



The Pensions Levy

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Introduction

Finance (No. 2) Act 2011 made changes to taxation legislation in order to fund the Budget-neutral Jobs Initiative, announced earlier this year. One of these changes is a temporary, four-year pensions levy (“the levy”). This applies to funded pension schemes and personal pension plans. The levy applies at a rate of 0.6% to the capital value of assets under management in pension schemes approved by the Revenue Commissioners under Irish tax legislation.

In his Second Stage speech on the Bill, the Minister for Finance said that the levy is to:

“apply for a period of 4 years commencing [in 2011] and is intended to raise about €470 million in each of those years. The levy will not apply to pension funds established here and providing services and benefits solely to employers and members exercising their activities and employment outside the

State. In other words, the levy will not apply to the extent that a scheme is intended to provide retirement benefits outside the State. In addition, it will not apply where the trustees of a scheme have passed a resolution to wind-up the scheme and where the business in respect of which the scheme was established is insolvent.

Provision is made to allow pension scheme trustees or administrators the option of adjusting the benefits payable under a pension scheme, on foot of payment of the duty.

The chargeable persons for the levy are trustees of pension schemes and the insurers and administrators having the management of the assets of pension schemes.”

The levy was introduced by s4 of Finance (No. 2) Act 2011, which introduced a new s125B to the Stamp Duties Consolidation Act 1999.¹ The concept of the levy is easy enough to understand, but the

¹ Other than as stated, all references to sections are to sections of the Taxes Consolidation Act 1997 (as amended) and references to s125B are to s125B of the Stamp Duties Consolidation Act 1999 (as amended).

legislation is highly technical and complex. The commentary below touches on some aspects of the new regime, as our understanding of how the legislation works and is being applied has only just begun.

The Levy is a Stamp Duty on Funded Pension Vehicles

The levy is a stamp duty, and usual stamp duty principles apply. The persons who must pay the duty have to deliver a statement, in electronic format, which shows the chargeable amount for the relevant year.² Duty at the rate of 0.6% of the chargeable amount for the year concerned is charged on the statement.³

Which Pension Vehicles Does the Levy Apply to?

The levy applies to certain “schemes”:

- › certain retirement benefit schemes⁴ (commonly known as occupational pension schemes) other than schemes where the trustees have passed a resolution to wind up the scheme⁵ and the sponsoring employer is insolvent,⁶
- › annuity contracts and trust schemes⁷ where the member has not yet been paid a lump sum and
- › PRSA contracts⁸ where the member has not yet taken a lump sum.

Chargeable Persons

Chargeable persons must file the stamp duty return and pay the levy when filing the return.⁹ The definition of chargeable person¹⁰ is linked to a scheme’s assets because the duty is payable by

reference to those assets. A distinction is made between insured and non-insured assets.

In practice, scheme trustees may need to agree with various parties on which party will be the administrator for the purposes of the levy to avoid the levy being paid by more than one party.

In the case of insured assets,¹¹ the chargeable person is the insurer with whom a contract of assurance¹² has been taken out. Where the scheme is not an insured arrangement, the chargeable person is the “administrator”.¹³

The practice to date has been for insurers to interpret the legislation as applying to them where such an interpretation is possible and to rely on their powers discussed below (under “Who Bears the Cost of the Levy?”) to realise scheme assets to discharge the levy and to then pay it.

The Revenue Commissioners’ Guidance Notes state that:

“It is usual that the trustees of a scheme would hand over the management of the scheme and the scheme assets to professional administrators and/or investment managers. It is administratively desirable that such administrators/investment managers should value the assets, determine the liability to the levy and make the necessary return and payment.”

If the scheme has both directly held investments, such as cash or equities, and pension or assurance policies, it will have two chargeable persons. The administrator will have to pay the levy on the non-insured assets, and the insurer will have to pay the levy on the insured assets.

Given the wide definition of administrator, many third parties who are not administrators for tax purposes but carry out other functions in relation to an occupational pension scheme (e.g. a registered administrator appointed under s59(1)(f) of the Pensions Act 1990 or a person carrying out an investment management function) have

² Section 125B(2).

³ Section 125B(3).

