

Stamp Duty Reliefs on Re-organisations

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Relief from stamp duty under the conveyance on sale heads of charge (but not the lease head of charge) is available on the transfer of certain assets in the course of a scheme for the reconstruction or amalgamation of companies which satisfies the requirements of section 80 Stamp Duties Consolidation Act 1999 (as amended) (“SDCA”). The aim of this article is to outline the key features of the relief in a practical manner.

RE-ORGANISATION STRUCTURES

The basic types of structure frequently used in corporate re-organisations are:

- (a) the transfer of an undertaking by an existing company to the acquiring company, which issues the consideration shares to the existing company (two party share for undertaking swap);
- (b) the transfer of an undertaking by an existing company to the acquiring company, which at the direction of the existing company, issues the consideration shares directly to the shareholders of the existing company (three party share for undertaking swap); and
- (c) the issue by the acquiring company of shares to the shareholders of an existing company in exchange for their shares in the existing company (share-for-share swap).

In assessing whether a transaction will qualify for the relief it is necessary to determine:

- (a) if there is a scheme for the bona fide reconstruction of any company or companies, or the amalgamation of any companies;

- (b) if the relevant transfer of assets has been entered into in connection with such a scheme; and
- (c) whether the specific conditions in section 80 SDCA have been complied with.

SCHEME OF RECONSTRUCTION OR AMALGAMATION

The terms “reconstruction” and “amalgamation” are not defined in the stamp duty legislation but have been the subject of judicial interpretation. The standard definition of a reconstruction is contained in *Re: South African Supply and Cold Storage Company Limited* (1904) 2 Ch 268 per Buckley J.:

“What does ‘reconstruction’ mean? To my mind it means this: An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as the persons now carrying it on will substantially continue to carry it on. It involves, I think, that the same business shall be carried on and substantially the same person shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially, the business and the persons interested must be the same.”

The above passage was subsequently approved in the context of the then United Kingdom equivalent of S80 SDCA by


Pennycuik J. in *Brooklands Selangor Holding Limited v IRC* [1970] 2 All ER 76 with the qualification that it was subject “always, of course, in the absence of any controlling factor leading to some other meaning”. The passage from the *South African Cold Storage* case quoted above, subject to the qualification set out in the *Brooklands Selangor* case, has recently been approved by the Irish High Court in *Patrick W. Keane And Company Limited v Revenue Commissioners* (unreported High Court 17 December 2007) as an accurate description of reconstruction for Irish stamp duty purposes.

The term “amalgamation” has been described by United Kingdom authorities as the joining of two or more companies to form a third entity, or where one company is absorbed and blended with another company (*Re: Walker’s Settlement* [1935] Ch 367) and the joining of two or more companies so that they are in substance owned by the same person (*Crane Freuhauf Limited v IRC* [1975] 1 All ER 429).

While the judicial interpretations of what constitutes as a reconstruction do not refer to share-for-share swap, some commentators have argued that some of the judicial formulations did not exclude the possibility of a share-for-share swap being a reconstruction.

SUBSTANTIAL SHAREHOLDER IDENTITY

It can be seen from the foregoing that the undertaking must be carried on by substantially the same persons before and after a reconstruction. This test is concerned with the ownership of the business and not participation in its management. It requires



substantial – though not exact – identity of ownership.

The substantial identity of ownership requirement applies to both reconstructions (consisting of two and three party share for undertaking swaps) and amalgamations. In a share-for-share swap the statutory conditions impose stricter requirements, which are considered below.

PARTITION OF BUSINESSES

It will be seen from the judicial interpretation of “reconstruction” that it involves the transfer of an undertaking (or part thereof) to persons who are substantially the same as those who owned the old company. It has been held in a number of UK stamp duty cases that situations involving a partition of the assets of the target company amongst its shareholders does not qualify as a reconstruction.

A case involving partition has recently been considered by the Irish High Court in *Patrick W. Keane And Company Limited v Revenue Commissioners* (unreported 17 December 2007). Briefly, the facts in this case were that the company owned several businesses operating at different locations. In order to resolve a shareholders’ dispute it was decided to partition the ownership of the various businesses. This was effected in two stages: Firstly, the share capital of the company was reclassified into a number of classes of shares and each of those classes gave the holders of that class the rights to one of the businesses owned by the company. A further class of E Shares was created, which afforded the holders thereof no voting or dividend or distribution rights (save what they were allowed to by the holders of the other classes of shares). These valueless shares were held by the shareholders in proportion to their original shareholdings prior to the reclassification exercise. Secondly, about a month later the businesses were transferred by the company to newly incorporated companies by way of three party share for undertaking swaps (i.e. the A business was transferred to a newly incorporated company owned by the holders of the A Shares in the old company and so on).

