

CHAPTER 2 Miscellaneous

Transactions to avoid liability to tax. FA89 s86 811.—(1) (a) In this section—

“the Acts” means—

- (i) the Tax Acts,
 - (ii) the Capital Gains Tax Acts,
 - (iii) the Value-Added Tax Act, 1972 , and the enactments amending or extending that Act,
 - (iv) the Capital Acquisitions Tax Act, 1976 , and the enactments amending or extending that Act,
 - (v) Part VI of the Finance Act, 1983 , and the enactments amending or extending that Part, and
 - (vi) the statutes relating to stamp duty,
- and any instruments made thereunder;

“business” means any trade, profession or vocation;

“notice of opinion” means a notice given by the Revenue Commissioners under subsection (6);

“tax” means any tax, duty, levy or charge which in accordance with the Acts is placed under the care and management of the Revenue Commissioners and any interest, penalty or other amount payable pursuant to the Acts;

“tax advantage” means—

(i) a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or

(ii) a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person,

including any potential or prospective amount so refundable or payable,

arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction;

“tax avoidance transaction” has the meaning assigned to it by subsection (2);

“tax consequences”, in relation to a tax avoidance transaction, means such adjustments and acts as may be made and done by the Revenue Commissioners pursuant to subsection (5) in order to withdraw or deny the tax advantage resulting from the tax avoidance transaction;

“transaction” means—

(i) any transaction, action, course of action, course of conduct, scheme, plan or proposal,

(ii) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and

(iii) any series of or combination of the circumstances referred to in paragraphs (i) and (ii),

whether entered into or arranged by one person or by 2 or more persons—

(I) whether acting in concert or not,

(II) whether or not entered into or arranged wholly or partly outside the State, or

(III) whether or not entered into or arranged as part of a larger transaction or in conjunction with any other transaction or transactions.

(b) In subsections (2) and (3), for the purposes of the hearing or rehearing under subsection (8) of an appeal made under subsection (7) or for the purposes of the determination of a question of law arising on the statement of a case for the opinion of the High Court, the references to the Revenue Commissioners shall, subject to any necessary modifications, be construed as references to the Appeal Commissioners or to a judge of the Circuit Court or, to the extent necessary, to a judge of the High Court, as appropriate.

(2) For the purposes of this section and subject to subsection (3), a transaction shall be a “tax avoidance transaction” if having regard to any one or more of the following—

(a) the results of the transaction,

(b) its use as a means of achieving those results, and

(c) any other means by which the results or any part of the results could have been achieved,

the Revenue Commissioners form the opinion that—

(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and

(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage,

and references in this section to the Revenue Commissioners forming an opinion that a transaction is a

tax avoidance transaction shall be construed as references to the Revenue Commissioners forming an opinion with regard to the transaction in accordance with this subsection.

(3) (a) Without prejudice to the generality of subsection (2), in forming an opinion in accordance with that subsection and subsection (4) as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that—

(i) notwithstanding that the purpose or purposes of the transaction could have been achieved by some other transaction which would have given rise to a greater amount of tax being payable by the person, the transaction—

(I) was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person, and

(II) was not undertaken or arranged primarily to give rise to a tax advantage,

or

(ii) the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided.

(b) In forming an opinion referred to in paragraph (a) in relation to any transaction, the Revenue Commissioners shall have regard to—

(i) the form of that transaction,

(ii) the substance of that transaction,

(iii) the substance of any other transaction or transactions which that transaction may reasonably be regarded as being directly or indirectly related to or connected with, and

(iv) the final outcome and result of that transaction and any combination of those other transactions which are so related or connected.

(4) Subject to this section, the Revenue Commissioners as respects any transaction may at any time—

(a) form the opinion that the transaction is a tax avoidance transaction,

(b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,

(c) determine the tax consequences which they consider would arise in respect of the transaction if

their opinion were to become final and conclusive in accordance with subsection (5)(e), and

(d) calculate the amount of any relief from double taxation which they would propose to give to any person in accordance with subsection (5)(c).

(5) (a) Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, they may, notwithstanding any other provision of the Acts, make all such adjustments and do all such acts as are just and reasonable (in so far as those adjustments and acts have been specified or described in a notice of opinion given under subsection (6) and subject to the manner in which any appeal made under subsection (7) against any matter specified or described in the notice of opinion has been finally determined, including any adjustments and acts not so specified or described in the notice of opinion but which form part of a final determination of any such appeal) in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned.