⁴ Defined by s771 and approved under Chapter 1 of Part 30 of TCA 1997 (and predecessor enactments). (Note that there is a typographical error in paras (a)(i) and (ii) of the definition of “scheme”, as the language indicates that such schemes are approved by Chapter 1 of TCA 1997 rather than Chapter 1 of Part 30, as is the case).

⁵ The scheme’s trust deed and rules will usually explain how the scheme is wound up. Frequently, this may be at the option of the sponsoring employer. Consequently, if a pension scheme is likely to be wound up in circumstances where the employer is insolvent, in order to avoid the levy it is important that the trustees are the persons to take the action to wind up the scheme. This may require a change to the terms of the scheme’s trust deed and rules.

⁶ For the purposes of the Employees (Employers’ Insolvency) Act 1984.

⁷ Set up under s784 or s785.

⁸ Set up under s787A.

⁹ Section 125B(4).

¹⁰ Section 125B(1).

¹¹ For example, occupational pension schemes, PRSAs and RACs that are taken out with an insurance company, but one-member occupational pension schemes that require the member to deliver annual accounts to the Revenue Commissioners are expressly excluded (i.e. single-member small self-administered schemes).

¹² As defined by s706(3) and any other insurance policy taken out by the trustees of a retirement benefits scheme.

¹³ This is widely defined; see s125B(1). It includes an administrator under s770(1), which is an administrator of an occupational pension scheme for tax purposes, and this includes the person or persons in s772(2)(c) who is the overseas administrator who has entered into a written contract with the Revenue Commissioners in relation to the discharge of its duties under Chapter 1, Chapter 2C of TCA 1997 and s125B of SDCa 1999, or the Irish-resident person who is responsible to discharge those duties.

to date embraced the function of administrator for the purposes of the levy and have taken steps to discharge it for 2011. In practice, scheme trustees may need to agree with various parties on which party will be the administrator for the purposes of the levy to avoid the levy being paid by more than one party.

Where the chargeable person is not a trustee of the scheme, the trustees are nonetheless jointly and severally liable for payment of the levy.¹⁴

A similar position prevails for single-member arrangements:¹⁵ if the chargeable person is the trustee who is not a member, the member trustee and the non-member trustee are jointly and severally liable for payment of the levy. Interestingly, this position does not apply in the case of a PRSA arrangement not taken out with an insurance company. In that case the PRSA administrator is liable to discharge the levy, and should it be unable to do so,¹⁶ the PRSA holder is not jointly liable.

What Are Chargeable Assets?

Assets¹⁷ are all property (including investments, deposits, debts and contracts of assurance) held for the purposes of the scheme, other than excluded assets.

Excluded assets¹⁸ arise where an occupational pension scheme has liabilities related to members who exercise their employments abroad.

Exclusion applies only if the affected employee never exercised any part of the employment in the State. If part of the employment was exercised in the State, the exclusion is not pro-rated. The exclusion is aimed at preventing pension schemes that operate on a cross-border basis and admit employees based in countries other than Ireland from having a liability to discharge the levy in respect of non-Irish employments.

As would be expected, there is no equivalent exclusion for benefits derived from PRSAs, as these are member-specific.

Contingent assets (which are sometimes held by defined-benefit schemes to support the scheme when it is running a deficit and which become payable or “convert” into a real asset when the contingency arises) are excluded for levy purposes.

What Is the Chargeable Amount?

The chargeable amount is 0.6% of the aggregate market value^{19,20} of assets for which a chargeable person is chargeable on the relevant “valuation date”.²¹ The valuation date for insured arrangements, other than single-member small self-administered schemes,²² will always be 30 June.

Administrators of non-insured assets held by defined-benefit pension schemes and one-member schemes may select the valuation date. This can be either 30 June or the last date of the scheme year-end falling before 30 June for the year in question, provided that the scheme provides accounts to “an appropriate accounting standard”,²³ in which event the value of the non-insured assets appearing in those accounts may be chosen.