Edwards J. found on the facts that the reclassification of the shares and the subsequent transfer of the businesses among the shareholders were both an integral part of the same scheme and, accordingly, found that the substantial shareholder identity test could not be satisfied. The judge did not regard the E

Shares as satisfying the substantial shareholder identity test and he dismissed them as a “mere contrivance” and holding that the quality of ownership must be “real and meaningful and not technical”. The judge was also prepared, if necessary, to find that the scheme was not a bona fide scheme of reconstruction.

A partition would, on similar considerations, fail to constitute an amalgamation. It seems to have been left open – at least as a theoretical possibility (albeit a very unlikely scenario in practice) – that if the ownership of the shares of a company was divided into separate classes of shares which gave the holders thereof the right to separate undertakings held by the company, and this structure was not put in place with a view to executing a partition, then a subsequent partition of the undertakings among the holders of the respective classes of shares might qualify as a reconstruction.

ACQUIRING COMPANY

The acquiring company must be a limited liability company incorporated in Ireland or another EU Member State, provided that in the latter case the acquiring company corresponds under the law of its place of incorporation to an Irish limited company. In such cases the Revenue Commissioners would, in practice, require that the liability of all shareholders must be limited in order for this requirement to be met. Finance Act 2008 provides that, with effect from 1 June 2005, a society established under the Industrial and Provident Societies Act 1893 qualifies as an acquiring company.

The acquiring company must satisfy certain additional conditions:

- (a) in the case of an acquiring company established for the purposes of the acquisition, it must have, as one of the objects in its memorandum of association, the acquisition of the shares or undertaking of the target company which must be identified with reasonable certainty;
- (b) in the case of an acquiring company that is already in existence, the resolution increasing its share capital must show that it was done for the purpose of the acquisition. An increase in the authorised or issued share capital of the acquiring company is sufficient to satisfy this requirement.

TARGET COMPANY

The target company may be incorporated anywhere in the world and includes limited or

unlimited companies and, with effect from 1 June 2005, a society established under the Industrial and Provident Societies Act 1893. Where the target company does not have shares it may be problematic to satisfy the condition of acquiring 90% or more of the issued shares in a share-for-share swap and in such cases it would be prudent to seek the view of the Revenue Commissioners as to the availability of the relief.

CONSIDERATION FOR THE ACQUISITION

The nominal value of the acquiring company’s shares must represent at least 90% of the value of the total consideration for the acquisition. Cash or other non-share considerations must not exceed 10% of the value of the total consideration. The assumption of any liabilities of the target company is ignored in calculating this 90% test.

If, as part of the scheme for reconstruction on amalgamation, there is an obligation to sell or transfer the consideration shares or part thereof, the 90% share consideration requirements will not be capable of being satisfied (*Crane Freuhauf Limited v IRC*).

Additional inducements for the target company’s shareholders to sell their shares may, if found to be part of the scheme for reconstruction on amalgamation, be considered to be part of the consideration for the acquiring company’s offer to the target shareholders and may render the 90% consideration requirement incapable of being satisfied (*Central and District Properties Limited v IRC* [1966] 2 All ER 433).

The acquiring company must issue the consideration shares to the target company or the registered shareholders of the target company and their names must be entered into the register of members of the acquiring company. If the shares are issued to nominees of, or purchasers from the registered shareholders, then the relief may be refused.

SHARE FOR SHARE SWAPS

In a share-for-share swap the consideration shares must be issued in exchange for the share in the target company. This means that the proportions must be maintained but not necessarily that the acquiring company has to issue the same number of shares.

In a share-for-share swap the acquiring company must acquire 90% or more in



nominal value of the issued share capital of the target company. If the acquiring company already holds in excess of 10% of the issued share capital of the target company it will not then be able to claim the relief.

In situations where an acquiring company has not acquired 90% of the issued share capital of a target company but has otherwise satisfied the conditions of the relief, the Revenue Commissioners will grant the relief on a reclaim basis where the acquiring company, as part of the scheme, acquires the 90% within six months of the initial offer, or the first issue of consideration shares, to the target company's shareholders (whichever is the earlier).

