

TALC Direct and Capital Taxes Sub-Committee Meeting (by Teams)

Thursday 23 June 2022

2.30 pm – 4:30 pm

Minutes

Item 1: Minutes of meeting of 28 April 2022

The minutes from the meeting of 28 April 2022 were approved.

Item 2: Matters arising from meeting of 28 April 2022

a) *Revenue to report on the technical analysis leading to the withdrawal of Precedent 28.*

It was noted by Revenue that a sub-group of the TALC Direct and Capital Taxes Subcommittee is being established to tease out the issues surrounding Precedent 28. Some nominees for the sub-group have already been received and Revenue will contact the representative bodies for any outstanding nominees. .

ACTION: Revenue to contact representative bodies for outstanding nominees for the Precedent 28 sub-group.

b) *The issues encountered in obtaining Irish tax residence certificates were raised at the previous meeting. Practitioners have provided examples to Revenue for discussion.*

Revenue noted that a judgement call is made by caseworkers when issuing certificates. In relation to recent examples received, Revenue noted that the examples were exceptional due to the complexity of those cases. Revenue has not identified general issues which need to be rectified in its view.

Following the meeting, Revenue contacted the secretary to clarify a misunderstanding. Revenue's representatives were informed incorrectly before the meeting that a note had been circulated to practitioners via this sub-committee. This was not in fact the case. As such, it is proposed that:

- A reminder will be issued to relevant Revenue staff about the criteria for tax residence for corporates.
- The issues raised at the TALC Direct and Capital Taxes Sub-Committee will be brought to Revenue staff's attention.

It is expected that this will be done shortly. If the issues highlighted by practitioners at the TALC Direct and Capital Taxes Sub-Committee continue Revenue will re-visit the issue.

ACTION: Revenue to circulate to relevant staff regarding the issues raised by practitioners.

- c) Revenue to provide an update on a meeting with the Department of Finance on 29 April 2022 in relation to the mooted Leasing legislative updates. Revenue also to discuss what is proposed in relation to updating Leasing guidance.**

Representatives from the Revenue Commissioners and the Department of Finance met recently to discuss the issue. Little progress was made at the meeting as both sides acknowledged more work was required. As such, a next meeting was not agreed until such time as both parties completed the requisite level of preparations in advance of the necessary discussions.

Practitioners queried if the old sub-group which was formed to consider the issue previously would now be re-formed? Revenue confirmed that the sub-group will be re-formed in due course.

- d) Revenue to provide an update on the concerns raised in relation to ePSWT and the implications (if any) of the recent TAC case 01TCAD2022 on the employment status of locums.**

It was noted by Revenue that the submissions received from practitioners were helpful. However, the view of the representatives from Revenue was that the submissions received did not address the specific TDM (Part 05-01-20) and whether locums are employed or self-employed. Revenue noted that in its view it is recording PSWT correctly according to the contracts in place but noted that consideration is being given as to whether this is the appropriate approach going forward. However, Revenue acknowledged that there is no one-size fits all answer and consideration must be given to the facts and circumstances in each case. Revenue also stated the point regarding the issue of allocating payments must also be considered more widely than PSWT alone.

In its submission on the matter, the ITI referenced a 2011 eBrief (eBrief 08/2011) as that eBrief referred to the employment status of locums and the ITI highlighted that many GP practices restructured their businesses as a result of the review undertaken by Revenue in 2010. Revenue noted that the 2011 eBrief was specific to the facts and circumstances leading to the clarification at that time. The 2011 eBrief catered more for cases where locums were working at the weekend, rather than throughout an entire working week. The key difference between the current review is that a locum operating under a GMS contract is different from a locum operating on an ad-hoc basis. Revenue requested practitioners update their submissions, taking TDM Part 05-01-20 into account.

- e) Regarding CGT Retirement Relief, it was agreed at the last meeting that the group would continue to monitor the potential impact of the COVID-19 closures on the availability of the availability of the relief.**

The Chair asked if any issues have been brought to Revenue's attention requiring an update to guidance?

Revenue has not received any queries to date. As such, the item will be taken off the agenda. If examples subsequently come to light, it can be raised again.

f) In relation to the deduction in respect of certain expenses of remote working, at the last meeting it was discussed whether the legislation should be amended to differentiate between the position for PAYE and self-assessed taxpayers. If no examples have been provided in the meantime, it was agreed this item would be taken off the agenda.

The Chair asked if any further examples have been received by Revenue?

