

Limitation on meaning of “distribution” — general. CTA76 s84A, FA87 s28(5)(b); FA89 s21(1)(a) and (2), FA90 s41(4) and s46; FA91 s28; FA92 s40; FA93 s45; FA94 s50; FA97 s146(1) and Sch9 Ptl par10(2)(b) 133.—(1) (a) In this section—

“agricultural society” and “fishery society” have the meanings respectively assigned to them by section 443 (16);

“relevant principal” means an amount of money advanced to a borrower by a company which is within the charge to corporation tax and the ordinary trading activities of which include the lending of money, where—

(i) the consideration given by the borrower for that amount is a relevant security, and

(ii) interest or any other distribution is paid out of the assets of the borrower in respect of that security;

“selling by wholesale” means selling goods of any class to a person who carries on a business of selling goods of that class or uses goods of that class for the purposes of a trade or undertaking carried on by the person;

“specified trade” means, subject to paragraphs (b), (d) and (e), a trade which consists wholly or mainly of the manufacture of goods, including activities which, if the borrower were to make a claim for relief in respect of the trade under Part 14, would be regarded for the purposes of that Part as the manufacture of goods, but not including trading activities in respect of which a certificate has been given by the Minister for Finance under section 445.

(b) Where the borrower mentioned in subsection (5) is a 75 per cent subsidiary of—

(i) an agricultural society, or

(ii) a fishery society,

“specified trade”, in that subsection, means a trade of the borrower which consists wholly or mainly of either or both of—

(I) the manufacture of goods within the meaning of the definition of “specified trade” in paragraph (a), and

(II) the selling by wholesale of—

(A) where subparagraph (i) applies, agricultural products, or

(B) where subparagraph (ii) applies, fish.

(c) For the purposes of the definition of “specified trade” in paragraph (a) and of paragraph (b), a trade shall be regarded, as respects an accounting period, as consisting wholly or mainly of particular activities only if the total amount receivable by the borrower from sales made in the course of those activities in the accounting period is not less than 75 per cent of the total amount receivable by the borrower from all sales made in the course of the trade in that period.

(d) A qualifying shipping trade ) shall not be regarded as a specified trade for the purposes of this section.

(e) This section shall apply as respects any interest paid to a company in respect of relevant principal advanced before the 20th day of April, 1990, by the company to another company which carries on in the State a trade which but for section 443 (6) would be a specified trade as if that trade were a specified trade.

(2) Any interest or other distribution which—

(a) is paid out of assets of a company (in this section referred to as “the borrower”) to another company within the charge to corporation tax, and

(b) is so paid in respect of a security (in this section referred to as a “relevant security”) within subparagraph (ii), (iii)(I) or (v) of section 130 (2)(d),

shall not be a distribution for the purposes of the Corporation Tax Acts unless the application of this subsection is excluded by subsection (3), (4) or (5).

(3) Subsection (2) shall not apply where the principal secured has been advanced by a company out of money subscribed for the share capital of the company and that share capital is beneficially owned directly or indirectly by a person or persons resident outside the State.

(4) Subsection (2) shall not apply in a case where the consideration given by the borrower for the use of the principal secured represents more than a reasonable commercial return for the use of that principal; but, where this subsection applies, nothing in subparagraph (ii), (iii)(I) or (v) of section 130 (2)(d) shall operate so as to treat as a distribution for the purposes of the Corporation Tax Acts so much of the interest or other distribution as represents a reasonable commercial return for the use of that principal.

(5) Subject to subsections (6) and (7), subsection (2) shall not apply to any interest paid by the borrower, in an accounting period of the borrower, to another company in respect of relevant principal advanced by that other company, where—

(a) in that accounting period the borrower carries on in the State a specified trade,

(b) the relevant principal in respect of which the interest is paid is used in the course of the specified trade—

(i) for the activities of the trade which consist of the manufacture of goods within the meaning of the definition of “specified trade” in paragraph (a) of subsection (1), or

(ii) where paragraph (b) of subsection (1) applies, for the activities of the trade which consist of such selling by wholesale as is referred to in paragraph (II) of the definition of “specified trade” in that paragraph,

and

(c) the interest, if it were not a distribution, would be treated as a trading expense of that trade for that accounting period.

(6) Subsection (5) shall not apply to interest paid in respect of relevant principal to a company which on the 12th day of April, 1989, had no outstanding amounts of relevant principal advanced.