(b) Subject to but without prejudice to the generality of paragraph (a), the Revenue Commissioners may—

(i) allow or disallow in whole or in part any deduction or other amount which is relevant in computing tax payable, or any part of such deduction or other amount,

(ii) allocate or deny to any person any deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof, or

(iii) recharacterize for tax purposes the nature of any payment or other amount.

(c) Where the Revenue Commissioners make any adjustment or do any act for the purposes of paragraph (a), they shall afford relief from any double taxation which they consider would but for this paragraph arise by virtue of any adjustment made or act done by them pursuant to paragraphs (a) and (b).

(d) Notwithstanding any other provision of the Acts, where—

(i) pursuant to subsection (4)(c), the Revenue Commissioners determine the tax consequences which they consider would arise in respect of a transaction if their opinion that the transaction is a tax avoidance transaction were to become final and conclusive, and

(ii) pursuant to that determination, they specify or describe in a notice of opinion any adjustment or act which they consider would be, or be part of, those tax consequences,

then, in so far as any right of appeal lay under subsection (7) against any such adjustment or act so specified or described, no right or further right of appeal shall lie under the Acts against that adjustment or act when it is made or done in accordance with this subsection, or against any adjustment or act so made or done that is not so specified or described in the notice of opinion but which forms part of the final determination of any appeal made under subsection (7) against any matter specified or described in the notice of opinion.

(e) For the purposes of this subsection, an opinion of the Revenue Commissioners that a transaction is a

tax avoidance transaction shall be final and conclusive—

(i) if within the time limited no appeal is made under subsection (7) against any matter or matters specified or described in a notice or notices of opinion given pursuant to that opinion, or

(ii) as and when all appeals made under subsection (7) against any such matter or matters have been finally determined and none of the appeals has been so determined by an order directing that the opinion of the Revenue Commissioners to the effect that the transaction is a tax avoidance transaction is void.

(6) (a) Where pursuant to subsections (2) and (4) the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction, they shall immediately on forming such an opinion give notice in writing of the opinion to any person from whom a tax advantage would be withdrawn or to whom a tax advantage would be denied or to whom relief from double taxation would be given if the opinion became final and conclusive, and the notice shall specify or describe—

(i) the transaction which in the opinion of the Revenue Commissioners is a tax avoidance transaction,

(ii) the tax advantage or part of the tax advantage, calculated by the Revenue Commissioners which would be withdrawn from or denied to the person to whom the notice is given,

(iii) the tax consequences of the transaction determined by the Revenue Commissioners in so far as they would refer to the person, and

(iv) the amount of any relief from double taxation calculated by the Revenue Commissioners which they would propose to give to the person in accordance with subsection (5)(c).

(b) Section 869 shall, with any necessary modifications, apply for the purposes of a notice given under this subsection or subsection (10) as if it were a notice given under the Income Tax Acts.

(7) Any person aggrieved by an opinion formed or, in so far as it refers to the person, a calculation or determination made by the Revenue Commissioners pursuant to subsection (4) may, by notice in writing given to the Revenue Commissioners within 30 days of the date of the notice of opinion, appeal to the Appeal Commissioners on the grounds and, notwithstanding any other provision of the Acts, only on the grounds that, having regard to all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination, and to this section—

(a) the transaction specified or described in the notice of opinion is not a tax avoidance transaction,

(b) the amount of the tax advantage or the part of the tax advantage, specified or described in the notice of opinion which would be withdrawn from or denied to the person is incorrect,

(c) the tax consequences specified or described in the notice of opinion, or such part of those consequences as shall be specified or described by the appellant in the notice of appeal, would not be just and reasonable in order to withdraw or to deny the tax advantage or part of the tax advantage specified or described in the notice of opinion, or

(d) the amount of relief from double taxation which the Revenue Commissioners propose to give to the person is insufficient or incorrect.