Trustees of occupational pension schemes with over 100 members are required by the Pensions Act 1990 to prepare audited accounts. Those operating smaller schemes, which are generally not required to produce audited accounts, may wonder what standard their accounts must comply with to meet the required appropriate test. Trustees will need to check the values at both dates to ensure that the value providing the lower rate of levy is selected.

Tax Briefing, Issue 4, August 2011, explains that in order for a date to be valid as a valuation date, the chargeable person must have held the assets concerned as administrator or insurer on that date. This *Tax Briefing* makes it clear that the Revenue Commissioners will not permit trustees to change the composition of scheme assets from insured to non-insured or vice versa in order to manipulate and reduce the amounts liable to the levy on particular valuation dates.

Other points that may have a bearing on the value of assets being taken into account for levy purposes include the following:

14 Section 125B(7)(a).

15 Section 125B(7)(b).

16 Arising perhaps due to insolvency.

17 Section 125B(1).

18 Section 125B(1).

19 Market value is defined as in s548.

20 One valuation anomaly relates to pensions in payment. Where trustees of an occupational pension scheme hold annuity contracts that they have taken out with an insurance company (i.e. to discharge an obligation to pay pensions in payment), these contracts have a nil value for levy purposes, and thus such pensioners are unaffected by the levy. In contrast, if a scheme pays pension income directly to the pensioner from the scheme's resources (e.g. from annual investment income or annual contributions from the employer and the members), the levy applies and the pensioners' benefits may be reduced to pay the cost of the levy should the employer fail to discharge its cost.

21 Section 125B(1).

22 One-member schemes.

23 See the definition of “chargeable amount” in s125B(1).

- › Excluded assets should be ignored.
- › Borrowings related to real property reduce the amount liable to the levy.
- › The timing of transfer payments from one pension scheme to another will need to be examined carefully to ensure that affected members do not bear the levy twice, as could occur if the date to which scheme accounts are drawn includes the transfer amount for both the paying and the receiving scheme.

The Revenue Commissioners have given some guidance on how the levy is to be calculated for occupational pension schemes in 2011 as regards current assets and current liabilities (i.e. the amounts due to or from an occupational pension scheme at the valuation date). It appears that differences arise depending on whether the valuation date is 30 June or the last day of the scheme year falling before 30 June.

Valuation at 30 June

The assets subject to the levy are (1) the bid value of invested assets, plus (2) any balance in the trustees' bank account, plus (3) outstanding contributions that relate to a period before the previous 31 May (i.e. it is not necessary to include contributions that relate to the month of June but have not been paid by 30 June) less (4) any amounts received by the trustees in respect of insured death benefits that on the valuation date have not been distributed to the deceased's dependants/personal representatives.

Valuation at last day of scheme year falling before 30 June

The above principles apply, but pre-paid contributions or amounts due to the employer may not be deducted.

Trustees of defined-benefit pension schemes running deficits who are negotiating a funding proposal with the sponsoring employer need to consider the terms of such arrangements and whether the language of the proposal could have the effect of including future payments, which are expected to be paid long into the future, as assets to which the levy applies. This point ought to be considered whenever a funding proposal is being negotiated. The proposal's

terms should be drafted to make clear exactly when each payment under the proposal is due.

Who Bears the Cost of the Levy – Is It the Members or the Sponsoring Employer?

In the first instance, the chargeable person is responsible to pay the levy in respect of the chargeable amount for which they are chargeable. The chargeable person, "for the purposes of payment of the duty [is] entitled to dispose of or appropriate such assets of the scheme as are required to meet the amount of the duty so payable".²⁴ This language implies that the insurance company may realise insured assets, and likewise an administrator is entitled to realise non-insured assets.

Where scheme assets are so realised, "no action shall lie against the chargeable person in any court by reason of such disposal or appropriation".²⁵

This protection is helpful for a chargeable person where members had hoped to prevent scheme trustees or administrators from paying the levy (and reducing the scheme assets for that purpose) by giving an instruction to that effect.²⁶ Members may consider that they are entitled to direct trustees on what actions they ought to take in relation to the payment of the levy, but this is not the case.