(7) Notwithstanding subsection (5), where at any time after the 12th day of April, 1989, the total of the amounts of relevant principal (in this subsection referred to as “the current amounts of relevant principal”) advanced by a company in respect of relevant securities held directly or indirectly by the company at that time is in excess of a limit, being a limit equal to 110 per cent of the total of the amounts of relevant principal advanced by the company in respect of relevant securities held directly or indirectly by the company on the 12th day of April, 1989, then, such part of any interest paid at that time to the company in respect of relevant principal as bears, in relation to the total amount of interest so paid to the company, the same proportion as the excess bears in relation to the current amounts of relevant principal shall not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company.

(8) (a) In this subsection and in subsection (10), “specified period”, in relation to relevant principal, means the period commencing on the date on which the relevant principal was advanced and ending on the date on which the relevant principal is to be repaid under the terms of the agreement to advance the relevant principal or, if earlier—

(i) in the case of relevant principal advanced before the 11th day of April, 1994, the 11th day of April, 2001, and

(ii) in any other case, a date which is 7 years after the date on which the relevant principal was advanced.

(b) Notwithstanding subsection (5), where at any time on or after the 31st day of January, 1990, the total of the amounts of relevant principal (in this subsection and in subsections (9) and (10) referred to as “the current amounts of relevant principal”) advanced by a company in respect of relevant securities held directly or indirectly by the company at that time is in excess of a limit, being a limit equal to 75 per cent of the total of the amounts of relevant principal advanced by the company in respect of relevant securities held directly or indirectly by the company on the 12th day of April, 1989, then, any interest paid to the company in respect of relevant principal advanced by the company on or after the 31st day of January, 1990, being relevant principal which is included in the current amounts of relevant principal, shall not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company.

(c) Where apart from this paragraph any part of any interest paid to a company in respect of relevant

principal advanced by the company on or after the 31st day of January, 1990, would not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company by virtue only of paragraph (b), then, that paragraph shall not apply in relation to so much of that interest as is paid for a specified period in respect of relevant principal advanced and which was, at the time the relevant principal was advanced, specified in the list referred to in subparagraph (iv) if—

(i) the relevant principal is advanced by the company to a borrower who was in negotiation before the 31st day of January, 1990, with any company for an amount of relevant principal,

(ii) the borrower had received before the 31st day of January, 1990, a written offer of grant aid from the Industrial Development Authority, the Shannon Free Airport Development Company Limited or Údarás na Gaeltachta in respect of a specified trade or a proposed specified trade for the purposes of which trade the relevant principal is borrowed,

(iii) the specified trade is a trade which the borrower commenced to carry on after the 31st day of January, 1990, or is a specified trade of the borrower in respect of which the borrower is committed, under a business plan approved by the Industrial Development Authority, the Shannon Free Airport Development Company Limited or Údarás na Gaeltachta, to the creation of additional employment,

(iv) before the 25th day of March, 1992, the specified trade of the borrower was included in a list prepared by the Industrial Development Authority and approved before that day by the Minister for Industry and Commerce and the Minister for Finance, being a list specifying a particular amount of relevant principal in respect of each trade which amount is considered to be essential for the success of that trade, and

(v) the borrower or a company connected with the borrower is not a company which commenced to carry on relevant trading operations ) after the 20th day of April, 1990, or intends to commence to carry on such trading operations;

but this paragraph shall not apply to any interest in respect of any relevant principal advanced after the time when the total of the amounts of relevant principal to which this paragraph applies, advanced by all lenders who have made such advances, exceeds £170,000,000.

(d) For the purposes of this subsection and subsections (9) and (10)—

(i) relevant principal advanced by a company at any time on or after a day includes any relevant principal advanced on or after that day to a borrower under an agreement entered into before that day,

(ii) where on or after the 6th day of May, 1993, a period of repayment of relevant principal advanced by a company is extended (whether or not the right to such an extension arose out of the terms of the agreement to advance the relevant principal), the company shall be treated as having—

(I) received repayment of the relevant principal, and

(II) advanced a corresponding amount of relevant principal,

on the date on which apart from the extension the relevant principal fell to be repaid, and

(iii) where at any time after an amount of relevant principal is specified in a list in accordance with paragraph (c)(iv) or subsection (9)(c)(ii) or (10)(b)(ii) a company advances, or is treated as advancing, to a borrower relevant principal the interest in respect of which is treated as a distribution by virtue only of paragraph (c) or subsection (9)(c) or (10)(b), the amount of relevant principal specified in the list shall be treated as reduced by the amount of relevant principal so advanced, or treated as advanced, and the amount so reduced shall be treated as the amount specified in that list.

(e) For the purposes of this subsection and subsections (9) and (10), where a company which has on or after the 31st day of January, 1990, advanced relevant principal to a borrower under the terms of an agreement and, under the terms of that or any other agreement, the company assigns to another company part or all of its rights and obligations under the first-mentioned agreement in relation to the relevant principal, such assignment shall be deemed not to have taken place.

