

Stamp Duty eAlert

Associated Companies Relief

INTRODUCTION

Section 79 SDCA 1999 provides full relief from stamp duty for transfers of property between bodies corporate that are associated to the required degree and subject to meeting certain other conditions. The purpose of this article is to explain in a practical manner how the relief operates.

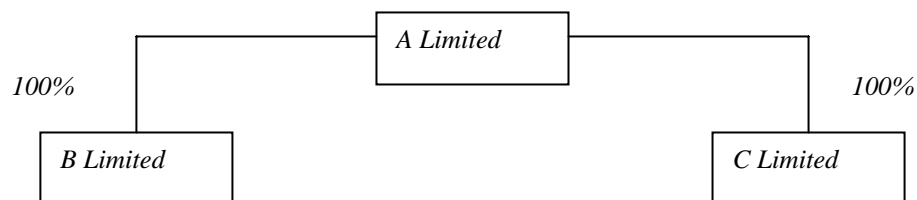
TEST OF ASSOCIATION

The parties to a transaction must be associated at the time of execution of the relevant instrument to the following extent:

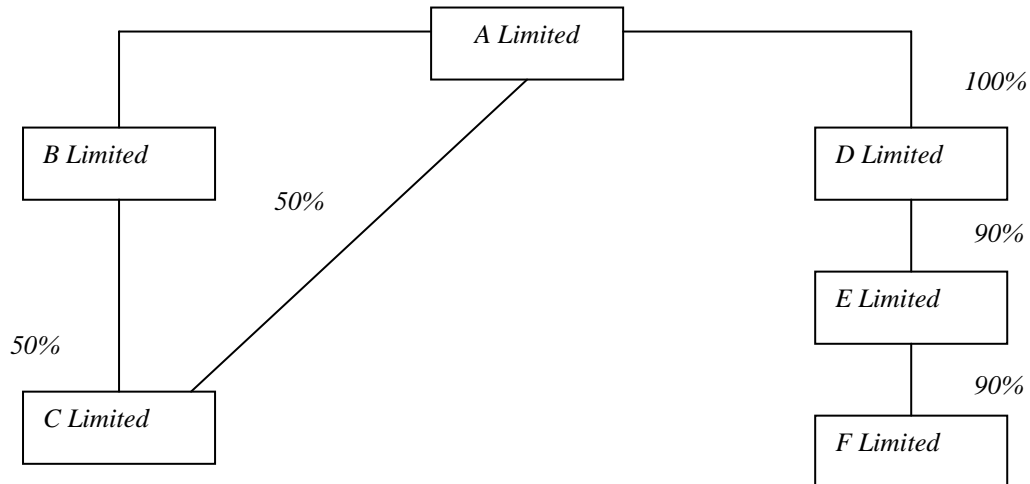
- (a) one body corporate is the beneficial owner of not less than 90% of the issued ordinary share capital of the other body corporate; or
- (b) a third body corporate is the beneficial owner of not less than 90% of the issued ordinary share capital of both.

The qualifying relationship may be established directly or indirectly through another body corporate or other bodies corporate or partly directly and partly through another body corporate or other bodies corporate.

Example



A transfer of assets from B Ltd to A Ltd (or vice versa) or from C Ltd to A Ltd (or vice versa) would come within paragraph (a) above. A transfer of assets from B Ltd to C Ltd would come within paragraph (b) above.

Example

A transfer of assets from C Ltd to D Ltd would come within the test of association as the necessary degree of qualifying relationship is established through A Ltd partly directly and partly indirectly.

However, a transfer of assets from F Ltd to any of the other group members (other than E Ltd) would not qualify because it would not be possible to establish a qualifying relationship with any of those companies (other than E Ltd).

In addition, the shares must carry the entitlement to at least 90% of the profits available for distribution and 90% of the assets available for distribution on a winding-up. The phrase “ordinary share capital” excludes fixed-rate preference shares. The 90% threshold is calculated on the nominal value of the relevant shares (i.e. any premium paid on the shares is ignored) (*Canada Safeway v IRC* [1972] 1 AER 666).

The relief is not restricted to Irish companies and is available to foreign bodies corporate meeting the terms of the relief. However, some foreign bodies corporate may not have a share capital structure, and this can cause problems where the qualifying association is sought to be traced through such a body corporate. The Revenue Commissioners are prepared to grant relief in such cases where the body corporate has a capital structure that is equivalent to a share capital structure and the other conditions of the relief are met. In such a case it would be prudent to seek confirmation in advance from the Revenue Commissioners that the body corporate's capital structure would satisfy this requirement.

