

GUIDANCE NOTES

ON

GAAR:

THE GENERAL ANTI-AVOIDANCE RULE

&

PROTECTIVE NOTIFICATIONS

Revenue Commissioners
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Part 1. Introduction

1.1. What these guidance notes are about

The following Guidance Notes set out the implications of entering into a 'tax avoidance transaction', within the meaning of **section 811C**, and what you can do if you enter into or have entered into a transaction that you are concerned may be a 'tax avoidance transaction'. These guidance notes provide an outline of how interest and the tax avoidance surcharge can arise together with details of how a taxpayer can make a protective notification and the benefits it can provide.

These guidance notes apply to transactions which commenced after 23 October 2014.

If a taxpayer is implementing a transaction that relies on ordinary tax planning using standard statutory exemptions and reliefs in a routine fashion for bona fide commercial purposes, as intended by the legislature, it is unlikely that the transaction will be a 'tax avoidance transaction'.

1.2. What law these guidance notes cover

The legislation covered by these Guidance Notes is:

- **Section 811C of the Taxes Consolidation Act 1997**, and
- **Section 811D of the Taxes Consolidation Act 1997**

1.3. Scope of the General Anti-Avoidance Rule (GAAR)

The GAAR applies to a 'tax avoidance transaction' involving any of the taxes which are covered by **section 811C**. Those taxes are: Income Tax, Corporation Tax, Capital Gains Tax, the Universal Social Charge, Value Added Tax, Capital Acquisitions Tax and Stamp Duties. It does not encompass, for example, PRSI, Excise or Customs Duties.

Sections 811C and **811D** only apply to a transaction which was commenced after 23 October 2014. If the transaction was commenced on or before that date **sections 811** and **811A** have application.

1.4. Terminology

A reference in these Guidance Notes to a section of legislation is a reference to a section of the Taxes Consolidation Act 1997, unless otherwise stated.

A reference in these Guidance Notes to a tax avoidance surcharge is a reference to a surcharge imposed by **Section 811D(3)** of the Taxes Consolidation Act 1997, unless otherwise stated.

A reference in these Guidance Notes to a protective notification is a reference to a general anti-avoidance protective notification provided for by **Section 811D**, unless otherwise stated.

1.5. The effect of the GAAR (Section 811C & 811D)

Under the GAAR a person is not entitled to any tax advantage that arises from a tax avoidance transaction.

If a taxpayer claims such a benefit, contrary to **section 811C(3)**, the taxpayer will be liable to pay:

- the additional tax arising by virtue of withdrawing the tax advantage;
- interest from the date the additional tax would have been due had the tax avoidance transaction not been entered into; and
- a tax avoidance surcharge of 30% of the tax advantage.

The amount of interest and surcharge due will depend on whether or not a protective notification (as set out in **Part 4**) was made.

Part 2. The GAAR

2.1. Self Assessment

Complying with the GAAR is part of a taxpayer's self-assessment obligations.

Under the **section 811C(3)** a person is not entitled to any tax advantage that arises from a tax avoidance transaction. When completing a tax return, or a claim form, a taxpayer should therefore identify any tax avoidance transaction which has been entered into and ensure that the benefit of any tax advantage which arose as a result of any tax avoidance transaction is not claimed.

Where taxpayers wish to mitigate the consequences of Revenue assessing that they have entered into is a tax avoidance transaction, they can submit a protective notification, which modifies some of the effects of the GAAR as set out below. See **Part 4** for details of what protections making a protective notification affords a taxpayer.

2.2. "Reasonable to consider" (section 811C(2)(a))

Whether or not it is reasonable to consider that the transaction gives rise to, or but for Section 811C, would give rise to, a tax advantage and whether or not it is reasonable to consider that the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage, are objective tests and not subjective ones.

Therefore, it is not enough for a taxpayer to say "I reasonably consider that I did not undertake this transaction primarily for the purposes of avoiding tax". That would be applying the test in a subjective manner. An objective test involves asking oneself a hypothetical question of what a reasonable person would reasonably consider, given the facts of the case.

2.3. No Time Limit

If a taxpayer has entered into a tax avoidance transaction and has sought to obtain the benefit of the tax advantage contrary to the GAAR there is no time limit on when Revenue can:

- carry out enquiries as to whether or not a transaction is a tax avoidance transaction;
- withdraw a tax advantage by, for example, amending an assessment; or
- collect or recover any amount of tax.