(9) (a) Notwithstanding subsections (5), (7) and (8), where at any time on or after the 31st day of December, 1991, the current amounts of relevant principal advanced by a company in respect of relevant securities held directly or indirectly by the company at that time is in excess of a limit, being a limit equal to 40 per cent of the total of the amounts of relevant principal advanced by the company in respect of the relevant securities held directly or indirectly by the company on the 12th day of April, 1989, then, any interest paid to the company in respect of relevant principal advanced by the company on or after the 31st day of December, 1991, being relevant principal which is included in the current amounts of relevant principal, shall not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company.

(b) (i) Where the total of the amounts of relevant principal advanced by a company in respect of relevant securities held directly or indirectly by the company at any time on or after the 31st day of December, 1991, is less than the limit referred to in paragraph (a), that paragraph shall apply as if that limit were the total of the amounts of relevant principal so advanced as at that time unless the company proves that it has as far as possible, at all times on or after the 31st day of December, 1991, advanced to borrowers relevant principal in respect of the interest on which paragraph (a) does not, or would not, apply by virtue of paragraph (c).

(ii) Where at any time during the period commencing on the 18th day of April, 1991, and ending immediately before the 31st day of December, 1991, an amount of relevant principal which was advanced to a borrower, being a company which carries on one or more trading operations (1)), is repaid, this section shall apply as if—

(I) references in subparagraph (i) and in paragraph (a) to the 31st day of December, 1991, were references to the day on which the amount is repaid, and

(II) during that period—

(A) the reference in subparagraph (i) to relevant principal in respect of the interest on which paragraph (a) does not, or would not, apply by virtue of paragraph (c) were a reference to such principal in

respect of the interest on which paragraph (b) of subsection (8) does not, or would not, apply by virtue of paragraph (c) of that subsection, and

(B) the reference in paragraph (c) of subsection (8) to paragraph (b) of that subsection were a reference to paragraph (a).

(c) Where apart from this paragraph any part of any interest paid to a company in respect of relevant principal advanced by the company on or after the 31st day of December, 1991, would not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company by virtue only of paragraph (a), then, subject to subsection (11), that paragraph shall not apply in relation to so much of that interest as is paid if—

(i) the specified trade is a trade which the borrower commenced to carry on after the 31st day of January, 1990, or is a specified trade of the borrower in respect of which the borrower is committed, under a business plan approved by the Industrial Development Authority, the Shannon Free Airport Development Company Limited or Údarás na Gaeltachta, to the creation of additional employment,

(ii) the specified trade of the borrower was selected by the Industrial Development Authority for inclusion in a list, approved by the Minister for Industry and Commerce and the Minister for Finance, being a list specifying a particular amount of relevant principal in respect of each trade which amount is considered to be essential for the success of that trade, and

(iii) the borrower or a company connected with the borrower is not a company which commenced to carry on relevant trading operations ) after the 20th day of April, 1990, or intends to commence to carry on such trading operations.

(10) (a) Notwithstanding subsections (5) and (7) to (9), any interest paid to a company in respect of relevant principal advanced by the company on or after the 20th day of December, 1991, shall not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company.

(b) Where apart from this paragraph any interest paid to a company in respect of relevant principal advanced by the company on or after the 20th day of December, 1991, would not be treated as a distribution for the purposes of the Corporation Tax Acts in the hands of the company by virtue only of paragraph (a), then, subject to subsection (11), that paragraph shall not apply in relation to so much of that interest as is paid for a specified period in respect of relevant principal advanced and which was, at the time the relevant principal was advanced, specified in the list referred to in subparagraph (ii) if—

(i) the specified trade is a trade which the borrower commenced to carry on after the 31st day of January, 1990, or is a specified trade of the borrower in respect of which the borrower is committed, under a business plan approved by the Industrial Development Authority, the Shannon Free Airport Development Company Limited or Údarás na Gaeltachta, to the creation of additional employment,

(ii) before the 25th day of March, 1992, the specified trade of the borrower was included in a list prepared by the Industrial Development Authority and approved before that day by the Minister for Industry and Commerce and the Minister for Finance, being a list specifying a particular amount of relevant principal

in respect of each trade which amount is considered to be essential for the success of that trade, and

(iii) the borrower is not a company which carries on relevant trading operations ) or intends to carry on such trading operations.

(11) Subsections (9)(c) and (10)(b) shall not apply to any interest in respect of any relevant principal advanced after the time when the total of the amounts of relevant principal to which those subsections apply, advanced by all lenders who have made such advances, exceeds the aggregate of—

(a) £250,000,000, and

(b) the excess, if any, of £170,000,000 over the total of the amounts of relevant principal to which subsection (8)(c) applies advanced by all lenders who have made such advances.

