Finance Act 2010

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OHT Guide

The Finance Act 2010 was passed on 3 April 2010. FA10 revised the administration of CAT, put the measures announced in the December Budget on a legislative basis, and introduced some new anti-avoidance provisions. Some of the main measures of the Act are discussed below.

CAT: New Compliance Rules

The Finance Act makes major changes to the administration of Capital Acquisitions Tax, with the aim of simplifying and streamlining the tax.

CAT: e-Filing

e-Filing is now mandatory for returns with relief or exemption claims (apart from a small gifts exemption claim).

The Revenue Guide to the proposed changes to CAT (also published on 3 April 2010) indicates that direct filing of the IRA will be in effect by mid June 2010 and will apply to deaths as far back as 5 December 2001. The old rules (IRA filed with Revenue and certified first) will apply to all deaths up to 5 December 2001.
The Revenue CAT FAQs can be accessed here.

CAT: Agric. Relief Anti-avoidance

CAT agricultural relief has been amended by the introduction of anti-avoidance legislation. If:-

⇒ agricultural relief is claimed,
⇒ the agricultural property is later sold,
⇒ the farmer buys new land to avail of the re-investment exemption from the claw back provisions,
⇒ the new land is purchased from the farmer's spouse, and
⇒ the land bought from the spouse was previously transferred to the spouse by the farmer,

then the investment will not be effective in preventing the claw back of the agricultural relief on the land which has been sold.

CGT: CPO Disposals

The Finance Act revised the disposal date for CGT on land which is acquired by means of a compulsory purchase order (CPO).

Previously the date of the disposal was the earlier of:

⇒ the date the local authority entered the land, or
⇒ the date on which the compensation was agreed

The Finance Act provides that the date of disposal for a CPO will be the date the compensation is actually received. This is a welcome change to what many saw as a harsh measure which often resulted in a substantial CGT liability arising before the profits being taxed (i.e. the sales proceeds) were received.

The Act goes on to provide that if a person who is making a disposal under a CPO dies before the consideration is received the disposal will be deemed to occur immediately before the death.

This amendment prevents CGT being lost on a lifetime gain simply because the taxpayer dies before the negotiations are finalized, but the CGT payment date can arise shortly after the disposal date so a tax charge could arise shortly after the death, before anybody is appointed to administer the estate or the consideration is received.

CGT: Retirement Relief

Retirement relief (S. 598 TCA 97) is to be extended to cover a payment made by a family company to redeem or purchase its own shares, if CGT treatment

applies (S. 176 TCA 97) and the disposal is on/after 04 February 2010.

It should be noted that the inclusion of share buyback proceeds in the relief may erode the €750,000 life time limit. Once the lifetime limit has been exceeded any further disposals of chargeable business assets will be subject to CGT, and relief given on earlier disposals may be clawed back (although there is some provision for marginal relief).

CGT: Losses Anti-Avoidance

A CGT anti-avoidance measure has been introduced to combat the creation of virtual losses which have no economic reality but which technically result in a capital loss claim, securing a tax advantage. A new S. 546A TCA 97 has been introduced to prevent a loss claim arising where there is no genuine economic loss. S. 607 TCA 97 has also been amended to prevent artificial losses being created on futures contracts.

The Minister indicated that this provision was needed to combat aggressive schemes which are entered into purely for a tax advantage, although the Revenue Commissioners already have very extensive powers to counteract aggressive tax planning under general anti-avoidance provision in S. 811 TCA 97.

Income Tax: Remittance Basis

Irish domiciled individuals who are not ordinarily resident will no longer be eligible for the remittance basis of taxation. The effect of this change is that an Irish domiciled person who returns to Ireland will be liable to income tax on worldwide income, once he becomes tax resident here.

Income Tax: Foreign Employees

The favourable remittance basis of taxation available to senior executives assigned from non EEA jurisdictions which have a double taxation agreement with Ireland (such as the US), under which they only pay income tax on a portion of their employment income arising in Ireland or remitted into Ireland, has been extended to include EU and EEA nationals from 1st January 2010. The minimum time limit for the assignment to Ireland has also been reduced from 3 years to 1 year.

Income Tax: Cross Border

Cross border relief is available to Irish tax residents who work outside Ireland in a tax treaty country, spending at least one day per week in Ireland.

The Act amends the meaning of a "day" for this relief to bring it into line with the tax residence test (i.e. any part of a day). For 2009 and earlier years, the relevant test would have been the "Cinderella" test, i.e. presence in Ireland at midnight.

Income Tax: Rent a Room Relief

No relief will be available if rent is paid by an employer to an employee or director (or a person who is connected to the employee or director).

Income Tax: High Earners

As announced in Budget 2010, the Finance Act introduced further restrictions on the use of tax incentives by high earners, who are not subject to an effective rate of tax of at least 30% in 2010. The entry level threshold for the restriction on the use of incentives will be €125,000 with a full restriction applying once income reaches €400,000.

New: Domicile Levy

A new levy is to be introduced for Irish citizens who are domiciled in Ireland and meet the following criteria:

i. they have world-wide income (as defined) of more than €1,000,000,
ii. they have Irish located assets with a value in excess of €5,000,000 (excluding shares in trading companies or groups but including shares in other companies), and
iii. they have any Irish tax liability of less than €200,000 in the relevant year of assessment.

The definition of world-wide income is very wide as it encompasses all income, ignores tax reliefs and exemptions, and provides a very limited range of deductions. The section goes on to provide that liabilities charged on assets should be ignored when calculating the market value of Irish located assets, so mortgages are to be ignored.