The 90% relationship must be in existence at the time of execution of the instrument on which relief is claimed. Relief will not be available where the instrument causes the 90% relationship to come into existence.

CEASING TO BE ASSOCIATED

Section 79(7) SDCA 1999 provides that the relief will be withdrawn where the transferor and transferee cease to be associated to the required degree within a period of two years from the date of execution of the instrument on which relief is being claimed. In such cases the stamp duty becomes payable by the accountable person from the date on which the 90% relationship is broken. Interest will accrue on the amount of stamp duty with effect from the date on which the association is broken (i.e. there is no 30-day grace period). The accountable person is normally the transferee, but in a transaction that is wholly or partly gratuitous all parties to the instrument are liable on a joint and several basis.

A concern is sometimes raised as regards the position of a future purchaser of a property on which s79 relief was claimed and subsequently clawed back. A clawback means that there is a liability for the stamp duty (and interest) on the person who would have been the accountable person at the time of the execution of the relevant instrument. However, a future purchaser can rely on s20(6) SDCA 1999, which provides that an instrument that bears an adjudication stamp is admissible in evidence for all purposes. In other words it should not be necessary for a future purchaser of the property to have to enquire into whether circumstances giving rise to a clawback have arisen.

The Revenue Commissioners routinely carry out desk audits to verify that the requisite degree of association has been maintained for the required two-year period.

TRANSFER OF BENEFICIAL INTEREST

Another condition of the relief is that the instrument must have the effect of transferring the beneficial interest in property. The transferor must hold the beneficial ownership in the property immediately before the instrument becomes effective, and the transferee must hold the beneficial ownership immediately afterwards. The existence at the time of the transfer of a contract or an option to sell the property may, depending on the circumstances, result in the relief being unavailable as it may prevent the transferor or transferee from holding a beneficial interest in the property at the time of execution of the contract. However, it is not a condition of the relief that the transferee must hold the property for any period of time, and it can dispose of the property at any time after it has acquired same.

On commencement of a liquidation (whether solvent or insolvent) a company ceases to be the beneficial owner of its assets, including shares in any subsidiary companies (*Ayerst v C & K (Construction)* [1975] 2 AER 537). Accordingly, a transfer of property by a body corporate after the commencement of liquidation will not be entitled to relief.

A frequently encountered situation that can be problematic is where an intra-group transfer of assets is made with effect from a date that precedes the date of execution of the instrument. From a legal perspective the obligations under a contract or deed may take effect retrospectively where that is the intention of the parties as reflected in the contract or deed. Therefore in appropriate cases it should be possible to satisfy the requirement of s79 SDCA 1999 that the instrument operates to transfer the beneficial ownership in property even though the instrument states that the ownership is deemed to transfer on a date prior to the date of execution of the instrument. However, the two-year clawback period would run from the date of the execution of the instrument and not the date on which the property was deemed to have been transferred.

LIQUIDATIONS AND RECEIVERSHIPS

As explained above, a transfer of property by a company after the commencement of a liquidation cannot satisfy the conditions of the relief. This means that a liquidator cannot effect a hive-down of assets to a clean subsidiary of the company in liquidation in order to be able to sell same to a purchaser.

Where a body corporate transfers property to an associated company and subsequently a liquidator is appointed to the transferor within two years of the date of the transfer, this will result in the qualifying association being broken and the relief being subject to clawback. The Revenue Commissioners have indicated that there may be circumstances where, even though the qualifying association is technically broken, a clawback of the relief would not be sought. The Revenue Commissioners gave the following practical example:

“Subsidiary company A transfers all its assets to its parent company B and obtains relief under section 79. Company A is now dormant and is to be liquidated. The liquidation and strike off of company A results in the cessar of the group relationship between company A and company B. A clawback will not be pursued in such circumstances where;

- *company B retains ownership of the transferred assets for the period of 2 years,*
- *the liquidation is effected for bona fide commercial reasons and*
- *the transaction is not part of a scheme or arrangement for the avoidance of any tax or duty.*

The availability of the above treatment will be decided on a case-by-case basis having regard to the facts and circumstances of each individual case.”

It is possible that Revenue may consider other situations where the 90% group relationship is broken by virtue of a liquidation but the assets stay within the same group of companies on a case-by-case basis.

The example given by the Revenue Commissioners appears to suggest that the qualifying relationship is not broken until the liquidation concludes and the company is dissolved. However, this is not strictly correct as, once a liquidation of a subsidiary commences, the parent company technically no longer has an entitlement to profits from the subsidiary and therefore the group relationship is broken. Accordingly, if it is contemplated to **commence** a liquidation of a subsidiary within the two-year clawback period, one should seek clearance from the Revenue Commissioners that the concessionary treatment will apply.