(12) (a) In this subsection, “scheduled repayment date”, in relation to any relevant principal, means the date on which that relevant principal is to be repaid under the terms of the agreement to advance that relevant principal.

(b) Where at any time before the 7th day of December, 1993—

(i) relevant principal (in this subsection referred to as “the first-mentioned relevant principal”), the interest in respect of which was treated as a distribution by virtue only of subsection (8)(c), (9)(c) or (10)(b), advanced by a company to a borrower was repaid by the borrower before the scheduled repayment date, and

(ii) a further amount or further amounts of relevant principal, the interest in respect of which is to be treated as a distribution by virtue only of subsection (8)(c), (9)(c) or (10)(b), was or were advanced to that borrower,

then, subsection (8)(d)(iii) shall not apply in relation to so much of—

(I) the further amount of relevant principal advanced as does not exceed the amount of relevant principal repaid, or

(II) where there are more further amounts advanced than one, the aggregate of the further amounts of relevant principal advanced as does not exceed the relevant principal repaid.

(c) Where by virtue of paragraph (b) subsection (8)(d)(iii) does not apply in relation to any amount of relevant principal advanced by a company, the company shall be treated as having—

(i) received a repayment of that amount of relevant principal, and

(ii) advanced a corresponding amount of relevant principal,

on the scheduled repayment date of the first-mentioned relevant principal.

(d) For the purposes of this subsection, where there are more further advances of relevant principal than one, the amount to which subsection (8)(d)(iii) does not apply shall be referable as far as possible to an earlier rather than a later such further advance.

(e) Notwithstanding paragraphs (b) to (d), interest which but for this paragraph would not be treated as a distribution by virtue only of subsection (8)(d)(iii) may be treated as a distribution if it is paid in respect of relevant principal advanced before the 7th day of December, 1993.

(13) (a) In this subsection, “relevant period” means a period which commences at a time at which, in accordance with the terms of the agreement under which relevant principal secured by a relevant security is advanced, an amount representing the interest for the use of the relevant principal is to be paid, and ends at a time immediately before the next time at which such an amount is to be paid.

(b) Interest paid to a company in respect of—

(i) relevant principal denominated in a currency other than Irish currency, and

(ii) a relevant period which begins on or after the 30th day of January, 1991,

shall not be a distribution for the purposes of the Corporation Tax Acts in the hands of the company if, at any time during that period, the rate on the basis of which interest is computed exceeds 80 per cent of the rate known as the 3 month Dublin Interbank Offered Rate on Irish pounds (in this subsection referred to as “the 3 month Dublin Interbank Offered Rate”) a record of which is maintained by the Central Bank of Ireland.

(c) Paragraph (b) shall not apply to any interest paid to a company in respect of relevant principal advanced by the company—

(i) before the 30th day of January, 1991, under an agreement entered into before that day if on that day the rate on the basis of which interest in respect of the relevant security is to be computed exceeds 80 per cent of the 3 month Dublin Interbank Offered Rate; but this subparagraph shall not apply as respects any relevant period commencing on or after the 20th day of December, 1991, if in that relevant period that rate exceeds the rate on the basis of which interest would have been computed if the relevant principal had continued to be denominated in the currency in which it was denominated on the 30th day of January, 1991,

(ii) on or after the 30th day of January, 1991—

(I) which is included in a list referred to in subsection (8)(c)(iv), (9)(c)(ii) or (10)(b)(ii), and

(II) for the purposes of a specified trade of a borrower who is certified by the Minister for Enterprise, Trade and Employment as having received an undertaking that the interest would be treated as a distribution;

but this subparagraph shall not apply as respects any relevant period commencing on or after the 20th day of December, 1991, if in that relevant period the rate on the basis of which interest in respect of the



relevant security is to be computed exceeds—

(A) a rate approved by the Minister for Finance in consultation with the Minister for Enterprise, Trade and Employment, or

(B) where it is lower than the rate so approved and the relevant principal was advanced on or after the 30th day of January, 1991, and before the 20th day of December, 1991, the rate which would have applied if the relevant principal had continued to be denominated in the currency in which it was denominated when it was advanced,

(iii) on or after the 18th day of April, 1991, where the rate on the basis of which that interest is computed exceeds 80 per cent of the 3 month Dublin Interbank Offered Rate by reason only that the relevant principal advanced is denominated in sterling, or

(iv) to a borrower which is a company carrying on one or more trading operations within the meaning of section 445 (1).