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

Thursday 1 September 2022

2.30 pm – 4:30 pm

Minutes

1. Minutes of meeting of 23 June 2022

Minutes accepted as final and agreed.

2. Matters arising from meeting of 23 June 2022

a) **Revenue to report on the technical analysis leading to the withdrawal of Precedent 28.**
The subgroup has convened its first meeting and is due to reconvene in September.

Practitioners noted that the group met before the issuance of the TSG papers. It was agreed that the group would meet again following the publication of the TSG papers. Practitioners have asked for an update from Revenue on the technical reason for foreign lump sums being treated differently.

Revenue will circle back on this with the relevant persons. The item will remain on the agenda.

Addendum (see end): A meeting of the Precedent 28 Subgroup was convened on 22 November 2022. The amendments introduced in Finance Bill 2022 were discussed and Revenue shared a paper with the group which sets out Revenue's view regarding the tax treatment of foreign pension lump sum payments. It was agreed that the paper would be included as an addendum to these minutes as it pertains to matters relevant to the discussions which have taken place at this group over the last number of months..

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 to circulate the issues raised to relevant staff.

Revenue noted that the requirements have been in circulation for a while now. The item can be revisited if further issues persist. The item can come off the agenda, subject to further issues being identified in the future.

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**.
Is there an update on when the sub-group will be re-formed?

This will be discussed under Item 4.

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.**

Practitioners to update submissions to take account of Revenue's position that eBrief 08/2011 is not applicable to the issues raised.

Practitioners made a submission to Revenue, which was circulated to the wider group. ITI submitted two technical query papers to Revenue on 31 May and 3 August for consideration regarding the status of employed GPs with GMS contracts. The ITI summarised its position from the most recent submission is that the view of practitioners is the role of employed GPs should be looked at holistically – the role in relation to both GMS patients and in relation to private patients. If it is Revenue's view that GMS income cannot be assigned to the practice, then there may be two options which GP practices could consider. One option would be for the GMS income to be treated as Case II income of the employed GP and the practice would pay a balancing amount through PAYE to bring the employed GP up to the agreed salary amount. However, this would require a significant, almost unworkable level of administration on the part of most GP practices. An alternative in certain circumstances may be for employed GPs to become fixed share partners.

In either option, there is a loss of employers PRSI to the Exchequer, along with significant additional administrative responsibilities for GP practices. The reality of how GP practices are operated needs to be considered. If the administration becomes too burdensome, it may have a knock-on impact on the uptake of GMS contracts.

ITI noted further submissions from practitioners were unlikely to progress the matter and requested a practical solution and clarity for GP practices going forward.

Revenue noted that submissions did not take account of the original contracts between the doctors and the HSE under the GMS scheme. The only people who can be paid under these contracts are the individual medical practitioners. Revenue do not view the veterinary scenarios as being comparable from a contractual perspective.

Revenue is continuing to engage with external stakeholders. Further meetings are planned, and a reply will be issued at the earliest opportunity.

ACTION: Revenue to provide an update following discussions with stakeholders.

e) The draft TDM on the classification of foreign entities for Irish tax purposes was circulated by Revenue for discussion in advance of the meeting (see attachment).
The Law Society agreed to make a submission on the matter.

The Chair acknowledged the submission received from the Law Society in advance of today's meeting.

Revenue has acknowledged the differing views. Revenue suggested a once-off meeting to discuss the issues in full to reach a swift resolution and arrive at a shared understanding.

Practitioners suggested that a robust agenda accompanies the meeting to ensure the meeting is as productive as it needs to be.

ACTION: Revenue to arrange a meeting between practitioners to discuss the various submissions made to date.

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

This is an ongoing issue as practitioners are concerned with the volume of TDMs unavailable while under review. Can Revenue provide an update on the review of the overall process?

Revenue is looking to replace the existing TDM review system. The project should be finalised by the end of the year. Revenue is asking for views in relation to the removal of TDMs. Revenue is suggesting a meeting sometime after 23 September to get the views of practitioners. Revenue will then consider the outcome of that meeting when updating the TDM process.