2.4. Consequences of the Application of the GAAR by Revenue

If a taxpayer does not comply with **section 811C**, the taxpayer will be liable to pay:

- the additional tax arising by virtue of withdrawing the tax advantage;
- interest from the date the additional tax would have been due had the tax avoidance transaction not been entered into; and
- a tax avoidance surcharge.

The amount of interest and surcharge due will depend on whether or not a protective notification (as set out in **Part 4**) was made.

2.4.1 The tax avoidance surcharge

If a taxpayer is found not to have complied with the provisions of **section 811C**, and to have claimed a tax advantage contrary to that section, then a tax avoidance surcharge will apply.

The tax avoidance surcharge is 30% of the tax advantage. This is 30% of the additional amount of tax that is due or payable by the person after the application of **section 811C**.

For example, if a person entered into a tax avoidance transaction with a view to creating a loss, then the tax avoidance surcharge is calculated with reference to the tax “saved” by using that loss. That is, no tax avoidance surcharge arises until the person claims relief for the loss, and underpays their tax, or over-claims a refund.

If at any point before an appeal against the withdrawal of a tax advantage pursuant to **section 811C** is heard, the taxpayer makes a “qualifying avoidance disclosure”, the amount of the tax avoidance surcharge can be reduced (refer to **Part 5** for more details).

The tax avoidance surcharge is determined and recovered in a similar way to a tax penalty, in that if the taxpayer and the Revenue officer cannot agree that the tax avoidance surcharge is due under the Acts, the tax avoidance surcharge is determined by the Courts. This ensures that a taxpayer has the right to challenge the imposition of the tax avoidance surcharge in a relevant Court.

While the tax avoidance surcharge is determined and recovered using the same mechanisms as a penalty, a taxpayer, on whom a tax avoidance surcharge is imposed, will not be published in the quarterly list of tax defaulters. A tax avoidance surcharge can only apply where a tax geared penalty, under for example Section 1077E for filing an incorrect tax return, does not apply.

2.5. Alternative Assessments (section 811C(5))

A Revenue officer is allowed to make or amend an assessment under **Section 811C** where a tax avoidance transaction has occurred to withdraw or deny, in whole or in part, any tax advantage. The Revenue officer can also, in accordance with **section 811C(5)**, make an alternative assessment based on another provision of the legislation.

Part 3. Who should make a Protective Notification?

3.1. Protective Notifications (*section 811D(1)*)

Protective notifications are notifications made to Revenue in a prescribed form – **Form PN1** – in relation to a transaction undertaken by the taxpayer. The Form PN1 must be received within 90 days of the date on which the transaction commences. The Form PN1 must be fully completed and must contain:

- Full details of the transaction;
- Full reference to the provisions of the Acts that the person considers relevant to the tax treatment of the transaction;
- Full details of why those provisions apply or do not apply, as the case may be; and
- Full details of why, in the opinion of the taxpayer, **section 811C** does not apply.

In addition, the protective notification must include copies of all documentation relevant to the transaction (e.g. contracts, implementation plans, powers of attorney etc.). If a contract has not been executed at the time when the Form PN1 is submitted, provided the documentation is submitted within 30 days of its execution, the protective notification will be treated as completed on time.

3.2. Transactions for which a Protective Notification can be made

If a taxpayer has entered into a transaction which commenced after 23 October 2014 and it would be reasonable to consider, based on the substance and form of the transaction, and the results of that transaction, that it is a tax avoidance transaction then that taxpayer should, in accordance with **section 811C**, not claim the tax advantage from the tax avoidance transaction when submitting a tax return.

However, if the taxpayer is of the view that they have not entered into a tax avoidance transaction but the taxpayer wishes to mitigate the consequences of Revenue assessing that the taxpayer has entered into a tax avoidance transaction, the taxpayer can file a protective notification.

3.3. Impact of a valid protective notification

The making of a valid protective notification by a taxpayer, who undertakes a transaction which is found to be a tax avoidance transaction, will provide certain benefits to that taxpayer. The making of a protective notification in respect of such a transaction -

- protects the taxpayer from paying a tax avoidance surcharge in the event of the transaction being found to be a tax avoidance transaction under the GAAR,
- allows a taxpayer a period of one month from the date of Revenue's assessment or amended assessment applying the GAAR to pay any tax due before interest starts to accrue, and
- limits the time during which Revenue can investigate and challenge a transaction on the grounds that it is a tax avoidance transaction to the standard period for the tax in question, (e.g. in the case of income tax, four years from the end of the chargeable period in which a tax return is filed).

