.1 on the calculation of SARP in tax equalisation cases. We understand the update has been made in the context of a Tax Appeals Commission determination (143TACD2023). However, the position from 2024 stated by Revenue represents a departure from previous established practice in respect of tax equalised individuals since the inception of SARP and from the fundamental principle of calculating a gross-up for tax purposes under Re-Grossed Pay less PAYE/USC/PRSI deducted should equal Net Pay.

Revenue response: Sub-paragraph 7.1 was inserted into TDM Part 34-00-10 to provide clarification on the calculation of SARP in tax equalisation cases, on foot of Tax Appeals Commission determination 143TACD2023. The inclusion of the sub-paragraph was considered necessary to provide certainty to employers/agents on the correct methodology to use when re-grossing the net employment income of a tax equalised employee, where SARP is claimed on the re-grossed income. This is the first time that Revenue has issued TDM guidance on the matter. There was no "established practice", all be it Revenue is aware that there were a number of methodologies being applied to the calculation. The TAC determination is clear that the approach used in that case is incorrect. Recognising the fact that previous Revenue guidance was not prescriptive in relation to this issue, the TDM confirmed that the correct methodology was required to be followed from 1 January 2024 and not for previous years.

Practitioners would welcome Revenue's view on this and have set out further context below:

- It is generally accepted that for tax equalised arrangements, gross income less tax should equal an individual's net pay. When regrossing an individual's net pay, all reliefs, credits and standard rate bands etc would be incorporated into the calculation of determining net pay.

Revenue response: Guidance on the calculation of re-grossed employment in tax equalisation cases is provided in TDM Part 02-04-01 - Tax Equalisation Arrangements. A detailed example is provided in Appendix I on the calculation of re-grossed net income for Irish tax purposes, which allows for the inclusion of tax credits and standard rate bands in the calculation. Revenue does not agree that a tax relief such as SARP, can be incorporated into the calculation of re-grossed income, given that the relief operates by reducing the level of employment income which is chargeable to income tax. The relief must therefore be applied as such and there is not basis for its inclusion in a re-grossing calculation which determines the level of assessable employment income in the first instance.

- Up to 31 December 2023, when calculating gross-up liabilities on relevant net earnings, SARP relief has been incorporated into the gross-up calculation. This had the effect of reducing the gross-up cost.
- From 2024, the updated guidance now provides that SARP relief should not be included in the initial gross-up calculation. Instead, the gross-up calculation should first be performed, and SARP relief applied only to the re-grossed earnings. Under this revised methodology, while SARP is still beneficial, the benefits are diminished given the higher gross-up.

- The change arises on foot of a recent Tax Appeal Case (TAC) which considered SARP relief in the context of a tax-equalised assignee on secondment to Ireland in 2013. In that case, the Irish shadow payroll calculations did not incorporate SARP relief at the time of processing. The assignee subsequently filed a 2013 personal tax return, reporting recalculated gross earnings incorporating SARP relief, using the same net income base. The recalculation was to reflect the tax-equalisation agreement in place between the parties.

Revenue response: In accordance with paragraph 85 of the determination, the Commissioner found as a material fact that the appellant was a party to a tax equalisation agreement with her employer in 2013. For that year, the net employment income of the appellant was re-grossed for Irish PAYE purposes by her employer, thereby giving effect to the tax equalisation arrangement in place at that time. The appellant's agent sought to re-calculate the 2013 employment income by taking account of SARP relief in a revised regrossed calculation. The purpose of the calculation was to reduce the level of the appellant's taxable employment income for 2013 and not to reflect the tax equalisation agreement in place between the parties.

- The refund was refused by Revenue on the basis that the 2013 shadow payroll earnings reflected the actual gross income received in the tax year. The Appeal Commissioner concluded that a tax-equalisation agreement between an employer and an employee is a private contractual matter and has no legislative effect for the purposes of SARP relief.
- The updated guidance does not distinguish between the position for shadow payroll purposes where a gross-up occurs in real-time or a recalculation of earnings on a tax return (which was the focus of the TAC case).

Revenue response: The guidance does not need to distinguish between the position for shadow payroll purposes where a gross-up occurs in real-time or a recalculation of earnings on a tax return, as the same re-grossing principles apply. Guidance on the calculation of re-grossed employment income in tax equalisation cases is provided in TDM Part 02-04-01 - Tax Equalisation Arrangements.

- In addition, the approach outlined in the guidance results in an unsatisfactory outcome whereby the assignees' net pay for Irish tax purposes is higher than their actual net pay i.e., their gross income for Irish tax purposes, less Irish taxes, does not correspond to the employees actual net pay (i.e., the net pay that has been delivered via the home-country payroll). As a result, adjustments to net pay figures are required through the payroll system to ensure additional payments are not due to the assignee. Using the example of an employee on a net pay arrangement of €125,000, this can result in an additional tax cost of approx. €7,400.

