Frank Murray
Tax Director, Deloitte

Finance Act 2017: Property Measures

Stamp Duty

The single most important change in relation to property in Finance Act 2017 was the trebling of the rate of stamp duty on non-residential property from 2% to 6% on documents executed on or after 11 October 2017. Non-residential lease premiums are also subject to the increased stamp duty rate of 6%.

It should be noted that the 6% rate applies to all non-residential property, not just what is normally termed commercial real estate. Therefore the 6% rate could apply to, for example, the disposal of goodwill in the context of a sale of a business. (The rate of stamp duty on residential property, which broadly means a building suitable for use as dwelling, remains at 1–2%).

Finance Act 2017 made changes to types of bodies defined as 'housing authorities' under the Act, which now include housing authorities within the meaning of the Housing Acts

1966-2009 or the Housing and Sustainable Communities Agency established under Article 4 of the Housing and Sustainable Communities Agency (Establishment) Order 2012.

a) Where there is a conveyance, transfer or lease of houses, buildings or land to these bodies, there is an exemption from stamp duty.

b) Where there is a conveyance, transfer or lease of houses, buildings or land by these bodies, stamp duty will apply up to a maximum of €100.

Transitional measures

To avail of the 2% rate on commercial property where contracts were entered into before 11 October, the following were required:

- a binding contract was in place before 11 October 2017 and
- the instrument for the transfer was executed before 1 January 2018.

Now that the Finance Act has passed, a stamp duty certificate can issue.

Residential development land refund

Land acquired for residential development is generally treated as commercial land for stamp duty purposes. However, Finance Act 2017 provides for a stamp duty refund of the difference between 6% and 2% in respect of land acquired for the development of residential property. The key aspects of the provision are as follows:

It applies to residential development comprising construction operations that commence within 30 months following execution of the purchase.
The commencement notice must be pursuant to building regulations and acknowledged by a building control authority.

The amount to be repaid is calculated by the formula:

$$A \times B \times \frac{2}{3}\text{, where}$$

A is the amount of stamp duty paid at the rate of 6% on the instrument, and

B is the proportion of the area of the land represented by the appropriate part, i.e. the part of the land that relates to relevant residential land development, expressed as a fraction.

A claim can be made when construction operations have started pursuant to a commencement notice. A claim is to be made by the purchaser, in a form specified by Revenue, and includes a statutory declaration. It must be made within four years following acknowledgement by building control authority and a completion certificate to evidence completion of residential development. The refund can be clawed back if there is no completion certificate, but there is no need to wait for a completion certificate before making the application for a refund.

A clawback will occur if the relevant residential development is not completed within 2 years, or

a) the relevant land is not at least 75% occupied by dwelling units, or

b) the gross floor area space of the dwelling units do not amount to at least 75% of the total surface area of that land.

The provision shall not apply to construction operations commencing after 31 December 2021.

6% rate on transfer of shares in a company that derives its value from Irish real estate

When the rate of 6% was announced there was much interest in whether a sale of shares in a property company at 1% would give a better tax result. However, in a very late amendment to the Finance Act, a provision was introduced so that a 6% stamp duty could apply on a transfer of shares in a company that derives its value or the greater part of its value from Irish immoveable property. The provision applies also to units in an IREF, i.e. a fund with Irish real estate assets/ business, and to interests in a partnership. This will apply where it would be reasonable to consider that the property concerned was:

- acquired by the company with the sole or main object of realising a gain from its disposal,
- being developed with the sole or main object of realising a gain from its disposal when developed or
- held as trading stock.

The legislation applies to any instrument executed on or after 6 December 2017.

There are transitional provisions for instruments where:

- the instrument is executed before 1 March 2018,
- the effect of the application of the provision would be to increase the duty and
- the instrument contains a statement, in such form as Revenue may specify, certifying that the instrument was executed solely in pursuance of a binding contract entered into before 6 December 2017.

The stamp duty is on the price paid or market value, whichever is greater, of the shares being acquired. Therefore in a company situation, for example, the price or value of the shares would generally take into account any debt or other liabilities of the company in respect of the property, which would reduce the value of a company.

However, the legislation as drafted is likely to cause practical difficulties because the obligation to pay the stamp duty on the acquisition of the shares rests with the purchaser, whereas the new provision refers to the intent of the company. It may well be very difficult to get or give comfort that a property was not acquired with the object of realising a gain on disposal, even where it is clearly held for a period as an investment property. There is no guidance on the matter. Therefore we would expect that a purchaser would likely seek an indemnity from a vendor before acquiring shares in a company where the intent of the company in acquiring the property is not clear.

