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Capital Gains Tax Clearance

Introduction

There are lots of instances in Irish tax law that advisers need to be aware of and comply with, one of the most important of which is the CG50 clearance certificate. The details of this clearance are enshrined in Irish tax law at s980 of the Taxes Consolidation Act 1997 (TCA 1997). Although the concept of CG50 clearance may seem reasonably straight forward, the law still manages to consume some six pages of TCA 1997. In this article I will give a recap of the law itself and then provide a number of practical examples that practitioners can come up against that can make the whole process of clearance something of a conundrum.

Section 980 TCA 1997

Where there is a transfer of certain assets for consideration exceeding €500,000 or, in the case of residential property, exceeding €1m, the provisions of s980 TCA 1997 apply. The assets to which the law applies (as outlined at s980(2)) are:

(a) Irish land and buildings;

(b) mineral or exploration rights within the Irish continental shelf;

(c) shares deriving the greater part of their value from the specified assets outlined above

(d) shares to which s584 applies, so that in respect of a person disposing of those shares, they are treated as the same (original) shares as those mentioned at (c) above; and

(e) goodwill of an Irish trade.

Section 980 requires the purchaser to withhold 15% of the gross sales proceeds and pay it over to the Revenue Commissioners unless the purchaser obtains a CG50 clearance certificate from Revenue. At s980(3) it is provided that "this section shall not apply where the amount or value of the **consideration in money or money's worth** [emphasis added] on a disposal...". Therefore it appears quite clear from the law (but more on this later) that s980 applies where consideration is actually paid – whether that be in the form of cash consideration or non-monetary consideration (for example, a land swap between two parties).

It is then provided at s980(4)(a):

> *"Subject to paragraph (b), on payment of the consideration for acquiring an asset to which this section applies –*
>
> *(i) the person by or through whom such payment is made shall deduct from that payment a sum representing an amount of capital gains tax equal to 15 per cent of that payment,*
>
> *(ii) the person through whom the payment is made shall allow such deduction on receipt of the residue of the payment, and*
>
> *(iii) the person making the deduction shall, on proof of payment to the Revenue Commissioners of the amount so deducted, be acquitted and discharged of so much money as is represented by the deduction as if that sum had been actually paid to the person making the disposal."*

The timelines of this withholding are provided for at sub-section (5):

> *"Where any payment referred to in subsection 4(a) is made by or on behalf of any person, that person shall, within 30 days of the date of that payment, deliver to the Revenue Commissioners an account of the payment and of the amount deducted from the payment, and pay to the Collector-general an amount of capital gains tax equal to 15 per cent of the amount of the payment."*

There are a few important observations here: (1) this is a purchaser obligation and (2) there is a 30-day time limit. If the consideration paid is non-monetary, it can be a costly process for a purchaser in the absence of CG50 clearance (readers are referred to s980(9)). Even if an asset to which s 980 applies is sold at a loss, the purchaser still must withhold – the test is based on the sales price, not the gain.

However, at sub-section (4)(b) it is confirmed that:

> *"where the person disposing of the asset produces to the person acquiring the asset –*
>
> *(i) a certificate issued under subsection (8) in relation to the disposal, or*
>
> *(ii) if the asset concerned is land on which a new house has been built or land on which a new house is in the course of being built, a certificate*

> *issued under subsection (8) in relation to the disposal or one of the certificates specified in subsection (8A) which, in either case, has been issued to the person disposing of the asset*
>
> *no deduction referred to in paragraph (a) shall be made."*

At sub-section (8) is it noted:

