Shares deriving value from immovable property situated in the State

Part 5: section 31C

This document should be read in conjunction with section 31C SDCA 1999

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Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

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1 Introduction

Section 31C is an anti-avoidance measure introduced in Finance Act 2017 on foot of the increase in the stamp duty rate from 2% to 6% (now 7.5%) applying to sales and transfers of non-residential property. The difference between the exemption on the acquisition of units in certain investment undertakings, or the 1% rate applying to the acquisition of shares in a corporate entity, and the 7.5% rate creates an incentive for stamp duty avoidance. Such avoidance could take the form of the indirect transfer or sale of non-residential property by, for example, transferring or selling the shares (chargeable at the lower rate of 1%) in the corporate entity holding the property.

While the targeted entities are those that derive the greater part of their value from underlying Irish property, not all such entities are subject to the higher rate of duty. In addition, relevant entities must have acquired or developed the property with the intention of making a profit or gain on its disposal or have held the property as trading stock.

While companies are targeted by this anti-avoidance measure, they are not the only 'wrapper' or 'envelope' that could be used for property assets. Partnerships and certain investment undertakings used for collective investment purposes are also targeted. For convenience, references to shares in this manual includes interests in partnerships and units in investment undertakings. References to property include land and buildings.

2 Residential v non-residential property

Residential property for stamp duty purposes is defined in section 1 as a building or part of a building which, at the date of the conveyance:

- was used or was suitable for use as a dwelling;
- was in the course of being constructed or adapted for use as a dwelling; or
- had been constructed or adapted for use as a dwelling and had not, since such construction or adaptation, been adapted for any other use.

However, these criteria are subject to the relevant local authority's classification of a property for rating purposes[1] at the immediately preceding 31 December. This means that, regardless of whether property is being constructed or adapted for use as a dwelling at a point in time, it is not residential property for stamp duty purposes where it was classified as commercial property for rating purposes on the immediately preceding 31 December. The local authority rating classification takes precedence unless a property is completed and in use or suitable for use as a dwelling at the time it is necessary to ascertain the value that an entity derives from non-residential property (see section 3.3 below including example). In the case of a

[1] Properties falling within Schedule 3 or 4 Valuation Act 2001.

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mixed-use classification by a local authority, an apportionment is required to determine the part of an entity's value to be attributed to non-residential property.

The curtilage (normal domestic out-houses, yard, garden, etc.) of a residential property up to an area (exclusive of the site of the residential property) of one acre is also treated as residential property.

A conveyance on sale combined with a building agreement for a dwelling house or apartment is treated as residential property under section 29.

Non–residential property is any property that is not residential property.

3 Targeted entities

3.1 Types of entity

Three types of entity are targeted by section 31C.

Companies, the meaning of which is set out in section 4 TCA 1997 and which includes any body corporate. Most public bodies are excluded.

Certain investment undertakings, which may include companies, and particularly includes Irish Real Estate Funds (IREFs), the meaning of which is set out in section 739K(1) TCA 1997. To be treated as an IREF, at least 25% of the value of an entity's assets must be directly or indirectly attributable to Irish property, or if not so attributable, it would be reasonable to consider that the main purpose, or one of the main purposes, of the entity was to acquire Irish property or to deal in/develop such property or rent it out. An IREF is not a particular type of legal entity and designation as such arises purely because of the amount of Irish property held.

Section 88 provides for a stamp duty exemption for the conveyance or transfer of shares in certain collective investment schemes subject, inter alia, to the shares in such an entity that is foreign not being related to Irish property. Section 31C specifically brings units in foreign-incorporated collective investment schemes (section 88(1)(b)(ii)) within its terms. While section 31C(4), in applying the higher stamp duty rate, generally disapplies the exemption provided for by section 88, this exemption is maintained for investment undertakings within the meaning of section 739B TCA 1997. These include certain unit trusts, certain UCITS, certain authorised investment companies and authorised ICAVs, provided such entities are not also an IREF.

Partnerships, which, while not defined for section 31C, would include:

- a limited or unlimited partnership within the meaning of the Partnership Act 1890;
- a limited partnership under the Limited Partnership Act 1907;
- an investment limited partnership within the meaning of the Investment Limited Partnerships Act 1994; or
- any other partnership wherever registered or situated.

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3.2 Value derived from non-residential property

The targeted entity must derive the greater part of its value (i.e. >50%), directly or indirectly, from Irish non-residential property (subsection (2)). Indirectly refers to interests held in Irish property such as shares held in a property-holding company.

Anti-avoidance provisions disregard transactions intended primarily to artificially change the value attributable to property, particularly where connected persons are involved. While subsection (8) specifically refers to arrangements (defined very broadly for the purposes of section 31C) involving transfers of money or non-property assets preceding the conveyance or transfer of shares, it also contains the standard broad anti-avoidance provision. This brings within the scope of section 31C any arrangements undertaken with a purpose of avoiding a liability to tax or duty.