Revenue has not received any queries to date. As such, the item will be taken off the agenda. If examples subsequently come to light, it can be raised again.

g) The draft TDM on the classification of foreign entities for Irish tax purposes was circulated by Revenue for discussion in advance of the meeting.

The ITI made a comprehensive submission. Revenue acknowledged sufficient time had not been provided in advance of the meeting to properly consider the draft TDM or the ITI submission. The ITI queried whether the positions from different TDMs relating to US LLCs could be combined into one TDM and Revenue agreed to consider this request. Revenue noted it had considered the queries raised in the submission and had the following comments:

- Regarding paragraph 2.2 of the draft TDM dealing with partnerships, Revenue acknowledged the simplistic approach for the purposes of the guidance. Revenue is not suggesting that legal personality is a requirement, but pointed out that simplicity was favoured instead of potentially unwieldy guidance.
- Revenue also noted that there is a broader view on withholding taxes, and these are dealt with in a separate manual.
- Paragraph 4.1 deals with case law relating to the common law approach to classifying a foreign entity as opaque or transparent. Revenue noted concerns raised by practitioners regarding the interpretation of certain cases and confirmed the draft TDM will be amended.
- In respect of paragraph 5.2 relating to the list of factors which would be indicative of a foreign entity being classified as opaque for Irish tax purposes, Revenue noted that an internal working group had considered whether the various factors should be given a weighting. The collective view was that all factors would be considered equally.
- On the various points in the Appendix, Revenue acknowledged the various requests and noted these would need to be considered collectively and may not occur in the near future.
- Overall, Revenue was reluctant to give views in the absence of collective consideration.

The Law Society will make a submission. It noted that the UK *Anson case* would be taken into account by the Irish Courts. It is not necessarily inconsistent with *Harris*. CCAB-I noted that the treatment of partnerships is important. More broadly, clarification would be welcomed in TDMs which reference payments through partnerships. Revenue noted a substantial body of work was carried out in terms of legal personality and the Interest Limitation Rule. Practitioners acknowledged that the anti-hybrid guidelines contain useful guidance.

Practitioners noted the treaty aspects of the *Anson case* and stated that there was no inconsistency between that case and the decision in *Memec*.

Ultimately, the guidance needs to give instructions on the consequences of classification. It would be helpful if the guidance addressed withholding tax issues or linked to other guidance dealing with this. Further, practitioners asked for Revenue to share some insights on the proposed approach adopted in the guidance to the classification of foreign entities, specifically, has Revenue considered the HMRC approach where detailed examples are given? Revenue noted that the collective decision was not to provide a list. Structures can be nuanced and can indeed change. As such, Revenue is reluctant to provide a list. It has been considered but decided against.

ACTION: Law Society to make a submission.

h) Revenue to provide an update on the proposed review of its TDM Review Process.

Revenue noted that the review of the publication process for TDMs is commencing. It is at the scoping and planning stage. As such, the historic approach will continue for now. The Chair noted the issue for practitioners where 'old' TDMs are removed while a 'new' draft is being prepared. Revenue noted that the system is designed such that TDMs will be removed when they are being revised. Revenue will advise on the timelines for the review of the TDM Review Process. Revenue needs to consider what technology will support any proposed system and scoping the extent of that new system.

Practitioners noted that circa 27 of the CGT manuals (25-30% of that cohort of manuals) are down at present. Revenue acknowledged that it had committed to updating these at previous meetings. Revenue noted that some of those items are being considered for deletion. Revenue noted that CGT accounts for 12% of all TDMs. The evolution of the CGT manuals is that the manuals have been broken down in far more detail than other tax heads. Revenue is conscious of the impact of offline TDMs. It has halved the number of offline TDMs since the last meeting and Revenue has committed to rectifying the issue by the end of the summer. Revenue did note that the issue is particularly relevant to CGT.

Practitioners noted that the comments from them related more to the removal of TDMs rather than the review process. As such, the problem could be remedied by watermarking 'old' TDMs while a review is ongoing. CCAB-I asked if all changes to TDMs will be referenced by way of an eBrief. Sometimes it can be tricky to understand what has been amended or updated. Revenue noted that every effort is made to communicate substantive, technical changes in an eBrief. In this regard, practitioners referred to HMRCs version control process.

Practitioners noted that while Revenue is not going to amend its policy, the current level of uncertainty created by the process is unacceptable. Regarding the deletion of old TDMs, these should be retained. They are a historical record of the 'state-of-play' at a particular point of time.

i) Practitioners agreed at the last meeting to provide examples to Revenue to assist in determining criteria for whether an offshore fund is equivalent to an Irish fund.