(8) The Appeal Commissioners shall hear and determine an appeal made to them under subsection (7) as if it were an appeal against an assessment to income tax and, subject to subsection (9), the provisions of the Income Tax Acts relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications; but on the hearing or rehearing of the appeal—

(a) it shall not be lawful to enquire into any grounds of appeal other than those specified in subsection (7), and

(b) at the request of the appellants, 2 or more appeals made by 2 or more persons pursuant to the same opinion, calculation or determination formed or made by the Revenue Commissioners pursuant to subsection (4) may be heard or reheard together.

(9) (a) On the hearing of an appeal made under subsection (7), the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or are required to have regard under this section, and—

(i) in relation to an appeal made on the grounds referred to in subsection (7)(a), the Appeal Commissioners shall determine the appeal, in so far as it is made on those grounds, by ordering, if they or a majority of them—

(I) consider that the transaction specified or described in the notice of opinion or any part of that transaction is a tax avoidance transaction, that the opinion or the opinion in so far as it relates to that part is to stand,

(II) consider that, subject to such amendment or addition thereto as the Appeal Commissioners or the majority of them deem necessary and as they shall specify or describe, the transaction, or any part of it, specified or described in the notice of opinion, is a tax avoidance transaction, that the transaction or that part of it be so amended or added to and that, subject to the amendment or addition, the opinion or the opinion in so far as it relates to that part is to stand, or

(III) do not so consider as referred to in clause (I) or (II), that the opinion is void,

(ii) in relation to an appeal made on the grounds referred to in subsection (7)(b), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the tax advantage or the part of the tax advantage specified or described in the notice of opinion be increased or reduced by such amount as they shall direct or that it shall stand,

(iii) in relation to an appeal made on the grounds referred to in subsection (7)(c), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the tax consequences specified or described in the notice of opinion shall be altered or added to in such manner as they shall direct or that they shall stand, or

(iv) in relation to an appeal made on the grounds referred to in subsection (7)(d), they shall determine the appeal, in so far as it is made on those grounds, by ordering that the amount of the relief from double taxation specified or described in the notice of opinion shall be increased or reduced by such amount as they shall direct or that it shall stand.

(b) This subsection shall, subject to any necessary modifications, apply to the rehearing of an appeal by a judge of the Circuit Court and, to the extent necessary, to the determination by the High Court of any question or questions of law arising on the statement of a case for the opinion of the High Court.

(10) The Revenue Commissioners may at any time amend, add to or withdraw any matter specified or described in a notice of opinion by giving notice (in this subsection referred to as “the notice of amendment”) in writing of the amendment, addition or withdrawal to each and every person affected thereby, in so far as the person is so affected, and subsections (1) to (9) shall apply in all respects as if the notice of amendment were a notice of opinion and any matter specified or described in the notice of amendment were specified or described in a notice of opinion; but no such amendment, addition or withdrawal may be made so as to set aside or alter any matter which has become final and conclusive on the determination of an appeal made with regard to that matter under subsection (7).

(11) Where pursuant to subsections (2) and (4) the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction and pursuant to that opinion notices are to be given under subsection (6) to 2 or more persons, any obligation on the Revenue Commissioners to maintain secrecy or any other restriction on the disclosure of information by the Revenue Commissioners shall not apply with respect to the giving of those notices or to the performance of any acts or the discharge of any functions authorised by this section to be performed or discharged by them or to the performance of any act or the discharge of any functions, including any act or function in relation to an appeal made under subsection (7), which is directly or indirectly related to the acts or functions so authorised.

(12) The Revenue Commissioners may nominate any of their officers to perform any acts and discharge any functions, including the forming of an opinion, authorised by this section to be performed or discharged by the Revenue Commissioners, and references in this section to the Revenue Commissioners shall with any necessary modifications be construed as including references to an officer so nominated.

(13) This section shall apply as respects any transaction where the whole or any part of the transaction is undertaken or arranged on or after the 25th day of January, 1989, and as respects any transaction undertaken or arranged wholly before that date in so far as it gives rise to, or would but for this section give rise to—

(a) a reduction, avoidance or deferral of any charge or assessment to tax, or part thereof, where the charge or assessment arises by virtue of any other transaction carried out wholly on or after a date, or

(b) a refund or a payment of an amount, or of an increase in an amount, of tax, or part thereof, refundable or otherwise payable to a person where that amount or increase in the amount would otherwise become first so refundable or otherwise payable to the person on a date,

which could not fall earlier than the 25th day of January, 1989.