References to value derived from property are to a property's gross value, which means that debts relating to property are not deductible in calculating such value (subsection (8)(b)).

3.3 Land holding, dealing and development

The targeted entities must deal in Irish non-residential property. The entity must have acquired or developed the property with the sole or main aim of making a profit or gain from its disposal (whether or not it develops the property) or must have held the property as trading stock (within the meaning of section 89 TCA 1997). Where an entity secures the development of property, it is regarded as itself developing the property. Development is widely defined for the purposes of section 31C.

The aim of making a gain from the disposal of property or the requirement to have held property as trading stock are not explicitly attributed to the targeted entity itself but, instead, are indirectly stated in terms of it being "reasonable to consider" that they applied.[2] This effectively puts the onus on a purchaser or transferee to consider these matters when preparing for the purchase or transfer of shares and to have formed a view on the intention of the vendor or transferor in acting in a particular way. For stamp duty purposes, the purchaser or transferee is the accountable person rather than the vendor or transferor and, in this context, would be expected to carry out appropriate due diligence.

The aim of making a gain from the disposal of property or the requirement to have held property as trading stock are treated as applying in the case of a particular entity where they apply in the case of another entity in which the first entity holds shares (subsection (2)(c)). This provision prevents an entity from claiming that, for example, it did not develop property where it was developed by a different entity in which the first entity holds shares.

While it may happen that land that has been acquired or developed with the main aim of making a profit or gain from its disposal is used for previously unintended or temporary activities before its disposal, such activities would not negate the

[2] Similar mechanism applied in section 739K(1) TCA 1997 in relation to IREF's.

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underlying original aim. Some examples might be the use of an undeveloped site for paid car parking or the rental of an office block pending a suitable purchaser.

Example

An IREF buys a vacant site in 2018 with the aim of developing it into apartments for sale at a profit. The site is its only asset and developing the site is its sole activity. The local authority designated the site as commercial property for rating purposes at 31 December 2018 and again at 31 December 2019 when building work on the apartments had commenced. Another company wishes to acquire the site and the partially completed apartments and does so by buying 100% of the shares in the IREF in June 2020. The IREF is treated as deriving most of its value from non-residential property given the most recent local authority designation and the incomplete state of the apartments when the IREF is sold. As the IREF had acquired the site with a view to making a profit from its disposal following development and the purchaser company gained control over the property, the purchase of the shares in the IREF are chargeable at the 7.5% rate of stamp duty instead of the usual 1% rate applicable to shares.

Example

Company A is a 100% holding company for several property development companies, including company B. It has no other assets. The value of company B is fully attributable to an undeveloped site which it acquired for the purpose of building a shopping centre for onward sale. Before development commenced, company B entered into an agreement with an unconnected company for the sale of the completed shopping centre. However, after carrying out some minor site preparation work, company B ran into funding difficulties, ceased development and started temporarily renting out car parking spaces on the site. Company A then sells company B by selling its shares in company B. This sale is chargeable to stamp duty at the rate of 7.5% as -

- company A derived its value indirectly from non-residential property;
- the non-residential property was acquired by company B with the aim of making a gain from its disposal following development and this aim is also attributable to company A as the parent company;
- the use of the site for the rental of car parking spaces does not negate the original aim of company B in acquiring the site; and
- the sale of company B results in a different person gaining control over the non-residential property.

Not all entities deriving value from non-residential property are affected. Although the greater part of the value of certain businesses might be attributable to their property assets, they might not have acquired or developed the property with the sole or main aim of making a profit or gain from its disposal. Instead, the aim might have been to use the property for their core business. Sales or transfers of shares in the following types of **active** businesses should not attract the 7.5% rate of duty:

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- Hotels;
- Car park businesses where the land was acquired for that business;
- Office rental businesses;
- Creches;
- Shopping centres where the units are let.

Example

Tom, Dick and Harry are brothers and equal 25% shareholders in company A that owns and operates several hotels and that also owns a site that it acquired with a view to selling it on at a gain when land values had increased. Company A therefore derives the greater part of its value from non-residential property. Tom and Dick decide to sell their shareholding in company A to another brother Jim who already has a 25% shareholding. This sale results in a change in the persons controlling the hotels and site from all four brothers together, or any three of them together, (as connected persons) to Jim who then owns 75% of the shares in company A. However, as the hotels were acquired with the aim of operating a business, the part of the consideration attributable to them does not come within the scope of section 31C and continues to be chargeable at the rate of 1%. However, the part of the consideration attributable to the sale of the site is chargeable at the rate of 7.5%.