ACTION: The various bodies to nominate 2-3 representatives to attend the proposed meeting.

g) 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.
Can Revenue provide an update on its review of the submissions made to date?

Revenue is in the process of updating guidance following the submissions received from practitioners.

Practitioners hope for an update at the next meeting.

h) 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.
The CCAB-I provided its submission to Revenue on 21 July 2022. Can Revenue provide an update on its view of the points raised?

Revenue has looked at the manual and acknowledged that the TDM states any guidance is non-exhaustive. Revenue does have answers to the various questions raised but is of the view that the TDM is sufficiently clear as currently drafted. Revenue note that the queries revolve around the trade/double-trade test.

Practitioners noted that this is the first time the distinction between a trading s.110 company vs. a non-trading s.110 company has arisen. In the context of an ILR group Revenue stated that it is not whether a s.110 is trading, but rather if the shares in an ILR group are held as part of its s.110 trade.

Practitioners explained that there are significant issues arising in relation to section 452 elections as some section 110 entities had made such elections based on previous guidance which had been issued but it now appears that those elections are invalid.

i) Revenue temporary concession for employees of Ukrainian employers working in Ireland.
CCAB-I were due to provide examples. Is there an update on examples received by CCAB-I to date?

It is proposed that this item be taken off the agenda.

j) Update on the draft TDM 04-05-01 on the treatment of certain gains and losses on Foreign Currencies for corporation tax purposes.
This is tabled for discussion at the upcoming meeting of Main TALC. An update should be available at the next meeting of this sub-committee.

The Chair acknowledged the TSG papers included helpful commentary. It was proposed that this item be removed from the agenda for now.

k) Uncertainty regarding when a CG50 is required.
Revenue requested further examples.

Practitioners do not plan on making any further submissions on the matter. However, guidance would be welcomed on how the concept of "greater part of value" is arrived at. Is it a gross asset test? A net asset test? An off-balance sheet test?

Practitioners also noted that from a purchaser's perspective, there is uncertainty in terms of what information is available upon which a view can be formed.

ACTION: Revenue to pass on the query to the relevant individual for clarification.

l) Regarding stamp duty registrations, practitioners queried why additional information was being sought by companies seeking tax registration for stamp duty purposes only.
Revenue was due to follow-up with the Law Society. Can Revenue or the Law Society provide an update?

The Law Society discussed the matter with Revenue (Declan Rigney). Practitioners noted that Revenue committed to ensuring the additional information would no longer be requested and noted that it should not have been requested.

Practitioners acknowledged that the process has improved significantly.

m) Revenue confirmed a planned TDM regarding the taxation of Digital Services Tax (DST) is being developed.
The TDM was circulated to the various representatives on 2 August 2022.

The guidance is tabled for discussion under Item 3.

n) Section 604A TCA 1997 interaction with assets received by way of inheritance

This item was not initially on the agenda as it was understood the item was dealt with in full at the prior meeting. However, practitioners advised that Revenue committed to updating guidance at the prior meeting and this has not happened as of yet.

ACTION: Revenue to update guidance.

3. Guidance on the deductibility of certain Digital Services Taxes (DSTs) (Law Society, CCAB-I)

Prior to the meeting, the following information was shared with Revenue:

Law Society: On 5 August 2022, Revenue issued guidance in Revenue e-Brief 158/22 (the "**Guidance**") in respect of the deductibility of certain Digital Services Taxes ("DSTs"). The Guidance confirms that the following types of DSTs are deductible: France's Digital Services Tax; Italy's Digital Services Tax; Turkey's Digital Services Tax; United Kingdom's Digital Services Tax; and India's Equalization Levy. The

Guidance did not confirm that Spain's Digital Services Tax is also a deductible DST. However, the Guidance notes that the list of DSTs may be updated in the future.

Can Revenue please confirm that Spain's Digital Services Tax is also a deductible DST, and whether the Guidance will be updated in this regard.

CCAB-I: The Guidance raises the issues of how the list of countries was arrived at, and also the factors which disqualified DTSs arising in certain jurisdictions (if any). Practitioners would welcome any insights Revenue can share on how the list of qualifying DSTs was determined.