Revenue noted that the relevant representatives were not present. Revenue also noted that a submission was received from a non-TALC group. The ITI have submitted a detailed submission also. Revenue is reviewing these presently and will circulate the updated draft guidance for discussion in due course in advance of publishing.

j) Revenue to consider the potential interaction of Tax and Duty Manual 04-09-01 – “Section 110: entitlement to treatment” and Schedule 24 TCA 1997 in the context of group formation for Interest Limitation Rule purposes.

Revenue have asked for a short note on the issue as far as it is understood by practitioners. Practitioners noted the issue is linked to the ILR. In this regard, practitioners sought clarification as to whether Section 110 companies form part of an ILR group? Is a Section 110 company equivalent?

The CCAB-I will make a submission on this point in advance of the next meeting.

ACTION: CCAB-I to make submission.

Item 3: Revenue temporary concession for employees of Ukrainian employers working in Ireland (CCAB-I) (Note 2)

The eBrief was issued in exceptional circumstances. The conditions were outlined, and the general tenor of the exception was communicated. Revenue is not aware, anecdotally, or otherwise, of the position regarding such contractors. Revenue agreed to consider this at a future meeting. Revenue is open to looking at workers on a case-by-case basis. Practitioners welcomed Revenue’s willingness to look at workers circumstances on a case-by-case basis.

ACTION: CCAB-I agreed to revert with specific examples for Revenue to consider.

Item 4: Update on the draft TDM 04-05-01 on the treatment of certain gains and losses on Foreign Currencies for corporation tax purposes (CCAB-I)

Revenue is still awaiting feedback from the Department of Finance. The item is also on the agenda at Main TALC. Once feedback is received from the Department of Finance, further information will be provided to the group. The point ended up on Main TALC as the potential implications are significant.

Item 5: The impact of Listowel Race Company Ltd v Revenue [2022] IEHC 253 on the sporting exemption contained in section 235 TCA 1997 (CCAB-I)

Revenue are not appealing the judgment. Revenue are not planning on updating their guidance as they do not think do not think the ruling is of significant precedential value.

Practitioners queried if the recent judgment in the *Domino’s* case is being considered also. It was noted that this is not forming part of the review of the locum review process, discussed earlier in the meeting.

Item 6: Section 604A TCA 1997 interaction with assets received by way of inheritance (CCAB-I) (Note 3)

Revenue noted this is a timely query. Revenue's view is that s.604A TCA 1997 was introduced in 2010 at a point in time when the property market was stagnant. There has been much discussion in the years that followed, particularly the holding periods. The reference to "consideration" is 'actual' consideration and this position has been maintained by Revenue in all discussions and queries to date.

The term "consideration" should be given its normal meaning, i.e., for reward. To that end, Revenue's view is that the legislation is clear. However, Revenue will consider the point when updating the TDM, which should be issued in the next 4-6 weeks.

Item 7: Uncertainty regarding when a CG50 is required (ITI) (Note 4)

Revenue noted that s.980 TCA 1997 is applicable to a wide variety of circumstances. Revenue would welcome further guidance on the areas identified by the ITI. More information is required to give meaningful guidance on each point.

Practitioners noted the overriding concern is that an incorrect interpretation of the withholding obligations can be very penal on the prospective purchaser. Revenue noted that the system is based on self-assessment. As such, every circumstance in which s.980 can apply cannot be catered for in guidance. Practitioners noted that s.980 goes beyond self-assessment in that it requires an assessment of another taxpayer's basis of assessment.

Item 8: AOB

- Regarding stamp duty registrations, practitioners queried why additional information was being sought by companies seeking tax registration for stamp duty purposes only. The information request is case/individual specific. This is causing difficulty.

Practitioners also noted that Revenue is asking for information even where such information is available from documents already provided. The information request is over-and-above what was published in the manual earlier this year in January. Revenue agreed to follow up on the issue with the Law Society representative.

- Revenue confirmed a planned TDM regarding the taxation of Digital Services Tax (DST) is being developed. Practitioners would welcome sight before publication.