4 Targeted conveyances or transfers

4.1 Head of charge

The targeted conveyances or transfers are those that would normally be chargeable under the Head of Charge "CONVEYANCE or TRANSFER on sale of any stocks or marketable securities, which Head of Charge attracts the 1% rate of duty.

However, section 31C(4) operates to make certain conveyances or transfers involving the sale of shares chargeable under the Head of Charge "CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance", which Head of Charge attracts the higher 7.5% rate of duty.

Section 31C(7)(c) operates to make contracts or agreements that are not chargeable to stamp duty chargeable under the Head of Charge "CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance.

4.2 Transfer of control over property

4.2.1 Meaning of control

Section 31C(7)(a) operates by looking through the transfer or sale per se of shares in a company to the underlying effect of the transfer or sale in terms of whether there

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is any change in the person(s) having control (direct or indirect) over the non-residential property concerned following the transfer or sale. Subsection (7)(a) refers to “control over immovable property” and not to control over the entity holding the property. While in practice control over property held by an entity and control over the entity itself may be the same, this may not necessarily be the case.

“Control” is not defined for the purposes of section 31C and so takes its normal meaning. The normal meaning of control over property held by an entity would, for example, be the entitlement to sell the property or to retain and develop the property, whether such entitlement arises in the present or will arise under a future arrangement.

While the tests for control set out in section 432 TCA 1997 are used to determine the persons who control a close company, they may also be useful in determining if there has been a change in the person(s) who control a targeted entity’s property. The general meaning in this section is very broad and refers to a person exercising, or having the ability to exercise, or being entitled to acquire control over a company’s affairs whether done directly or indirectly. This is similar to the meaning of “control” in section 11 TCA 1997 which refers to the power of a person to secure that the affairs of a company are conducted in accordance with the wishes of the person. Section 432 also contains more detailed tests for control in relation to the greater part (i.e. >50%) of share capital, voting power, entitlement to distributable income or entitlement to distributable assets on a winding-up. More than one person or one group of persons may control a company. For example, one person may have the greater part of the voting power, while another holds the greater part of the issued share capital and a third is entitled to the greater part of the assets in a winding-up.

Section 7 Companies Act 2014 defines “subsidiary” company and may also be useful in determining the person(s) who control a company.

Example

60% of the issued share capital of a land dealing company is sold to an investor with no previous interest in the company. The shares acquired also equate to voting rights and the ability to exercise control over the company’s property. As the sale of the shares result in a change in the person entitled to exercise control over the company’s land holdings, the 7.5% rate of stamp duty applies, assuming that the other conditions for the charge apply.

4.2.2 Series of conveyances or transfers

Control over non-residential property may be transferred by a single conveyance or transfer of shares or by a series of such conveyances or transfers (subsection (3)). The 7.5% rate of duty is triggered by the latest in a series of conveyances or transfers that transfers control over the non-residential property concerned. Generally, this would be where the aggregate of the shares held in an entity that are conveyed or transferred exceeds 50%. Where this happens, the series of conveyances or transfers is treated as a single conveyance or transfer and the 7.5% rate of duty is applied to their aggregated value. The value of shares acquired by the purchaser and

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consideration paid should correspond to the market value of the non-residential property. Any debts taken on by a purchaser or transferee do not reduce the chargeable consideration.

In addition to taking account of control over non-residential property that might be transferred over a series of conveyances or transfers, section 31C(3) also takes account of the actions of persons who act in concert or who are connected (within the meaning of section 10 TCA 1997). This applies in relation to an entire series of conveyances or transfers resulting in a transfer of control.

Example

A Ltd. decides to acquire a site from an IREF that had acquired the site with the intention of making a gain from selling it on in an undeveloped state. However, A Ltd. does not want the IREF to know of its interest in acquiring the site and arranges to acquire shares in the IREF through a number of agents acting on its behalf. Over a period of several months these agents purchase shares in tranches. Until such time as the purchased shares exceed 50% of the shares held in the IREF, stamp duty is initially payable at the 1% rate. However, the purchase of the tranche of shares that, when aggregated with the preceding tranches, exceeds 50% triggers the charging of this tranche and the preceding tranches at the 7.5% rate. This is the stage at which A Ltd. acquires control over the IREF's property holdings.

5 Transitional arrangements

Section 31C contains transitional measures to take account of sales or transfers of shares that were at an advanced stage when this section came into effect so that the preceding stamp duty provisions and the lower rate of stamp duty could continue to apply. Where a binding contract for the sale or transfer was entered into before 6 December 2017 and the sale or transfer was then executed before 1 March 2018, section 31C did not apply. The instrument was required to include a statement to the effect that a binding contract had been entered into before 6 December 2017 and a letter signed by both the purchaser and vendor.