3.4. Protective Notifications and Alternative Assessments

Where alternative assessments (one showing Revenue's assessment of the taxpayer's liability applying the GAAR and one showing the Revenue's assessment of the taxpayer's liability applying another provision of the Acts) are made, the impact of a valid protective notification will depend upon which assessment is found to be final and conclusive:

- If it is finally determined that Revenue's assessment under the GAAR is upheld, the taxpayer will be entitled to the benefits of the protective notification outlined above.
- If it is finally determined that Revenue's assessment based on a provision other than the GAAR is upheld, the protective notification will have no impact on the amount of interest, penalty or tax avoidance surcharge which may apply.

3.5. What are the consequences of Revenue forming the view that a valid protective notification was not made?

If Revenue form the view that a notification received was not a valid protective notification, then there are four main consequences for a taxpayer:

- (i) Revenue may carry out enquiries outside of the standard time frame for a particular tax,
- (ii) Revenue may make or amend assessments outside of the standard time frame for a particular tax,
- (iii) The due date for tax will also be the date on which the tax would have been due had the tax avoidance transaction not been entered into, rather than a date which is one month after the date of the assessment or amended assessment, and
- (iv) The taxpayer will be subject to a tax avoidance surcharge if they failed in their self-assessment obligation to apply the GAAR.

3.5.1 What protections are there for a taxpayer?

If a Revenue officer makes an enquiry, or makes or amends an assessment, at a time when a taxpayer believes that the officer is debarred from so doing because a valid protective notification was made, then the taxpayer may appeal to the Appeal Commissioners within 30 days of the Revenue officer making the enquiry or within 30 days of the date of the notice of assessment or amended assessment as applicable.

3.6. Nothing can be inferred from a Protective Notification

In making a Protective Notification a taxpayer files a Form PN1 *wholly without prejudice* as to whether the transaction concerned was a tax avoidance transaction.

3.7. Who can make a Protective Notification?

A taxpayer can make a protective notification or an agent can make a protective notification on behalf of a taxpayer.

3.8. Time limits within which a Protective Notification must be made

A protective notification must be received by Revenue within 90 days of the transaction commencing.

3.9. Protective notifications and the Mandatory Disclosure Regime

If the transaction is one that is disclosable to Revenue under the Mandatory Disclosure Regime (under **Chapter 3 of Part 33 TCA 1997**) then in most circumstances a taxpayer will not be entitled to avail of the protections of making a protective notification.

In most cases, taxpayers will know that the transaction they are entering into is a disclosable transaction because a Promoter of the scheme (generally this will be the advisor providing the taxpayer with the advice) will provide them with a Transaction Number, which the taxpayers must then put on their tax returns.

However, if a taxpayer is not given a Transaction Number but believes that the transaction was a disclosable transaction (perhaps having received advice from an independent tax advisor) then the taxpayer may still be entitled to the protections afforded by a protective notification where all of the following circumstances apply:

- (i) The transaction was disclosable by a promoter and not by a person who entered into the transaction. In most cases the promoter will have the obligation to make the mandatory disclosure. However, a taxpayer may have the responsibility for making the mandatory disclosure in the first instance where the promoter is located outside of the country, where there was no promoter or where the promoter has claimed legal professional privilege.
- (ii) The taxpayer does not have a transaction number because either
 - a. the promoter or marketer did not comply with their mandatory disclosure obligations or
 - b. in the case of transactions disclosed before 23 October 2014 no transaction number was assigned.
- (iii) The taxpayer provides Revenue with all of the details of the transaction, including the details of the person who sold the transaction to them, by submitting a completed mandatory disclosure form (Form MD7) to Revenue.
- (iv) The taxpayer provides all the information that Revenue may reasonably require to determine if a penalty could be imposed on the promoter or marketer for failing to comply with their obligations under the mandatory disclosure regime without reasonable delay.

This is referred to as a Taxpayer Initiated Disclosure. See Chapter 7 of the **Code of Practice for Revenue Compliance Interventions** for further details.

3.10. Consequences of receiving a Transaction Number after making a Protective Notification

A taxpayer may make a protective notification and subsequently receive a Transaction Number from their advisor in relation to that transaction. This can arise due to differences in the timing of deadlines under the relevant provisions. Receipt of that number before the relevant return filing date (for the Form 11 or Form CT1 as appropriate) will render the protective notification invalid.