The appointment of a receiver over a company's assets does not cause the qualifying relationship to be broken and therefore does not result in a clawback of a relief already granted on a transfer of assets by or to the company in receivership.

ANTI-AVOIDANCE

Section 79(5) SDCA 1999 contains a number of complex anti-avoidance provisions that have been introduced to counter various schemes. The effect of these provisions is that relief will not be available where the instrument is executed in pursuance or in connection with an **arrangement** where:

- the consideration, or any part of the consideration, is provided or received directly or indirectly by a non-associated person;
- the beneficial ownership in the property was previously conveyed or transferred by a non-associated person; and
- the transferor and transferee are to cease to be associated to the required degree.

An "arrangement" is not a term of legal art but refers to any scheme between two or more persons (which may include a person not associated with the transferor or transferee) that involves a number of steps to be taken in order to achieve a desired result. It is not necessary that the whole of the arrangement is in contemplation from the outset, nor is it necessary that the arrangement be of a legally binding nature.

CONSIDERATION PROVIDED BY A NON-ASSOCIATED PERSON

Relief will not be available where there is an arrangement whereby the consideration for the transfer (or part thereof) is to be provided or received by a person who is outside the permitted degree of association at the time of the transfer.

Further, there is a rider to s79(5) that provides that such an arrangement will be deemed to exist if a non-associated person makes a payment or other disposition that enables the transferor or transferee (or a body corporate associated with either) to provide any of the consideration, or to part with it, in consequence of a transaction or transactions involving a payment or other disposition by a non-associated person.

Accordingly, any situation where the consideration is not being funded from the group's own resources needs to be approached with caution. The Revenue Commissioners have clarified that relief will not be denied where the consideration is borrowed from a financial institution as part of an independent commercial transaction. This still leaves ambiguity surrounding situations involving borrowings from third parties who are not financial institutions. In such situations one may need to satisfy the Revenue Commissioners that the third party was not part of an arrangement.

PROPERTY PREVIOUSLY TRANSFERRED BY A NON-ASSOCIATED PERSON

This anti-avoidance provision is capable of wide application: for example, if Company A enters into a contract with an unconnected third party for the purchase of property and, without taking a conveyance of the property, contracts to sell the property to its subsidiary (Company B) by way of sub-sale. As the beneficial interest in the property was transferred to Company A other than by an associated body corporate and there was an arrangement between Company A and Company B, relief would not be available in such circumstances.

ARRANGEMENT RE CEASING TO BE ASSOCIATED

This provision disallows relief where there exists at the time of execution of the instrument an arrangement whereby the necessary degree of association would cease to exist at some future date. This could have relevance where there is an intention on or before the date of the transfer to dispose of the transferee or transferor after the expiry of the two-2 year clawback period.

EXCLUSIONS FROM RELIEF

Section 79 SDCA 1999 relieves instruments that are chargeable under the conveyance on sale heads of charge. It does not cover instruments chargeable under the lease head of charge. Accordingly, the grant of a lease by a company to an associated company would not be entitled to relief under s79 SDCA 1999. However, the assignment of a lease between associated companies would be entitled to relief because an assignment of an existing lease falls under the conveyance on sale head of charge. Further, s79(10) SDCA 1999 prevents relief being claimed on a transfer of stocks or marketable securities where those stocks or marketable securities had immediately prior to such transfer been the subject of an exempt transfer pursuant to s75 SDCA 1999 (relief for intermediaries).

PROCEDURE FOR CLAIMING RELIEF

It is necessary to submit the instrument to the Revenue Commissioners in order to claim relief under s79 SDCA 1999. The burden of proof rests on the claimant to establish that the instrument satisfies the conditions of the relief. The Revenue Commissioners require a statutory declaration in the format set out in Form ADJN6 to be submitted in support of a claim for relief. This statutory declaration must be sworn by a responsible officer of one of the companies involved or by a solicitor acting for one of them. The Revenue Commissioners are insisting strictly that the Schedule to Form ADJN6 (which details the ownership of shares in the companies relevant to determining the qualifying association between the transferor and transferee) is certified by a director or secretary of the company concerned (or each of them where there are multiple companies involved). It should also be noted that clawback of the relief may arise where it is subsequently found that any declaration or other evidence furnished in support of a claim for exemption was untrue in any material particular. In such cases the clawback applies (and interest accrues) from the date of execution of the instrument.

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