Example

An investor enters into discussions with a property development company about purchasing the company by way of a purchase of all of its shares. The investor will then acquire indirect ownership of the company's land holdings which have yet to be developed. Discussions result in the signing of a binding contract for sale on 30 September 2017. However, there are delays in carrying out the remaining due diligence and the deed of sale is not executed until 1 April 2018. As this is later than 1 March 2018, and the purchase comes within the conditions of section 31C, the purchase was chargeable at the 6% rate of stamp duty applying at the time instead of the 1% rate of duty applying to the purchase of shares.

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6 Interaction with other SDCA 1999 provisions

6.1 Section 83D

Shares deriving value from non-residential property are deemed to be land for the purposes of section 31C. This allows purchasers of such shares who pay stamp duty at the rate of 7.5% to qualify for a refund of stamp duty under section 83D which provides for a repayment of stamp duty where land is developed for residential purposes, subject to meeting the relevant qualifying conditions. The Tax and Duty manual on section 83D: residential development refund scheme can be found here.

6.2 Section 88

Section 88 provides for a stamp duty exemption for the conveyance or transfer of shares in certain collective investment schemes subject, inter alia, to the shares in such a foreign entity not being related to Irish property. Section 31C specifically brings units in foreign-incorporated collective investment schemes (section 88(1)(b)(ii)) within its terms.

While section 31C(4), in applying the higher stamp duty rate, generally disapplies the exemption provided for by section 88, this exemption is maintained for investment undertakings within the meaning of section 739B TCA 1997. These include certain unit trusts, certain UCITS, certain authorised investment companies and authorised ICAV's, provided such entities are not also an IREF. The exemption is also maintained for section 110 TCA 1997 companies (securitisation).

6.3 Sections 79 and 80

Although section 31C does not specifically disapply section 79 or 80, it is Revenue's view that the anti-avoidance provisions in section 31C take precedence over these sections. However, Revenue is prepared to administratively allow the section 79 exemption in relation to conveyances and transfers of shares deriving value from non-residential property between group companies that are very closely associated. As it is possible that that conveyances and transfers of non-residential property might be structured as a reconstruction or amalgamation under section 80 purely to avoid the application of section 31C, Revenue is not prepared to commit to administratively allowing the section 80 exemption in all cases. Cases where both sections 31C and 80 might apply will therefore be decided by Revenue on the particular facts and circumstances on a case by case basis.

6.4 Contracts and agreements not chargeable to stamp duty

Subsection (7)(c) applies the stamp duty charge in the case of a contract or agreement where it would not otherwise be chargeable. For example, section 31(1) applies a stamp duty charge on certain contracts and agreements but excludes stocks or marketable securities. These may now be chargeable under section 31C.

The contract or agreement for the change in ownership of the entity is to be treated as an actual conveyance or transfer, and stamp duty is chargeable on this document

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under paragraph 4 of the Head of Charge CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance.

6.5 Section 31D

It is possible that an arrangement involving the indirect acquisition of non-residential property might meet the criteria for the stamp duty charge under both section 31C and 31D. Where this happens, subsection (7A)[3] provides that stamp duty is to be chargeable under section 31C only.

6.6 Section 31E

The standard rates of stamp duty that apply to acquisitions of residential property are 1% on the values up to €1 million and 2% on values exceeding €1 million. In 2021, section 31E was introduced as part of the Government's response to the bulk purchasing of residential properties by commercial institutional investors. Section 31E provides for a higher 10% rate of stamp duty to be charged where a person acquires 10 or more residential properties (excluding apartments) in any 12-month period.

Both sections 31C and 31E can apply to a single transaction; for example, both sections would apply if a person acquired all the shares in a company which had mainly held land for development but also owned more than 10 houses. As this transaction comprises a mixture of residential and non-residential property the acquisition must be apportioned in accordance with section 7(c). The person would be liable to stamp duty at the rate of 10% in relation to the value of the houses acquired and would also be liable to stamp duty at the rate of 7.5% in relation to the value of the non-residential land.

Detailed guidance on the application of section 31E can be found here.

7 Payment

Control over non-residential property held by an entity may be gradually transferred over a series of conveyances or transfers. Where this happens, stamp duty will initially be payable at the rate of 1%. However, when sufficient shares are transferred to transfer control, stamp duty at the rate of 7.5% is payable on the aggregate of the consideration paid for all of the transferred shares. At this stage, the accountable person should amend the return(s) made in relation to the transfer of shares and pay the balance of stamp duty due.

In the case of any issues or problems, the National Stamp Duty Office may be contacted, details as follows:

By post:

[3] Inserted by Finance Act 2020 (section 48) wef 19 December 2020.

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National Stamp Duty Office

14/15 Upper O’Connell Street,

Dublin 1

By Email: stampduty@revenue.ie or use the secure “MyEnquiries” service in “MyAccount” or “ROS”

By Phone: 01 7383646 (10am to 1pm Tuesdays and Thursdays)).

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