In addition, practitioners would welcome clarification as to how the deductibility of DSTs may be distinguished from the issue of the deductibility of withholding tax on receipts coming into Irish companies?

The following is the discussion which took place at the meeting:

Revenue is prepared to accept that DSTs are a cost of doing business and so wholly and exclusively incurred for the purposes of the trade. There is no country which Revenue has reviewed to date which does not satisfy their requirements for a deduction to be available. Practitioners queried the status of Spanish DSTs. Revenue said an updated DST TDM would be published soon and that practitioners may review the updated TDM in due course. Practitioners asked if there was any update Revenue could provide in advance. Revenue advised that the TDM would be published soon but the approach taken to date would be the same with regards the Spanish DST.

Revenue's view is that this does not impact the view in relation to WHT. Revenue is prepared to accept that a DST is not a tax on income, unlike WHTs.

4. Draft guidance on "Leasing Ringfences – Sections 403 and 404 TCA 1997" (Revenue)

The following note accompanied the notes to the agenda:

While the leasing ring fence has existed for many years, Revenue have not previously published guidance on it. The attached is a draft TDM which seeks to set out Revenue's interpretation of the legislation. While we welcome comments on all aspects of the TDM, given it is being newly introduced on an established section of the TCA, there are two places to which Revenue wish to particularly draw practitioners attention to understand whether there may be different views on the effect of the legislation, as it is currently drafted.

These areas are:

- Current year use of losses within a group against non-trading income, being the interaction of the ring fence under section 403(4) and section 403(1)(d).
- Losses carried forward, being the interaction of section 403(2) and section 403(1)(d).

The following is a summary of the discussion which took place at the meeting:

Revenue asked if the TALC Leasing group should be re-established? The view of practitioners is that the group should be reconvened.

Practitioners noted that extensive feedback has been provided to the Department of Finance Leasing Working Group on the issues under consideration and queried whether any legislative changes were envisaged.

Revenue noted that the purpose of sharing information was to let practitioners know where Revenue is commencing the analysis from. The TDM will set out Revenue's interpretation of the law. It is a matter for the Department of Finance whether a legislative amendment is required.

ACTION: The various bodies are to nominate 2-3 representatives for the sub-committee.

5. Irish Real Estate Investment Funds (IREF) filing issues (CCAB-I)

The following note was shared with Revenue in advance of the meeting:

This relates to the late release of the new Form IREF. On the basis that the deadline is 30 July, practitioners had started the compliance process for the majority of IREF cases and had almost finalised a number of returns when the new form, containing significant additional information requests, was issued. It should be noted that a new IREF return for returns due by 30 January 2022 was also released very close to the deadline (22 December 2021).

Could consideration be given to releasing new versions of the IREF returns at least a few months in advance of the filing deadline (as opposed to a few weeks) in order for tax advisors to efficiently manage the compliance process?

The following is a summary of the discussion which took place at the meeting:

An IREF is not an annual return. Filings are instead required every six months. Changes to forms are triggered based on information received in prior returns. Revenue acknowledged the late updates to forms close to filing deadlines. If the forms were not amended, it would instead have led to Level 1 enquiries to request the necessary information. Revenue noted that the nature of the filing deadlines is driving the changes to IREF forms.

Revenue do not anticipate significant changes in the next round of IREF filings.

6. Requirements of Section 845C TCA 1997 – Additional Tier 1 instruments (CCAB-I)

The following note was shared with Revenue in advance of the meeting:

Practitioners understand there is an appetite in the marketplace among Irish based financial services companies to issue interest bearing notes very similar to the Additional Tier 1 (AT1) instrument provided for in Section 845C. The only difference being that the Notes issued are not perpetual in nature whereas this is a condition of Section 845C. Could consideration be given to dealing with this issue by way of guidance pending a legislation change?

The following is a summary of the discussion which took place at the meeting:

Practitioners acknowledged this may be a legislative matter for the Department of Finance's attention.