> *"(a) a person chargeable to capital gains tax on the disposal of an asset to which this section applies, or another person (in this section referred to as an 'agent') acting under the authority of such person, may apply to the inspector for a certificate that tax should not be deducted from the consideration for the disposal of the asset and that the person acquiring the asset should not be required to give notice to the Revenue Commissioners in accordance with subsection (9)(a);*
>
> *(b) if the inspector is satisfied that the person making the application is either the person making the disposal, or an agent, and that –*
>
> *(i) the person making the disposal is resident in the State,*
>
> *(ii) no amount of capital gains tax is payable on the disposal, or*
>
> *(iii) the capital gains tax chargeable for the year of assessment for which the person making the disposal is chargeable in respect of the disposal of the asset and the tax chargeable on any gain accruing in any earlier year of assessment (not being a year ending earlier than 6th day of April 1974) on a previous disposal of the asset has been paid,*
>
> *the inspector shall issue the certificate to the person making the disposal or, as the case may be, the agent, and shall issue a copy of the certificate to the person acquiring the asset".*

It all sounds very straight forward. A vendor sells an asset to a purchaser; that asset is one to which s980 applies; the purchaser is either presented with a CG50 clearance certificate or pays to the Collector-General 15% of the consideration payable within 30 days.

However, let's look at some real-life issues that do not lend themselves that simply to the clearance process.

Gifts

We have seen above that sub-section (3) of s980 applies "where the amount or value of the consideration in money or money's worth on a disposal...". But what if there is a transfer (say, from parent to child) of an asset to which s980 applies in consideration of natural love and affection? The consideration is zero. No money changes hands.

The CGT law (ss549 and 547) will deem the transfer to have occurred at market value. The law provides at s547(1) that "[a] person's acquisition of an asset shall for the purposes of those Acts be deemed to be for a consideration equal to the market value of the asset..." Similarly, at s547(4) the person disposing of the asset "shall be deemed to be [doing so] for a consideration equal to the market value of the asset".

There can be no withholding obligation as there is no consideration – the above deeming provisions do not change this. The author understands that the Revenue are of the view that the provisions of s980 do not apply to gifts.

However, care needs to be taken if, say, land is transferred partially by way of gift. For instance, a client owns land worth €2m and transfers this land to his or her child for a consideration of €400,000. This type of situation is not that uncommon, where the child might pay sufficient consideration to fund the actual capital gains tax payable under the transaction. There is (1) a gift of €1.6m and (2) consideration payable of €400,000. This amount is less than that prescribed by s980(3).

The author understands that the view of the Revenue Commissioners in this circumstance is that the partial consideration means that the full €2m is within the provisions of s980. Although in the author's view the relevant tax law may not appear to support this , it is important to be aware of. Where this situation arises (and in the absence of Revenue confirmation to the contrary), the safest path is to obtain clearance where an asset is transferring partially by way of gift.

Intra-group Transactions

Assets often transfer between group companies, land and buildings being no exception. The provisions of s617 apply to such transactions, with s617(1) providing:

> *"Notwithstanding any provision in the Capital Gains Tax Acts fixing the amount of the consideration deemed to be received on a disposal or given on an acquisition, where –*
>
> *(a) a member of a group of companies disposes of an asset to another member of the group...both members shall, except where provided by [subsection (2), (3) and (4]), be treated, in so far as relates to corporation tax on chargeable gains, as if the asset acquired by the member to whom the disposal is made were acquired for a consideration of such amount as would secure that on the other member's disposal neither a gain nor a loss would accrue to that other member...".*

The position of the Revenue Commissioners is outlined in the Tax and Duty Manual Part 42-03-01, that is, the original cost of acquiring the asset is deemed to be the amount looked at in determining whether s980 is relevant.

Therefore, if an asset with a market value of €20m and an original tax base cost of €400,000 transfers between group members, the position is that the provisions of s980 do not apply.

For practitioners advising on intra-group transactions, the original consideration approach appears to be best suited at the time of this article.

Company Reconstructions: Transfer of Undertaking

Capital gains tax law at s615 is relevant. The wording is similar to that in s617. It most commonly rears its head on the transfer of an undertaking (say, the hive-out of a business).

The relief afforded by s615 allows an asset to move in non-group scenarios with no capital gains tax liability. This is the case provided that "the first-mentioned company receives no part of the consideration for the transfer (otherwise than by the company taking over the whole or part of the liabilities of the business)...".