Revenue response: Revenue's position, as per the TAC determination, is that tax equalisation is a contractual matter between an employer and an assignee. Under tax equalisation, an assignee receives an agreed net pay amount while working in Ireland, which is typically delivered through the home country payroll, i.e., the employee's net pay through the Irish shadow payroll is nil. In such circumstances, the foreign employer will be required to process a net pay adjustment through the Irish shadow payroll, and this applies regardless as to whether SARP applies to the employment income or not.

- The revised guidance could now result in two people, both qualifying for SARP who have the same net pay, having different gross pay due to the fact one is tax equalised.

Revenue response: This follows from the re-grossing requirements arising from tax equalisation arrangements, where the employer funds the Irish tax liability of the assignee, which is a taxable benefit in the hands of the employee, which should lead to a higher taxable employment income figure.

- As such, the revised guidance is not in line with Regulation 21 of the Income Tax Regulations Part 42-04-71, which states:
  Where payment is made to an employee on a net pay basis, the "pay" for income tax purposes is the amount which, after deduction of tax, would give the amount received by the employee.
- Such regulations were not considered as part of the TAC case, and there does not appear to be any legislative reason why Regulation 21 could not apply for tax equalised SARP calculations processed through the payroll system.

Revenue response: The TDM guidance referenced here applies to situations where an employer wishes to provide a taxfree emolument to an employee and this is referenced as such in the TDM (link).

The Income Tax (Employments) Regulations 2024 prescribe the manner in which the deduction of tax from salaries and wages operate under the PAYE system. Regulation 21(link) states that where an employer pays an amount to or for the benefit of the employee in respect of the employee's tax, this amount is deemed to form part of the emoluments on which PAYE deductions are due. In effect, the employee is assessed to PAYE on the payment of tax which is made on his/her behalf by the employer. Revenue does not agree that the treatment in the TDM guidance is in any way ultra vires the Regulations.

The rules relating to SARP relief must be construed in accordance with the provisions of section 825CTCA 1997. The section provides relief on "income…for the tax year from the employment" (per section 825C(2B)(b) TCA 1997). In effect, the relief reduces the amount of income on which a "relevant employee" for SARP purposes is chargeable to income tax and there is no legislative provision in section 825C TCA 1997, which also allows the relief to be factored into the calculation of the income upon which the relief is calculated.

- As noted above, the Appeal Commissioner concluded that a tax-equalisation agreement between an employer and an employee is a private contractual matter and has no legislative effect for the purposes of SARP relief. What has not been considered in the case is the position where the employee subsequently repays the refund received from Revenue to its employer under the tax-equalisation agreement. Per Revenue Tax and Duty Manual Part 42-04-70, "Recoupment of Overpayments of Salary by an Employer from an Employee", repayments of net income to an employer should give rise to a reduction in gross earnings. Not only should such reductions in gross income be available through personal tax returns, where net pay deductions are processed through the payroll to ensure the employee remains on the agreed net pay, this would reduce the overall gross pay and ultimately result in the same gross pay that would be expected under the method applied up to 31 December 2023.

Revenue response: TDM Part 42-04-70 sets out Revenue's position regarding the recoupment of an overpayment of emoluments by an employer from an employee. The examples provided in the TDM apply to situations where an employee is paid in accordance with the wrong pay scale or receives payment to which he/she is not entitled (e.g., holiday pay). These scenarios differ to tax equalisation scenarios where an assignee is placed on a shadow payroll in Ireland, through which he/she does not receive any net pay (the net pay is delivered through the home country payroll). For Irish shadow payroll purposes, a net pay adjustment is required to be processed through the Irish shadow payroll to ensure that the assignee's net pay is nil.

- This approach is also out of sync with how gross income is calculated for tax equalised individuals in other jurisdictions, which will create some unusual scenarios when looking at cross border cases.
- Furthermore, while the updated guidance explicitly refers to tax-equalised employees, we expect that Revenue intends this methodology to be applied in all instances where an employee qualifies for SARP, and grossing up of a net payment or benefit applies. Therefore, this change could also impact employees who are not tax equalised but are in receipt of net paid allowances/benefits.

Revenue response: The treatment in other jurisdictions is not relevant for the purposes of applying the relevant Irish legislative provisions. Revenue can confirm that the above approach is confirmed. Where a SARP claimant is not tax equalised but is in receipt of a net allowance/benefit, then the employer will be required to re-gross the net allowance/benefit for Irish tax purposes, however, SARP relief should not be incorporated into the calculation of the re-grossed income. TDM Part 34-00-10 will be updated to reflect this position.

Please note that a re-gross will not be required where the benefit to be provided to the assignee is not chargeable to tax, whether under SARP (e.g., the payment of an annual home leave cost) or where the costs of relocation to the State are considered to be tax-free under TDM Part 05-02-03 Removal and Relocation Expenses.