Revenue agreed and clarified that the treatment afforded to AT1 instruments in accordance with section 845C TCA 1997 cannot be extended to these instruments. Perpetuity is a key aspect of AT1's and instruments lacking a perpetual nature could not be regarded as 'similar'.

7. DAC6 – Relevant taxpayer – duty to disclose Arrangement ID in tax return(s) (CCAB-I)

The following note accompanied the agenda to the meeting:

We would like to clarify a point in relation to the duty of a Relevant Taxpayer to disclose the Arrangement ID assigned to a reportable cross-border arrangement in the relevant tax return(s) as provided for in Section 817RD(9) TCA 1997:

"A relevant taxpayer shall include the reference number assigned to a reportable cross-border arrangement in the return, within the meaning of Part 41A, for any chargeable period, within the meaning of Part 41A, in which the relevant taxpayer

(a) entered into any transaction which is or forms part of a reportable cross-border arrangement, or

(b) obtains, or seeks to obtain, a tax advantage from a reportable cross-border arrangement".

Under subpart (a), the Arrangement ID must be reported by the Relevant Taxpayer in the tax return(s) for the chargeable period(s) in which the arrangement is implemented. We would like to clarify our understanding that, based on subpart (b), the Arrangement ID may also be reportable in one or more subsequent chargeable periods in circumstances where a tax advantage is obtained or sought from the arrangement by the Relevant Taxpayer in that period.

If our understanding is correct, we would also like to confirm how this is to be applied in practice in the following scenarios:

- For arrangements involving deductible payments being made by the Relevant Taxpayer under loan arrangements in circumstances where either Hallmark C.1 or E.1 is met, is the Arrangement ID reportable in each year in which a tax deduction is claimed?
- For arrangements involving the transfer of IP or other assets to the Relevant Taxpayer in circumstances where either Hallmark C.4, E.2 or E.3 is met, and those assets qualify for tax amortisation, is the Arrangement ID reportable in each year in which this amortisation is claimed? If the acquisition is debt funded is it also necessary to report the Arrangement ID over the period in which deductible interest is incurred?

The following is a summary of the discussion which took place:

Revenue's view is that the TDM was relatively straightforward. The arrangement ID must be included for every year the tax advantage applies. For example, each year a capital allowance or interest deduction is claimed, the arrangement ID must be included.

Practitioners were seeking additional guidance in cases where no tax advantage is conferred by the arrangement even though the arrangement remains in place, many of the hallmarks contain a tax test. The Hallmarks in Categories A, B and part of Category C are subject to the 'main benefit test'. Other

hallmarks in Category C focus on deductions and reliefs being claimed in more than one jurisdiction. In these cases, the tax advantage and its duration should be clearly identifiable.

However, a number of hallmarks contain no specific tax tests and there is no requirement for any tax advantage to arise from the arrangement in order for it to be reportable. In particular, Hallmarks E2 and E3 cover cross-border transfers of IP and other assets both into and out of Ireland / the wider EU. In a case where assets are transferred intragroup from Ireland to the US, for example, there may be no tax consequences for the Irish company beyond the initial transactional taxes. Conversely if the assets transfer from the US to Ireland, capital allowances may be claimed by the Irish company for a specific number of years after the transfer. If the acquisition is debt funded, interest deductions may also be claimed over the duration of the loan.

ACTION: Revenue to consider the second point but has requested further information in relation to arrangements which may no longer confer a tax advantage.

8. Electric cars & Benefit-in-Kind (BIK) (ITI)

The following note accompanied the agenda to the meeting:

Considering the changes to the BIK regime for vehicles that apply from 1 January 2023, companies are currently reviewing and updating their policies for electric vehicles. This is giving rise to several questions in relation to BIK.

Section 118(5H) TCA 1997 confirms that any expense incurred by an employer in the provision of electric vehicle charging facilities for employees and directors on the employer's premises are exempt from the charge to BIK, once all employees and directors can avail of the facility. However, where the nature of the work means that employees are frequently on the road and travelling to clients directly from home, the employer may wish to incur the cost of providing charging facilities at the home for certain employees, for such company cars and vans. From a business perspective, travelling directly from home is preferable to minimise delays caused by an employee travelling to the office first to recharge the vehicle before undertaking the journey to a client.