The receipt of the Transaction Number may be the first time that a taxpayer becomes aware that the protections of filing a protective notification are not available. If the transaction gives rise to a tax advantage that has not yet been claimed in a tax return, for example in the Form 11, then the taxpayer can choose to simply self-assess in accordance with **section 811C** and not claim the tax advantage.

If the tax advantage relates to a tax where the return claiming the advantage was already filed, the taxpayer can consider making a qualifying avoidance disclosure (see **Part 5**), thus reducing the tax avoidance surcharge and interest that arise.

Part 4. How to make a Protective Notification

4.1. Forms to be completed

In order for a notification to be a complete protective notification it must be made on the prescribed form – the Form PN1.

4.2. How to obtain forms

Copies of the relevant Forms can be obtained from the Protective Notification Unit:

- Phone: 085 879 0929 or for callers outside the Republic of Ireland + 353 85 879 0929
- Online via MyEnquiries on myAccount or ROS, marked for the attention of protectivenotifications@revenue.ie; or
- On the Revenue website www.revenue.ie direct link: **Protective Notification Forms**

4.3. Where to submit forms

All forms should be sent to

Office of the Revenue Commissioners
Protective Notification Unit
High Wealth and Financial Services Division
Castle View
52-57 South Great George's Street
Dublin 2
D02 HF50

4.4. Will receipt of forms be acknowledged?

Revenue will endeavour to acknowledge receipt of Forms PN1 promptly.

However, in that confirmation, Revenue will not express any opinion as to whether or not the notification was a valid protective notification or whether or not the transaction is a tax avoidance transaction. The protective notification is *not* an invitation or request to Revenue to express an opinion as to whether a transaction is a tax avoidance transaction.

4.5. What information must be notified

A valid protective notification must include the following information:

- Name, Address / Business Address and Tax Reference Number of the person by whom, or on whose behalf, the protective notification is being made.
- Name, Address, Telephone Number and, if applicable, Tax Adviser Identification Number (TAIN) of the person to whom enquiries may be directed (if different from the person making the notification).
- Transaction Details – full details of the transaction that is the subject of the protective notification (including any part of the transaction that has not been undertaken before the protective notification is delivered).
- Relevant provisions of the Acts - full reference to the provisions of the Acts that the person, by whom, or on whose behalf, the protective notification is made, considers to be relevant to the treatment of the transaction for tax purposes.
- How the relevant provisions of the Acts apply to the transaction – full details of how, in the opinion of the person by whom, or on whose behalf, the protective notification is made, each of the relevant provisions applies, or does not apply, to the transaction.
- How **section 811C** applies to the transaction – details of how, in the opinion of the person by whom, or on whose behalf, the protective notification is made, **section 811C** does not apply to the transaction. This is an explanation of the reasons why a taxpayer believes **section 811C** does not apply, provided in sufficient information for Revenue to understand those reasons. It should be noted that the mere fact that a taxpayer introduces new details during an appeal does not mean that this requirement was not complied with.

In addition, the protective notification must include copies of all documentation relevant to the transaction (e.g. contracts, implementation plans, powers of attorney etc.). If a contract has not been executed at the time when the Form PN1 is submitted, once it is submitted within 30 days of execution the protective notification will be treated as complete and on time.

In order for a protective notification to be complete, it must include any information requested by the Form PN1.

4.6. Expressions of Doubt (**section 811D(2)(a)**)

Where a taxpayer has provided full details of the transaction in an ‘expression of doubt’ the legislation specifically provides that an expression of doubt will not constitute a valid protective notification and so will not afford taxpayers any of the protections of the protective notification mechanism.

In addition, an expression of doubt does not afford taxpayers any of the protections otherwise associated with expressions of doubt if it is made in relation to a transaction where the taxpayer was acting with a view to the evasion or avoidance of tax (see for example **section 959P(6)(c)**).

4.7. Mandatory Disclosure (**section 817N(3)**)

Where a person provides Revenue with the ‘specified information’ as required by the Mandatory Disclosure Regime, the legislation specifically sets out that that the provision of that information is not to be regarded as equivalent to the making of a protective notification for the purposes of **section 811D**.

Part 5. Qualifying Avoidance Disclosure

If a taxpayer has entered into a tax avoidance transaction which commenced after 23 October 2014, and now wishes to make a qualifying avoidance disclosure, taxpayers are directed to Section 811D and Chapter 7 of the Code of Practice for Revenue Compliance Interventions which deals with these disclosures.