Associated companies relief

Associated companies relief, which is a full relief from stamp duty for transfers of property between companies in a 90% group relationship, has been amended to allow stamp duty relief on mergers of companies by absorption. The normal two-year clawback period for retaining the group relationship will not be applied where:

- the company is merged by absorption,
- the transferor is dissolved or liquidated and
- the transferee holds the beneficial interest in the property, and the beneficial ownership of the transferee remains unchanged for a two-year period.

The above clawback exemption is subject to the standard anti-avoidance provision that the liquidation of the transferee is effected for “bona fide” commercial reasons and does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is the avoidance of liability to any tax or duty.

This is a welcome relief that aligns the tax position with the Companies Act 2014 in relation to mergers by absorption. The stamp duty reorganisation relief was also amended to take account of a merger that is undertaken in accordance with the Companies Act 2014. (See also article by Amanda Jayne Comyn, “Finance Act 2017: Impact on Mergers”, in this issue.)

Residential leases

Schedule 1 of the SDCA 1999, provides for a stamp duty exemption in respect of certain residential leases. The exemption is in respect of residential leases that are granted for any indefinite term or any term not exceeding 35 years. The Finance Act 2017 has increased the rental income threshold arising from such leases from €30,000 to €40,000.

Income Tax/Corporation Tax

Mortgage interest relief on certain home loans

The relief provided for in s244 TCA 1997 which provides for interest relief in respect of loans taken out between 1 January 2004 and 31 December 2012 to acquire, repair, develop or improve an individual's principal private residence has been extended to 2020. The relief will be phased out on a tapered basis, with qualifying interest and ceilings both restricted as follows: 75% for 2018, 50% for 2019 and 25% for 2020.

Pre-letting rental expenses

Such expenses, incurred within 12 months of the first letting of residential property that has been vacant for 12 months, may be allowed up to €5,000 on each vacant premises. This applies to:

- premises that have been let from the passing of the Finance Act on 25 December 2017 and
- expenditure incurred on or before 31 December 2021.
- Pre-letting expenditure incurred must be an allowable deduction for the purposes of s97(2) TCA 1997

There is a clawback which occurs in the year of assessment where the residential premises ceases to be let within a period of four years from the date of first letting. It is understood a clawback will not be triggered for reasonable periods of vacancy, for example to repair, upgrade or clean a property between lettings.

Capital Allowances

Acceleration of wear-and-tear allowances for energy-efficient equipment

The scheme under which accelerated wear-and-tear allowances are available for capital expenditure on certain energy-efficient equipment is extended to 31 December 2020. (See also article by Jacinta Shinnick, "Finance Act 2017: Corporation Tax Measures", in this issue.)

Capital allowances for equipment and buildings used for providing childcare services or a fitness centre to employees

This provision introduces a scheme of accelerated capital allowances for the construction of buildings and structures for use in the provision of childcare services or fitness centre facilities by employers to employees. The scheme also provides relief for expenditure incurred on related equipment.

The accelerated allowanced for buildings or structures will apply at the rate of 15% per annum for six years and 10% in Year 7 in respect of qualifying expenditure. The wear-and-tear allowances for related equipment will operate at an accelerated rate of 100%.

The relief is available only to employers that incur qualifying expenditure. Passive investors cannot avail of relief under the scheme. Where the employer is a company, employees of other companies connected with that company may avail of the services or facilities.

The tax relief is subject to approval of the EU and therefore will commence by Ministerial Order.

Capital Gains Tax

CGT exemption

This is a relief from CGT in respect of land or buildings that were purchased in the EEA area between 7 December 2011 and 31 December 2014 where such land or buildings are held for a minimum period of seven years. The Finance Act provides for a full exemption from CGT if the taxpayer had acquired the land or buildings within the required period and owned them for at least four years and no more than seven. The amendment applies to disposals made on or after 1 January 2018.

Where a building is owned for more than seven years, the relief is tapered. For example, if the asset is owned for eight years before disposal, 7/8ths of the gain would be exempt.

1 An article on farming tax will follow in a later issue of *Irish Tax Review*.

Amendment to specified asset and withholding tax provisions for CGT

The Finance Act 2017 provides that shares in a company deriving the greater part of its value from Irish land continue to be within the charge to CGT despite artificial flooding of the company with non-land value. Previously, the legislation referred to the introduction of cash to dilute the land value, but it now also includes "other assets", e.g. non-cash assets such as cars.

Withholding tax may apply where shares are disposed of in a company where the value or the greater part of the value of the shares is attributable to land or mineral rights etc. The legislation ensures that account shall not be taken of any arrangement that involves a transfer of money or other assets from a person connected with the company for the purposes of calculating the portion of the value of shares attributable directly or indirectly to the land or minerals etc. (See also article by Tom Maguire, "Finance Act 2017: Anti-avoidance Provisions", in this issue.)

Disposals of business or farm on retirement[1]

If solar panels are installed on land that is suitable for farming purposes, the land shall be treated as a qualifying asset for retirement relief where the area of the land on which the solar panels are installed does not exceed 50% of the land area is so leased.