The relief does not apply if the transferor company receives even €1 in cash consideration. No consideration can be paid, other than liabilities of a business that is transferred being assumed. The transferor must receive no consideration. Therefore, one might assume that s980 could not apply where s615 is adamant that the transferor is not to receive consideration.

What if your client has a situation where a business transfers from a transferor company to a transferee? There is a property worth €1.2m (with a base cost also of €1.2m). The liabilities of the undertaking being transferred are €400,000 (less than prescribed by s980(3)).

In this scenario, although on a strict reading of the law it is arguable that clearance may not be needed (for the property or indeed any goodwill), the prudent approach and the one that it would appear Revenue is supportive of is that any assets to which s980 could apply should be deemed to move at a no gain/no loss consideration (therefore clearance should be obtained), with consequent clearance obtained where required.

Goodwill of a Trade

People sometimes think of a CG50 as relating to land or to shares that derive the greater part of their value from land. It is very important to note that the law also applies to goodwill of a trade in the State. When advising clients on business transfer agreements (as opposed to share sales), practitioners should always be aware that if the value being paid for goodwill is greater than €500,000, then a CG50 clearance certificate is required to stop the withholding provisions from applying to the goodwill.

Transactions Where no Capital Gains Tax Applies

The provisions of s980 can equally apply to transactions that are not within the scope of capital gains tax. A typical example is a disposal of property held as stock-in-trade of a sole trader.

A more obscure example is a share disposal represented by a repurchase by a company of its own shares. On a repurchase of shares by a company, there is a disposal of shares. If these shares fall within the (d) or (e) category of specified assets listed in s980(2), then the provisions of the section apply. There is no capital gains tax payable on the disposal. In this case, it is possible for the shareholder to apply for a clearance certificate under s980(8)(b)(ii), which is the category where "no amount of capital gains tax is payable in respect of the disposal". Therefore, on share buy-backs, practitioners should always consider whether CG50 clearance is needed.

Capital Sum Derived from Assets

You may be presented with a client scenario where a capital sum is derived from an asset. Tenants occasionally pay large sums of money to landlords to break out of onerous leases. Where the lease itself is silent on such matters, a lump sum paid by a tenant is a capital sum obtained by the landlord. That capital sum is derived from the landlord's asset, being the lease.

There is no acquisition of any asset by the tenant; the lease was an onerous obligation (a liability). On first glance one could be forgiven for assuming that s980 does not apply, as no asset is being acquired. However, s980(11) provides for this by stating:

> *"subject to paragraph (b), where there is a disposal of assets by virtue of a capital sum being derived from those assets, the person paying the capital sum shall, notwithstanding that no asset is acquired by that person, be treated for the purposes of this section as acquiring the assets disposed of for a consideration equal to the capital sum...and this section shall, subject to any necessary modifications, apply accordingly."*

Earlier Share-for-Share Exchanges

You may find yourself advising the purchaser of a company. As part of your due diligence, s980(2)(e) should be considered. If the vendor had completed a prior share-for-share exchange, then they would not have needed a CG50, as ss584/586/587 apply such that there is no disposal for the purposes of the capital gains tax legislation.

Section 980(2)(e) means that a disposal of shares that do not derive the greater part of their value from assets to which s980 applies still applies where the shares exchanged were for ones that did derive their value from land, minerals etc. in the State.

This is a reasonably obscure piece of the CG50 rules and is best illustrated below:

Sample fact pattern

- Alice owns shares in a company that derives its value from Irish land (AliceCo).
- There is a takeover of AliceCo by a UK company, and Alice receives her

consideration in the form of shares in the UK company.

- Alice sells these shares in the future – and the shares do not derive the greater part of their value from Irish land.
- CG50 clearance is required to prevent withholding obligations.

Shares Deriving the Greater Part of Their Value from Irish Land

This seems very straight forward. If your client owns a company with land worth more than 50% of the value of the shares, then the company derives the greater part of its value from Irish land. That may not necessarily be the case, however.

Again, let's illustrate this.