ONWARD SALE SITUATIONS

The underlying rationale of a scheme of reconstruction or amalgamation is that the business remains owned by substantially the same persons at the conclusion of the scheme. This obviously places great significance on establishing the exact point in time when the scheme is concluded in order to fix the point at which the shareholder identity test is applied. In *Crane Freuhauf Limited v IRC*, Templeman J in the English High Court found that the scheme for amalgamation took place as soon as the target company shares had been transferred and the target company's shareholders had been registered as holders of the consideration shares issued by the acquiring company. Subsequent UK cases, most notably *Swithland Investments Limited and Another v IRC* (1990) STC 448, departed from this approach and looked at the overall commercial intention behind the transaction. Such an approach, if applied in this jurisdiction, could create difficulties where there are plans for selling on the consideration shares or introducing new shareholders. However, it is probably not necessary for the Irish Revenue Commissioners to apply the approach in *Swithland* as s80(2) SDCA contains the phrase "bona fide reconstruction of any company or companies or the amalgamation of any companies..", which arguably allows the Revenue Commissioners to look at the overall transaction in determining if a scheme of reconstruction or amalgamation exists.

More helpfully, the Revenue Commissioners in *Tax Briefing* 48 have commented on the substantial identity of ownership test for reconstructions in the capital gains tax code as follows:

"It is only required that substantial identity of shareholding exists immediately after the transfer. It is not necessarily significant that as the next step the shares in the new company are sold. However, it is essential that the reconstruction must not be in any way contingent on the subsequent sale or transfer of shares. Furthermore, the contract for the sale of shares must not be in existence prior to the issue of shares by the new company."

It is understood that much the same approach is taken by the Revenue Commissioners in a stamp duty context.

UNDERTAKING

In a two or three party share for undertaking swaps the acquiring company must acquire the "undertaking" of the target company as part of the scheme for reconstruction or amalgamation.

An undertaking must be a business and in the case of a part of an undertaking it must be capable of comprising a separate business. Even in the case of a disposal of trading assets those assets must be capable of constituting a separate business. A disposal by a holding company of an operating subsidiary can, depending on the facts, constitute an undertaking and Revenue Commissioners accept in a capital gains tax context (which is understood to be applied in a stamp duty context) that the disposal of a 100% subsidiary can constitute the disposal of an undertaking. It is even possible, again depending on the facts, that the holding of investments can constitute an undertaking.

Section 80(2A) SDCA provides that relief will only be available where the target company's undertaking contains property which has previously been conveyed to the target company. This was introduced into s80 SDCA in 2004 to close down a stamp duty avoidance scheme involving the acquisition of target companies that held the benefit of executory contracts for the purchase of land with those contracts being completed following the acquisition of the target company's shares on which relief under s80 was claimed. However, the new subsection left uncertainty over situations where a target company's undertaking includes immovable property acquired by virtue of the target company being granted a leasehold interest (which is not generally considered to be a conveyance) or intangible property, such as goodwill, which the target company built up itself. The Revenue

Commissioners responded to these situations by issuing guidance in the following terms:

"Where the undertaking of a target company comprises a leasehold interest in property, the target company will be treated by the Revenue Commissioners, for the purposes of this subsection, as having obtained a conveyance of the property where the leasehold interest has been directly acquired by the target company by virtue of the grant of a lease from the lessor and such lease has been duly stamped. In addition, relief under this subsection will not be denied in circumstances where an undertaking of a target company comprises goodwill which has been acquired by the target company by trading over a long number of years. This treatment will only be granted where the Revenue Commissioners are satisfied with the bona fides of the claim for relief under this section and that the reconstruction or amalgamation does not involve the avoidance of stamp duty or any other tax or duty."

CLAW-BACK OF RELIEF

Relief granted under section 80 SDCA will be clawed back in the following situations:

- (a) in a share-for-share swap, where the acquiring company ceases within two years from the date of incorporation of the acquiring company or the date of the authority for the increase in its share capital (as the case may be) to be the beneficial owner of the shares it acquired in the target company otherwise than in consequence of a reconstruction, amalgamation or liquidation;
- (b) in a two party share for undertaking swaps, where the target company ceases within two years from the date of incorporation of the acquiring company or the date of the authority for the increase in its share capital (as the case may be) to be the beneficial owner of the shares its acquired in the acquiring company otherwise than in consequence of a reconstruction, amalgamation or liquidation;
- (c) where the statutory declaration or other evidence provided to the Revenue Commissioners in support of the claim for relief is subsequently found to be untrue in any material particular, or if any of the conditions specified in s80(2) SDCA are not fulfilled in the reconstruction or amalgamation as actually carried out.