Relief for farm restructuring

For individuals who are entitled to such relief from CGT, there are new disclosure requirements to Revenue in relation to qualifying land sold or exchanged. These details will enable the amount of CGT saved to be calculated, to comply with State Aid publication requirements. This applies to disposals made on or after 1 July 2016.

CAT relief for leasing of agricultural land

CAT agricultural relief will not be affected where agricultural land is leased for solar energy production, provided that 50%or less of the total area of the leased land is used for that purpose.

Capital Acquisitions Tax

Dwelling-house exemption

There is an amendment providing for an exclusion from the exemption for a dwelling house that is taken by way of a gift that becomes an inheritance (i.e. where the gift is within two years of the death of the disponer). The exclusion does not apply if the gift is taken by a "dependent relative".

In the case of both gifts and inheritances, a property transferring to a dependent relative does not need to be the principal private residence of the disponer to qualify for the exemption.

Vacant Land/Site Levy

Changes announced

In the Budget on 10 October 2017 the Minister announced that the levy rate of 3% that will apply from 1 January 2019 to property held in 2018 will be increased to 7% for each subsequent year. The vacant site levy legislation is contained in the Urban Regeneration and Housing Act 2015 rather than the Tax Acts.

Separately, the Finance Act 2017 contains a provision whereby the Minister for Finance shall report on issues relating to making provision in law for a tax on vacant residential property within nine months after the passing of Finance Act, which was on 25 December 2017.

Therefore by September 2018 we may know more about how a tax on vacant residential property may look, in time for the first payments under the vacant site levy, discussed below, which are due on 1 January 2019.

Brief summary of the vacant site levy provisions

- A site must be vacant for a minimum period of 12 months before it can be subject to the vacant site levy.
- The levy shall be applied annually by the local authority on the market valuation of sites exceeding 0.05 hectares in area. The market valuation shall be determined by the local authority.

- Sites do not include any structure that is a person's home.
- Once a site is designated as a "vacant site", the local authority will issue a notice to the registered owner before 1 June 2018.
- Registered owners have the right to appeal this determination on the grounds that the site is not a vacant site.
- The levy is payable in arrears annually, commencing on 1 January 2019 in respect of 2018, based on the market value of a site as determined by the local authority.
- The standard levy rate is 3% (7% from 2020), which is reduced to zero in negative-equity situations.
- There are reductions in value for the purpose of the levy, depending on the level of debt attributable to the property.

Some comments on the levy

The vacant site levy applies to areas that are suitable for housing and those that are suitable for regeneration. Therefore, although it is principally associated with freeing up vacant sites for housing, it could potentially apply to commercially zoned property.

There seems to be a misconception that a site with planning is exempt from the vacant site levy. This is not the case. A landowner may have to fund all costs while the site is in planning, including the site and the costs of planning etc., but that would not be taken into account for the purpose of the levy.

I understand that the Department of the Environment, Community and Local Government takes the view that each site is treated separately. On this basis the levy could apply where, for bona fide commercial reasons, a site does not have development on it within the time limit, such as where a developer has a number of vacant sites and but not the facilities nor finance to develop them together.

A site must be vacant for at least 12 months during the period concerned to be subject to the levy; however, there is no clear definition of use. I understand that a temporary use will be treated as vacant. A use that is not authorised, such as farming on residentially zoned land, would be ignored in determining whether the site is vacant.

The local authority may have some level of discretion in relation to interpretation, so it remains to be seen what happens in practice.

If the site was not serviced from the outside with public services such as water and electricity, then it is unlikely to be suitable for use, within the meaning of the legislation.

Conclusion

The stamp duty refund scheme may provide some relief in respect of the housing market. However given the cost of the land has to be financed upfront this will serve as an additional cost for purchasers. In addition the vacant site levy is likely to increase prices as the cost will be passed on to purchasers.

While I appreciate that the increase in rate on non residential property may have been designed to shift focus to acquisition and development of residential land, a lower rate of duty would have been more measured and would assist in keeping ourselves competitive in the Real Estate international markets.

The proposed change in the 7 year capital gains tax exemption for investors which allows an exit after 4 years, which will help straddle the exit for some investors who want to sell earlier. However this is unlikely to free up much residential land given that the relief is for investment rather than trading property.

In terms of the residential sector other measures were flagged by commentators, but not introduced, such as changes to VAT, interest relief for rented residential, and a tax deduction for LPT. The measures which were introduced in Finance Act 2017 may well be insufficient to make a real impact to the housing shortage.

Read more on taxfind From Irish Tax Institute *Law of Capital Acquisitions Tax, Stamp Duty and LPT, Finance Act 2017; Direct Tax Acts, Finance Act 2017*