Queries have been raised about:

- the application of a BIK charge on the cost of installation of home chargers, and
- the related use of electricity at home for business and non-business purpose, for example, what proportion of electricity use would be considered business use in charging the vehicle?

In addition, reimbursing employees for costs incurred in recharging electric cars for business travel expenses has also been queried. For example, what receipts and supporting information would Revenue expect to be provided? Typically, employees with diesel/petrol cars are provided with a fuel charge card and/or provide receipts as supporting documentation. Practitioners understand certain fuel cards have been extended to electricity charging points and Apps may also be used to log charges to be reimbursed by the employer. However, it is not clear what supporting information Revenue would expect the employer to retain and clarity should be provided in guidance.

The following is a summary of the discussion which took place:

Practitioners asked about the application of a BIK charge on the cost of installation of home chargers.

Revenue confirmed that Section 118(5H) of the Taxes Consolidation Act 1997 provides the exemption from the general BIK charge in respect of any expense incurred by an employer in the provision of a facility on their business premises for the electric charging of vehicles of employees or director. The exemption does not extend to the provision or installation of an electric vehicle charge point at an employee's private address. Therefore, a BIK charge to tax applies.

Practitioners asked about the related use of electricity at home for business and non-business purpose.

Revenue advised that it depended on the facts and circumstances, for example, whether the vehicle is owned by the employer or the employee.

Employer provided vehicle

In principle, where the employer is providing a car to his/her employee /director and the employee/director is incurring home electricity costs, having regard to the manner in which the BIK charge is calculated, provided it can be demonstrated that the employer is only reimbursing for the running costs of that employer vehicle, then it would be reasonable for this reimbursement to be paid free of tax. This would be conditional on the employer retaining sufficient supporting documents to verify the amount of the reimbursed cost.

Employee owned vehicle used for business journeys

Similarly, where the vehicle is privately owned and the employee/director is charging the vehicle for the purpose of business journeys, in accordance with section 114 of the Taxes Consolidation Act 1997, a just and reasonable approach will apply. However, it is not possible to provide a one size fits all type answer. In general, where an employer reimburses his/her employee for travel and subsistence, it may be on the basis of either actual vouched expenses or applying a flat rate allowance.

Vouched Expenses/Record Keeping

The amount of business mileage is a question of fact. Employers must put in place a robust business process whereby business mileage covered and expenses reimbursed by employers is recorded and can be verified. For example, the employee could keep a logbook showing business journeys and the units (kWh) transferred to the car from the EV charger. This would then be used to calculate the cost based on the per unit cots on the ESB bill. If there are live examples, of the current practices being applied in calculating the relevant costs, if they are submitted, Revenue will consider them.

Flat Rate Allowance

Revenue advised that DEPR [1]recently updated the civil services travel and subsistence rates. The EV rate is being increased with effect from 1 September 2022 and is being set at the same rate as that applying to vehicles in the middle category of 1,201cc to 1,500cc.

[1] Circular 16/2022: Revised Motor Travel Rates

ACTION: Practitioners to provide Revenue with a reasonable basis for determining business miles for electric cars where private electricity source is used to power vehicle.

9. Travel to a temporary place of work – application of the "lower of" rule for business travel (ITI)

The following note accompanied the agenda to the meeting:

The proliferation of remote working gives rise to practical questions on the calculation and payment of business travel expenses for employees when visiting client sites and premises. According to Revenue guidance, the distance in kilometres for business travel is calculated by the lower of, either:

- the distance between the employee's home and the temporary place of work and
- the distance between the employee's normal place of work and the temporary place of work.

However, there are now circumstances where the application of the rule is unclear, such as situations where the employer's physical office has closed, and staff are working remotely full-time. In such circumstances, you would expect the distance from the employee's home to the temporary place of work to be what is relevant, and that such travel could be reimbursed.

There are also other arrangements that guidance does not adequately cater for, for example, where an employer is reducing their office space (i.e., downsizing or/and sub-letting their office space such that some employees do not have access to a desk in the office and are required to work remotely). Furthermore, a range of hybrid working arrangements have also been rolled out, some of which require minimal time spent at the employer's premises.