Revenue	ITI	CCAB-I	Law Society
Dave Brennan	David Fennell	Derek Henry (Chair)	Caroline Devlin
Karen Drake	Clare McGuinness	Cróna Clohisey	Aidan Fahy
Declan Rigney	Stephen Ruane	Gearóid O'Sullivan	David Lawless
Mary Breen	Laura Lynch	(Secretary)	John Cuddigan
Jacqueline O'Callaghan	David Moran	Enda Faughnan	
Lucy Whelan	Cillein Barry	Ken Garvey	
Liam Smith	Tom Maguire	Cormac Kelleher	
John Kelly	Lorraine Sheegar	Colin Smith	
		<i>Apologies:</i> Peter Vale	

Notes to the Minutes

Note 1 – Matters arising from meeting of 28 April 2022

- k) Revenue to report on the technical analysis leading to the withdrawal of Precedent 28.
- l) The issues encountered in obtaining Irish tax residence certificates were raised at the previous meeting. Practitioners have provided examples to Revenue for discussion.
- m) Revenue to provide an update on a meeting with the Department of Finance on 29 April 2022 in relation to the mooted Leasing legislative updates. Revenue also to discuss what is proposed in relation to updating Leasing guidance.
- n) Revenue to provide an update on the concerns raised in relation to ePSWT and the implications (if any) of the recent TAC case 01TCAD2022 on the employment status of locums.
- o) Regarding CGT Retirement Relief, it was agreed at the last meeting that the group would continue to monitor the potential impact of the COVID-19 closures on the availability of the availability of the relief.
- p) In relation to the deduction in respect of certain expenses of remote working, at the last meeting it was discussed whether the legislation should be amended to differentiate between the position for PAYE and self-assessed taxpayers. If no examples have been provided in the meantime, it was agreed this item would be taken off the agenda.
- q) The draft TDM on the classification of foreign entities for Irish tax purposes was circulated by Revenue for discussion in advance of the meeting.
- r) Revenue to provide an update on the proposed review of its TDM Review Process.
- s) Practitioners agreed at the last meeting to provide examples to Revenue to assist in determining criteria for whether an offshore fund is equivalent to an Irish fund.
- t) Revenue to consider the potential interaction of *Tax and Duty Manual 04-09-01 – “Section 110: entitlement to treatment”* and Schedule 24 TCA 1997 in the context of group formation for Interest Limitation Rule purposes.

Note 2 – Revenue temporary concession for employees of Ukrainian employers working in Ireland

The query we have is from a Ukrainian company that is considering using Ireland as a temporary location for its employees. In Ukraine they have a mix of employees and contractors (*de facto* employees). The question is whether the concession would extend to the contractors. If, from a review of the contractor arrangement, it could be said that PAYE should apply (based on the criteria for determining employee status), then should the concession not extend to these contractors also? There is anecdotal feedback from practitioners that the concession is not being extended to this cohort of workers and that these contractors are being pursued for Irish income tax.

Note 3 – Section 604A and assets received by way of inheritance

Section 604A (2) TCA 1997 confirms that CGT exemption applies to land or buildings located in an EEA State (EU together with Norway, Iceland, Liechtenstein) which is held for at least 4 years but not more than 7 years and:

- i. Was acquired for a consideration equal to its market value in the period commencing on 7 December 2011 and ending on 31 December 2014, or
- ii. Was acquired in the period referred to in subparagraph (i) from a relative (within the meaning of section 10 TCA 1997) and the consideration was not less than 75% of the market value at the date they were acquired.

It is not clear whether this section applies to assets received by way of inheritance.

Section 573 TCA 1997 deems assets passing to a beneficiary by way of inheritance is at the market value at the date of death of the disponent. Therefore, on an inheritance the beneficiary is deemed to have acquired the asset for market value.

However, Revenue's eBrief 108/18 updated their Section 604A guidance to make it clear that "in order to qualify for relief under section 604A, an individual who acquired land or buildings from a relative must have paid consideration amounting to at least 75% of the market value of the property at the time it was acquired in order to qualify for relief". The guidance does not address the issue of inheritances at all.

Practitioners are in doubt about this question.

Note 4 – Uncertainty regarding when a CG50 is required

There is a risk for a purchaser in a transaction where it is not clear whether a CG50 is required (e.g., a trading business which owns its premises). This can result in a purchaser insisting on a CG50, while the vendor may resist (especially if they hope to claim section 626B TCA 1997). Practitioners have experienced this issue in acquisitions of retail businesses where there is a mix of freehold and leasehold properties held by the target. The scenarios that could give rise to uncertainty include:

1. Acquisitions of retail, hospitality, or manufacturing businesses which own their own premises.
2. Following the Revenue challenge to the Cintra case and the appeal of this to the High Court, acquisitions of PPP operators.
3. IFRS 16 changes resulting in right of use (ROU) assets being recognised on the balance sheet.
4. Debt repayments on loans relating to land.

Practitioners would welcome guidance on the matter.