The Irish located assets are to be valued on 31 December in the relevant tax year and the pay and file deadline is the following 31 October. Any Irish income tax paid before or at the same time as the Domicile Levy by an individual in relation to the relevant year of assessment will be credited.

CAT: Inland Revenue Affidavit

The requirement for an Inland Revenue Affidavit ("IRA") to be certified by Revenue before submission to the Probate Office is to be removed by order of Revenue Commissioners. The IRA will be sent directly to the Probate Office.

CAT: Secondary Liability

Secondary accountability has been abolished from the passing of FA10 (4 April 2010) for personal representatives of a deceased person, trustees, and agents, to eliminate the processing and compliance costs of issuing personal clearance certificates (Form CA44).

CAT: 12 Year Charge Abolished

Previously, CAT was a charge on the relevant property for 12 years. This charge has been abolished to remove the requirement for clearance certificates. The legislation applies retrospectively so that no charge remains in place following the passing of FA10, unless the Revenue has already instituted proceedings for recovery of the charge.

CAT: Non Residents in Estate

If the estate includes a non-resident personal representative or beneficiary the Bill provides that an Irish-resident agent will be required who will deal with CAT. The Irish resident agent will be entitled to deduct a sufficient amount from the property comprised in the deceased person's estate in order to discharge the beneficiary's inheritance tax liability.

CAT: New Pay & File Regime

The payment and filing regime for CAT is to be brought into line with income tax by order of the Revenue Commissioners.

If the valuation date is in the first period (between 1 January and 31 August) the pay & file deadline will be 31 October in the same tax year. If the valuation date falls in the second period (between 1 September and 31 December) the CAT return and payment will be due by 31 October in the following year. If CAT is not paid on time interest on the CAT due will accrue from 1 November in the relevant year.

There has been no change to the existing valuation date rules in S. 30 CATCA 03 and the impact of the changeover to a 31 October deadline will depend on the valuation date. In some cases the new rules will extend the payment time substantially.

However the new rules could also reduce the time for payment of CAT (in rare cases bringing it down to as little as 2 months).

This could put taxpayers under substantial pressure if the valuation date is the date of death (e.g. in the case of a joint tenancy, or a remainder interest).

CAT: New Surcharge

A surcharge has been introduced for late filing of CAT returns, as follows:

i. 5% (with a maximum level of surcharge**:** €12,695) where the return is delivered within two months, or
ii. 10% (with a maximum level of surcharge: €63,485) where the return is more than two months late.

Mandatory Reporting

The Finance Act has introduced a mandatory reporting system for certain transactions (to be specified by Revenue). "Transaction" is widely defined and includes "schemes", "plans", "arrangements" and "undertakings" amongst other things.

The onus is placed on "promoters" (generally tax advisers and banks) to report such transactions to Revenue. The transaction will be reportable if it enables or "might be expected to enable" a person to obtain a "tax advantage", and the main benefit, or one of the main benefits, that might be expected to arise from the transaction, is the tax advantage.

In light of these new measures Revenue is seeking consultation from practitioners in relation to draft Regulations, Guidance Notes and forms. It is anticipated that these materials will be available in late May or early June. The consultation period will last about 2 months

Carbon Tax

The Act contains measures to extend the Budget provisions in regard to carbon tax on fossil fuels, from sales of petrol and diesel to other fossil fuels (such as kerosene, and natural gas) from 1 May 2010.

Carbon tax is also to apply to coal and commercial peat, but this provision is subject to a commencement order.

New: NAMA "Windfall Tax"

The NAMA "windfall tax" of 80% for profits on rezoned land has been introduced, and extended to land granted planning which is contrary to the development plan.

The NAMA windfall tax does not apply to land of an acre or less, valued at less than €250,000.

Corporation Tax: Exemption

The Finance Act extends the tax holiday" scheme for start-up companies to include companies that start trading in 2010. The scheme provides for an exemption from corporation tax and capital gains tax over the first 3 years if the tax on those gains and profits does not exceed €40,000 (with marginal relief for tax up to €60,000).

Corporation Tax: Dividends

Dividends received by an Irish resident company from its Irish resident subsidiary are exempt from tax as franked investment income.

The Act restricts the exemption in relation to dividends paid from profits earned while the subsidiary was tax resident outside Ireland, so relief is not given if the dividend is paid within 10 years of the subsidiary becoming tax resident in Ireland.

New: Transfer Pricing

A new Part 35A has been inserted into the TCA 97 to introduce transfer pricing rules. In simple terms the legislation will apply arm's length prices to trading transactions between associated persons
effectively replacing any overstated expenses or understated receipts with market value figures. The new rules will apply to both domestic and cross border transactions.

"Arm's length" is to be construed in accordance with the OECD Transfer Pricing Guidelines. No specific transfer pricing penalties are included within the legislation so the standard interest and penalty provisions should apply.

Small and medium enterprises are excluded from these transfer pricing rules (i.e. enterprises with less than 250 employees and either a turnover of less than €50m or assets of less than €43m on a group basis).

The regime starts on 1 January 2011 but will not apply to contracts or terms & conditions agreed before 1 July 2010.

Shari'a Law

The Finance Act introduced tax legislation to facilitate the use of Shari'a financial products. The 2006 Census indicated that the Islamic population continues to rise making Muslims the third largest religious group in the State.

Probate Tax

A new four year time limit has been introduced for overpayments of probate tax. Presumably this will have limited application as probate tax was introduced in 1993, and abolished in 2000.

Caveat: These notes are intended as only a guide to some provisions of the Finance Act 2010 . Formal tax advice should be obtained before any steps are taken that may have a tax effect.

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