In a three party share for undertaking swap there is no statutory requirement for the shareholders of the target company to retain

the consideration shares issued by the acquiring company for any period.

TIME LIMITS FOR CLAIMING RELIEF

Instruments on which the relief is claimed by an Irish incorporated acquiring company must be executed:

- (a) within 12 months of the date of incorporation of the acquiring company or the date of the authority for the increase in its share capital (as the case may be); or
- (b) where made for the purpose of effecting a conveyance or transfer in pursuance of an agreement, which (or particulars of which) have been filed with the Registrar of Companies, within 12 months of the date set out in paragraph (a) above.

The legislation refers to the “proper time for stamping” but does not specify what that time is. However, it would be prudent to submit instruments to the Revenue Commissioners within 30 days of their execution so that in the event that the transaction fails to qualify for the relief, it will not in such circumstances attract late presentation interest or penalties.

PROCEDURE FOR CLAIMING RELIEF

Adjudication is essential to claim the relief. A statutory declaration sworn by a solicitor must, in practice, be submitted along with the relevant instrument(s) effecting the re-organisation. The Revenue Commissioners have recently produced helpful checklists of the supporting documents to be submitted with an application for adjudication of a claim for relief under s80 SDCA.

SHARE FOR UNDERTAKING SWAPS (TWO OR THREE PARTY)

- 1 Must establish to the satisfaction of the Revenue Commissioners that there is a

scheme for the bona fide reconstruction of any company or companies or the amalgamation of any companies.

- 2 Acquiring company must be a limited liability company incorporated in Ireland or another EU State.
- 3 Target company may be incorporated anywhere in world.
- 4 Acquiring company must either be incorporated with an object in this memorandum of association to acquire, or passes a resolution authorising an increase in its nominal or issued share capital for the purpose of acquiring, the undertaking of the target company.
- 5 Cash and any other forms of non-share consideration restricted to 10% of total consideration. Liabilities of the target company assumed/discharged by acquiring company are ignored.
- 6 Relief will be lost if the target company ceases within two years to be the beneficial owner of the shares issued to it by the acquiring company other than in consequence of reconstruction, amalgamation or liquidation (applicable to two party share for undertaking swaps only).
- 7 Scheme must be affected for bona fide commercial reasons and not as part of a scheme or arrangement, a main purpose of which is tax avoidance.
- 8 Statutory declaration of solicitor.
- 9 In respect of instructions executed on or after 20 February 2004 effecting a transfer of an undertaking, the target company must have taken a conveyance of the property comprised in the undertaking.
- 10 Consideration shares must be issued (meaning allottees being entered on the acquiring company’s register of members) by the acquiring company to the registered holders of shares (but not necessarily all) in the target company (applicable to three party share for undertaking swaps) or to the target company (applicable to two

party share for undertaking swaps).

SHARE-FOR-SHARE SWAPS

- 1 Must establish to the satisfaction of Revenue Commissioners that there is a scheme for the bona fide reconstruction of any company or companies or the amalgamation of any companies.
- 2 Acquiring company must be a limited liability company incorporated in Ireland or another EU State.
- 3 Target company may be incorporated anywhere in the world (but a target company which does not have a share capital structure is problematic).
- 4 Acquiring company must either be incorporated with an object in its memorandum of association to acquire, or passes a resolution authorising an increase in its nominal or issued share capital for the purpose of acquiring, at least 90% of the issued shares in the target company.
- 5 Cash and any other forms of non-share consideration restricted to 10% of total consideration. Liabilities of the target company assumed/discharged by the acquiring company are ignored.
- 6 Relief will be lost if the acquiring company ceases within two years to be the beneficial owner of shares acquired in the target company otherwise than in consequence of reconstruction, amalgamation or liquidation.
- 7 Scheme must be affected for bona fide commercial reasons and not as part of a scheme or arrangement a main purpose of which is tax avoidance.
- 8 Statutory declaration of solicitor.
- 9 Consideration shares must be issued (meaning allottees being entered on acquiring company’s register of members) by the acquiring company to the registered holders of shares in the target company in exchange for the shares held by them in the target company.



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