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Tax Bulletin – Finance Bill 2010 – Committee Stage Amendments

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The Finance Bill 2010 was published on 4 February 2010. Committee Stage Amendments proposed have now been published.

In keeping with the unwelcome and undemocratic practice of recent years, certain substantive amendments have been introduced at Committee Stage. The introduction of substantive amendments at Committee Stage prevents proper opportunity for consideration of the provisions and can result in ill-considered provisions entering into law.

This bulletin highlights some amendments proposed.

Mandatory Reporting of Certain Transactions

Outline

The Committee Stage amendments propose the introduction of mandatory reporting to Revenue by promoters, including tax advisors and persons carrying on banking business, of certain, yet un-prescribed, transactions that give rise to a 'tax advantage'. The legislation is modelled on UK equivalent legislation.

The legislation proposed is in effect enabling legislation as the notifiable transactions are not yet listed and will be the subject of separate regulations, to be prescribed by Revenue.

The proposed disclosure rules will operate entirely independently of the 'voluntary disclosure regime' introduced via section 811A TCA 1997 in 2008, a situation specifically provided for in the new legislation. In effect, taxpayers and advisors will now have **both** a voluntary disclosure regime and a mandatory disclosure regime to observe on certain as yet undefined transactions. This may create real confusion in practice.

Revenue is given full discretion to stipulate the types of transactions which will be subject to the mandatory disclosure regime. Whilst Revenue has indicated that it will engage in a consultation process before publishing any regulations, the extent of this is unclear and the lack of consultation prior to the introduction of the new proposed legislation does not bode well.

In summary, the new legislation does not seek to impose tax or change the rules in relation to when tax should be payable. It merely provides a mechanism by which Revenue will have details on certain types of transaction, as yet unclear, passed to them.

Comment

Many commentators have already commented on the potential impact on Ireland's international tax competitiveness arising from these new provisions.

It might be noted that such criticism is not directed at the rationale for the provisions. It is of course proper that Revenue seeks to protect the tax base and early notification of possible schemes is an effective way to achieve this. However, the following issues are worrying:

- The new legislation may give rise to significant uncertainty on what is and is not a notifiable transaction and therefore a transaction considered by Revenue to represent avoidance. This is particularly so if the regulations are not clear and precise or if they introduce an element of subjectivity;
- In contrast to other sophisticated tax jurisdictions, and taking into account existing provisions concerning general anti-avoidance, Revenue will be permitted to assess tax and examine transactions under existing general anti-avoidance rules without

any effective time limits on their rights to do so (under rules brought in with the 'voluntary disclosure regime' in 2008) whether or not reported to them under the new mandatory regime. Given the wide definition of what is tax avoidance, this potential lack of finalisation of a tax position is of real concern for advisers and taxpayers. Additionally, the absence of time limits is not in keeping with a fundamental principle of a good tax system, which is to grant certainty of liability;

- In contrast to the UK, there is also no formal pre-transaction clearance system in place in Ireland. In effect, an adviser or taxpayer concerned with the possible effect of general anti-avoidance legislation will not be able to obtain certainty on a transaction prior to proceeding. This is a real gap in the Irish legislation, particularly when the unlimited ability of Revenue to look back on certain transactions is considered.

In summary, whilst Revenue are clearly entitled to bring in a system of mandatory disclosure of certain transactions to protect the tax base, it should do so in a way that does not affect or undermine the principle of certainty within the tax system. The new amendments have augmented concerns in this regard.

Domicile Levy

The Finance Bill 2010 also introduced the legislative provisions concerning the domicile levy, announced in Budget 2010.

In effect, the domicile levy of €200,000 will be payable where **all** of the following conditions are met:

- An individual is both domiciled in Ireland **and** an Irish citizen.
- The individual has an annual worldwide income of €1,000,000 or more.
- The individual has a final Irish income tax liability of less than €200,000 in a calendar year (where a credit exists for Irish income tax against the domicile levy).
- The individual has Irish situate assets, to which the individual is beneficially entitled

in possession, of not less than €5,000,000. It might be noted that Irish property for the purposes of the €5,000,000 asset test is based on gross value but does not take into account the value of shares in certain trading companies or a parent company of certain trading groups.

In assessing the application of the domicile levy, the following point might be noted:

1. The domicile levy can apply to Irish tax resident individuals as well as non-resident individuals. In practice, Irish resident individuals should not however be affected by the domicile levy as they will generally have an income tax liability of greater than €200,000 where they have income of more than €1,000,000. However, individuals resident in Ireland who are working in other countries may potentially be affected as the availability of DTA reliefs to reduce an Irish income tax liability could result in the credit for Irish income tax for levy purposes being similarly reduced.
2. In assessing worldwide income, it is gross income liable to income tax which is taken into account before any reliefs or capital allowances.
3. By virtue of Committee Stage amendments proposed, in assessing Irish situate assets to which an individual will be deemed to be beneficially entitled in possession, the following will be taken into account,

- any assets in a discretionary trust to which the individual has transferred assets for less than market value,
- any assets in a foundation (whether charitable or not) to which the individual has transferred assets for less than market value, and
- certain assets gifted to a spouse or minor children.

The new amendments do not apply to transfers of assets prior to 18 February 2010.

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