The advent of remote working has also resulted in many employees living further away from the office, so while travelling to client premises in their employer's local area or region, they are also travelling much further distances and incurring the related costs of such travel. Employers would not wish to leave their employees out of pocket for such travel especially given the increasing cost of fuel.

Whilst we recognise Revenue's general position (as outlined in the Remote Working Relief Manual) is no matter how few days are spent by an e-worker in the office, the normal place of work for income tax purposes remains the employer's place of business and we note the prohibition on reimbursing travel expenses from an employee's home to their employer's office/base, we believe the practical application of the "lower of" rule should be reviewed to take account of the new work arrangements.

The following is a summary of the discussion which took place at the meeting:

Revenue advised that where the employer's physical office has closed, and the employee is required to work remotely full-time, then the home would be regarded as the normal place of work.

Revenue acknowledged that the changed working environment and the wide diversity of working arrangements available to employees, which give rise to HR, legal and tax issues that require full consideration. In that context, Revenue is participating in the OECD Working Party II (Tax Policy Analysis and Tax Statistics), under the Committee on Fiscal Affairs, that is engaged in the review of these issues. Pending the outcome of these deliberations, the current policy position remains unchanged. Where an employee chooses to work remotely, then his/her normal place of work is the employer's office.

10. AOB

Stamp duty on share buy-backs

Practitioners queried if the comments in the TSG papers are going to lead to any changes in practice. A submission was made by Arthur Cox to Department of Finance this week.

ACTION: Revenue will ask the relevant person whether a change in practice is expected.

Revenue	ITI	CCAB-I	Law Society
Declan Rigney	Lorraine Sheegar	Peter Vale (Chair)	Rachael Hession
Áine Hollingsworth	Clare McGuinness	Gearóid O'Sullivan (Secretary)	Caroline Devlin
Alan Carey	Laura Lynch	Enda Faughnan	Aidan Fahy
Jacqueline O'Callaghan	David Fennell	Ken Garvey	David Lawless
Maresa Hempenstall	Stephen Ruane	Cormac Kelleher	John Cuddigan
Adele Murphy	Cillein Barry	Colin Smith	
Keith Noonan	Tom Maguire		
Dave Brennan			

Addendum

TALC subgroup on the treatment of foreign pension lump sum payments

1. Background

Below outlines Revenue´s position on the tax treatment of foreign pension lump sum amounts which are paid to individuals who are resident in the State for tax purposes.

The note addresses the tax treatment of such lump payments in the following circumstances:

(i) The taxpayer contributed to an overseas pension plan while not resident or ordinarily resident for Irish tax purposes.

(ii) The overseas pension plan is a fully-paid up pension arrangement, other than a state social security scheme, which-

   a. is established in, or entered into the law of, a territory other than the State,
   b. is, in good faith, established for the sole purpose of providing benefits of a kind similar to those referred to in Chapter 1,2, 2A or 2D of Part 30, and
   c. is not a relevant pension arrangement for the purposes of s.790AA Taxes Consolidation Act (TCA) 1997.

(iii) The taxpayer takes up residence in Ireland and draws down benefits from the overseas pension plan, which consists of the following:

   a. a lump sum payment by means of a commutation of part of the pension
   b. periodic pension payments from the plan.

2. Revenue precedent

The only published Revenue guidance on the treatment of overseas pension lump sums derives from Precedent 28 (PREC/28) dates from July 30, 1987, which states:

> *"Tax free lump sums in commutation of foreign pensions were not taxable in Ireland should the individual come to reside in the country following their retirement".*

The benefits associated with the precedent are no longer available. In common with most precedents over five years old, Revenue is treating that precedent as having lapsed. Revenue's current approach is that the payment of these lump sums is subject to income tax under Case III as it is a "foreign possession", assuming the taxpayer is resident in Ireland on the date of the payment.