Example

- Your client, Jack, owns a company.
- The company owns a building in Dublin valued at €10m.
- The company has equities valued at €6m.
- The company has bank debt secured on the property of €6m.
- Net asset share value is €10m.

Jack owns a company where the gross property value is €10m. This is 100% of the share equity value. However, there is bank debt of €6m, meaning that the net property value is 40% of the share equity value.

The author understands that the the Revenue Commissioners's view is that the test is applied on a gross asset basis and that secured liabilities should not be considered. It is important that practitioners are aware of this view, even where it is at odds with the economic reality of the blocks that build up the share value.

Multiple Vendors

Section 980 refers to an asset being acquired. What if a situation arises where the same asset (say, a piece of land) is owned by various vendors?

There may be a sale of land for €4m by 10 family owners, each receiving €400,000. The author understand that It has been agreed with Revenue in the past that in this scenario that CG50 clearance is needed only where each owner receives more than €500,000 for his or her share of the property.

Let us say that the land was being sold for €10m (with everyone receiving €1m). In this case the position adopted is that a CG50 is needed, but not 10 separate CG50s. Rather, all vendors are listed on the CG50 or as a schedule to it. There is one asset being sold, so one clearance is issued.

Take a slightly different example, where a company is being sold for €10m. In this case 10 separate CG50s are needed as the shares represent separate assets in the company – it is not one piece of land being sold.

Consideration Payable in Instalments

It is a common commercial reality that vendors and purchasers agree to phased payment arrangements when assets are sold. You may be faced with a scenario where a client is purchasing land for €3.5m, with €2m payable upfront and the balance payable in two equal instalments over the next 12 months. All three payments exceed the s980 limit of €500,000.

The consensus (which the author understands has been accepted by the Revenue Commissioners) is that a single certificate should issue at the outset for the maximum consideration. If there is unquantifiable consideration, then care needs to be taken before payments are made.

Value-Added Tax

The provisions of s980 apply to the consideration changing hands. If the sale of an asset to which s980 applies attracts VAT, then it is important that the certificate sought and issued is for the VAT-inclusive amount.

Assets Linked to Property

You may come across scenarios where loan stock in a company is being sold. That company may derive the greater part of its value from Irish land, and indeed the loan stock may be secured on the property of the company. In s980 shares are specifically defined as including "stock and any security". Therefore, practitioners should be aware that sales of loan stock can be within the provisions of s980. There are exclusions that apply by virtue of eBrief No. 43/2016 (incorporated Tax and Duty Manual Part 42-03-01), but these are quite specific.

Non-Resident Vendors

A significant amount of complexity can arise around the area of CG50 clearance and non-resident vendors, which would warrant an article in itself. As a summary, a non-resident will not obtain CG50 clearance unless the relevant CGT on the disposal of the asset has been paid at the time that clearance is sought.

eCG50

In a very welcome development, Revenue has introduced an eCG50 procedure. From June 2020, applications for vendor CG50A clearance certificates and purchaser CG50B forms can be submitted electronically through ROS or MyAccount. Revenue has issued guidance on this process in Tax and Duty Manual Part 42-03-01.

The paper application will remain in place and can be submitted by post or through MyEnquiries. Revenue has advised that the paper system will be subject to its customer service response times (20 working days, and 25 working days during peak periods). The idea of the new system is to improve significantly the turnaround time for receiving CG50 clearance certificates, with the potential for Irish-resident applicants to receive an immediate turnaround on their applications.

An administrative issue with this process is that vendors making an application must be or have at some point been registered for capital gains tax. Therefore it is important that, where a CG50 will be required, this point is checked and a registration for capital gains tax is put through as soon as possible, if needed.

There are additional requirements for non-resident vendors, which include capital gains tax computations and, where a capital gains tax payment is due, a receipt of payment or a letter of undertaking to pay. A non-resident applicant will need a PPSN to make an application.

Conclusion

The above are some of the main areas (and this is not exhaustive) that practitioners may come across when considering whether their client needs either to obtain or to seek capital gains tax clearance.

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