Where the chargeable person who is not the scheme trustee²⁷ realises scheme assets to pay the levy, the scheme trustees "shall allow such disposal or appropriation and the chargeable person shall be acquitted and discharged of any such disposal or appropriation as if the amount of duty had not been so paid".²⁸

Where an insurance company is the chargeable person, the payment is regarded as a necessary disbursement from the insurance product concerned, and the insurer may adjust any current or prospective benefits or guarantees under the contract. The reduction will not result in loss of Revenue approval of the contract.²⁹

In the case of trust arrangements, the trustees are entitled to reduce benefits currently or prospectively payable to members in order to pass on the cost of the levy.³⁰

²⁴ Section 125B(5)(a).

²⁵ Section 125B(6).

²⁶ It is the authors understanding that during summer 2011 many scheme administrators and insurers were expressly instructed by their beneficiaries/clients not to pay the levy.

²⁷ For example, an insurer where the scheme is a defined-contribution scheme set up with an insurer.

²⁸ Section 125B(5)(b).

²⁹ Section 125B(12)(a).

³⁰ Section 125B(12)(b).

At this stage, all schemes ought to have paid the levy for 2011. In all cases, the rules of the pension scheme should be consulted to establish who is responsible to bear the cost of the levy. The scheme rules will, most likely, have been written at a time when the levy was neither contemplated nor in force. If the rules suggest an unintended liability for the sponsoring employer, the trustees and sponsoring employer may need to consider their respective positions very carefully and take legal advice.

In practice, many occupational pension scheme trustees have been requesting their sponsoring employers to discharge the cost of the levy and to reimburse the trustees for the cost of the levy.

The attitude being taken by sponsoring employers to such requests varies from scheme to scheme and depends on the generosity of the employer. It is comparatively easy for a benefit reduction to be passed on to members of a defined-contribution scheme but less so in the case of a defined-benefit scheme. Actuarial advice will need to be taken in relation to the latter, as the trustees cannot reduce a member's entitlements by any greater extent than reflects each member's pro rata share of the levy.³¹

Even though the trustees are authorised by the legislation to reduce members' benefits, a deed of amendment reflecting the reductions may be needed so that the trust deed and rules are changed to update the benefit structure and authorise the trustees to pay the reduced benefits.

The Revenue Commissioners are entitled to review any disposal or appropriation of assets or reduction in members' benefits in respect of the levy to ensure that any such disposal, appropriation or adjustment is in keeping with s125B.³²

How Is the Levy Paid?

The levy is paid through the Revenue online payment system. Chargeable persons must, on or before the due date, 25 September, deliver a statement setting out the chargeable amount and make a payment of stamp duty to the Revenue Commissioners.

When Is the Due Date for Payment of the Levy?

The due date for payment of the levy is 25 September for 2011, 2012, 2013 and 2014.³³

What if the Payment Is Late or Incorrectly Calculated?

Interest on the unpaid tax at a rate of 0.0219%³⁴ per day, equivalent to an annual rate of 8%, is payable, and a fine of €380 applies to each day for which the levy remains unpaid.

While the levy is recoverable from scheme assets, the legislation does not appear to extend this reimbursement process to interest and penalties that apply to late payment.³⁵ Also, if the quantum of the levy is accidentally understated, it appears that the daily fine may still be applied, which seems quite harsh.

In practice, many occupational pension scheme trustees have been requesting their sponsoring employers to discharge the cost of the levy and to reimburse the trustees for the cost of the levy.

Are There Any Exclusions?

The levy does not apply to ARFs and AMRFs, vested PRSAs (i.e. where the PRSA holder has taken a lump sum from the PRSA but has retained funds in the PRSA), vested RACs and RAC schemes where the individual has already been paid a lump sum but has retained funds in the contract or scheme, and retirement benefit schemes in a winding-up where the sponsoring employer is insolvent.

Note also that the levy does not apply to excluded assets. See "What Are Chargeable Assets?" above for details.

Anti-Avoidance Warnings

See *Tax Briefing*, Issue 4, August 2011, referred to above under "What Is the Chargeable Amount?".

31 Section 125B(12)(b).

32 Section 125B(13).

33 See the definition of "due date" in s125B(1).

34 Section 159D SDCA 1999 and s125B(8)(i).

35 Section 125B(8).