It should be noted that the concession was published at a time when lump sum payments from domestic Irish pension arrangements were not subject to income tax and it would appear that the concession might have been granted to ensure equality of treatment for resident taxpayers with pension lump sums from either Irish or foreign pension arrangements. The position with respect to lump sums from domestic pension arrangements changed with the introduction, in Finance Act 2006, of a tax charge on lump sums from relevant pension arrangements, as defined (per s.790AA). Applying the equality of treatment principle, it would be difficult to allow taxpayers to claim a full tax exemption on foreign pension lump sums, while lump sums from domestic pension arrangements are chargeable to tax.

3. Request for clarification on tax treatment of overseas foreign lump sum payments

We understand that practitioners would like to understand the basis of taxation for the commutation of a foreign pension which accumulated from contributions out of foreign income and in respect of which no Irish tax relief was provided.

This is outlined further in the ITI's submission to Revenue on 27 August 2021:

"We would suggest that Revenue's current approach, which would appear to conclude that such lump sums are income from a foreign possession, is contrary to the principle that capital accumulated before someone becomes resident in Ireland is outside the scope of Irish tax. For example, if the accumulation of the fund had come from foreign rent earned before the individual became resident in Ireland, it would be capital and exempt from Irish tax on remittance. The basis for treating a pension fund differently is not clear. Practitioners request clarification on the domestic charging provision in Irish law which imposes income tax treatment".

4. Technical analysis

I. Charge to tax under Case III of Schedule D

As contained in section 18(2) of the TCA 1997, income from foreign securities and possessions are charged to tax under Case III of Schedule D. Between them, headings (e) and (f) of section 18(2) charge to tax all forms of income from foreign sources, notwithstanding that such income is of a type which would, if it arose within the State, be taxable under a different case or Schedule.

The meaning of "foreign possession" was considered by Lord Macnaghten in **Colquhoun v Brooks** 2 TC 490, where it was stated:

"…I am, therefore, forced to the conclusion that in the expression 'foreign possession' as used in the Act of 1799 the word 'possession' is to be taken in the widest sense possible as denoting everything that a person has as a source of income."

For Irish tax purposes, a retirement pension from outside the State was held to be income from a foreign possession which is taxable under Schedule D Case III (per Forbes v Dundon II ITR 491).
It had been argued on behalf of the taxpayer that his right to a UK retirement pension was not provided for by any deed, agreement or legal document and that, in consequence, he did not have any foreign possession from which he could derive income which was taxable in the State. In his High Court judgement, Kenny J rejected this argument, taking the view that the taxpayer did have a legal right under the UK National Insurance Act 1946 enforceable by proceedings before the Minister or the tribunals established under the Act, the decisions of which could be reviewed the High Court in England. He went on:

"In my opinion, a legal right to which a person resident in this country is entitled and which is situated outside Ireland and which may be enforced by legal proceedings in a country outside Ireland is either a security or 'a possession'…and income which comes from such a right is either income arising from securities in a place out of Ireland or income arising from possessions in a place out of Ireland."

II. Basis of assessment

As payments to Irish residents from a foreign source are taxable under Case III of Schedule D, the receipt of a lump sum from a foreign pension is a taxable source of income which is liable to Income Tax and Universal Social Charge (USC).

The basis of assessment of this income depends on whether the taxpayer is domiciled or not for Irish tax purposes. Please see below.

(a) Irish resident and domiciled taxpayer

Section 70(2) TCA 1997 states that the income chargeable under Case III of Schedule D shall "be computed on the full amount of the profits or income arising within the year of assessment".

A pension lump sum amount is, in effect, the replacement of a series of future pension payments by an immediate lump sum. The fact that a taxpayer has chosen to commute the pension in place of an immediate lump sum payment does not change the fact that the payment of the lump sum payment is considered to be income of the taxpayer, which if paid from an overseas pension plan is chargeable to tax under section 18(2) of the TCA on an arising basis.

(b) Irish resident, but non-domiciled taxpayer

Section 70(2) TCA 1997 states that the income chargeable under Case III of Schedule D shall "be computed on the full amount of the profits or income arising within the year of assessment". However, for taxpayers who are not domiciled in the State, income tax shall be computed on the full amount of the actual sums received in the State in the relevant tax year, rather than the income arising in that year. This basis of computation is more commonly known as the "remittance basis" of assessment (s.71(3) TCA 1997 refers).

It is an accepted tax principle that a remittance of income is liable to income tax, but a remittance of capital is not liable to income tax, but may be liable to a capital tax. It is also accepted that income that arises to an individual remains his or her income for the purposes of the remittance basis of assessment, notwithstanding that such income may have been invested or accumulated over a number of years prior to being remitted. The basis for this is found in case law. For example:

1. In the Irish High Court tax case of **J.M. O'Sullivan (Inspector of Taxes) v Julie O'Connor as Administrator of Evelyn O'Brien Deceased** (II ITR 61), Maguire, J stated:

   ¨It is well established that the accumulation of income remains income and that it does not cease to be income merely because it is allowed to accumulate. This principle is not contested in this case¨.

2. In the UK tax case of **Walsh v Randall** (23 TC 55), the taxpayer, a non-domiciled UK resident, had sources of income in India that, if remitted, were liable to tax in the UK under the remittance basis of assessment. His Indian source income was paid into his bank account in India and this money was used to purchase certain investments in India. The taxpayer made a donation of £10,000 to a UK hospital funded by way of 'cashing in' his Indian investments acquired from his accumulated Indian income.

   ¨It was held that the £10,000 donation to a hospital in the UK was a taxable remittance from India of his income notwithstanding that such income was 'routed' via investments in India before being remitted¨.

In cases where an individual's income qualifies for the remittance basis of assessment, any foreign income which is accumulated before he or she became Irish resident for tax purposes, but is remitted to the State after becoming Irish resident, is also liable to Irish income tax. This is

supported by **J.M. O'Sullivan (Inspector of Taxes) v Julie O'Connor as Administrator of Evelyn O'Brien Deceased** (II ITR 61), where Maguire, J stated:

> *¨It is well established that the accumulation of income remains income and that it does not cease to be income merely because it is allowed to accumulate. This principle is not contested in this case¨.*

There is, however, a long-standing Revenue practice to the effect that for individuals moving to Ireland for the first time, or Irish citizens returning to live in Ireland having been non-resident and non-ordinarily resident when the income was earned, funds accumulated from income earned abroad prior to 1 January in the year that the individual becomes Irish resident will not be liable to income tax even if remitted after that date.

Revenue does not apply this principle to overseas pensions which are paid to an Irish resident taxpayer for the following reasons:

- The practice, which is concessionary in nature, applies only to income which was paid to a taxpayer from a foreign source (e.g. foreign rental property) prior to becoming resident here. This is different to a case where a taxpayer is paid a pension from an overseas pension plan while resident. In such cases, the taxpayer is taking a payment from a "new" source of income (the foreign pension fund), which as it arises from a foreign possession, is chargeable to tax under Case III of Schedule D.

- Section 200 TCA 1997 provides for a tax exemption for certain foreign occupational and social security pensions, in cases where these pensions are disregarded for income tax purposes in the hands of a resident of the country of source. The section was introduced into law in the Finance (Miscellaneous Provisions) Act 1968. The section was introduced to attract US citizens, with non-taxable US pension plans, to come to live in the State.

  The section provides for the exemption of the qualifying pension from Irish tax by deeming it to fall outside the provisions of section 18(2) TCA 1997. This is an implicit acknowledgement that section 18(2) TCA 1997 charges foreign pension payments to tax, notwithstanding that the pension fund may have been in existence prior to an individual coming to the State to take up residence here.

- The source/foreign possession is the foreign pension asset held and the income arising is the lump sum payment is the income arising from the source. This includes:

  a. a lump sum payment by means of a commutation of part of the pension
  b. periodic pension or annuity payments

  With respect to a lump sum payment, this is, in effect, the replacement of a series of future pension payments by an immediate lump sum. The fact that a taxpayer has chosen to commute the pension in place of an immediate lump sum payment does not change the fact that the payment of the lump sum payment is considered to be income of the taxpayer, which if paid from an overseas pension plan, is chargeable to tax under section 18(2) of the TCA.