80% "Windfall Tax" on Profits/Gains Attributable to Land Re-zonings

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Probably the last thing the Irish development land market needed was further penal tax provisions in the run up to NAMA. These provisions introduced as part of the NAMA Act 2009 and further amended by Finance Bill 2010 (due to be enacted in early April) will certainly dampen the supply of land for redevelopment into the future.

Purpose and Retrospective Effect

Broadly, the legislation seeks to claw-back the lion's share of any uplift in land values attributable to re-zoning decisions via an 80% tax charge. Importantly, the legislation is not retrospective in that it does not seek to charge increases in land values attributable to re-zoning decisions made prior to the introduction of the legislation. However, the legislation can be said to have a retrospective effect in the sense that it will adversely affect the value of un-zoned land with "hope value" given that 80% of any in-built "hope" value will be clawed-back in tax if the land is re-zoned and sold at a future date. It is likely that the full effects of these provisions will only be felt when normal transaction levels return to the Irish development land market.

The Finance Bill amendments provide an exemption for small sites not exceeding 1 acre and €250,000 in value, which seems designed for those who sell land for one-off housing purposes. There is also an exemption for land disposed of under a compulsory purchase order where Revenue is satisfied that a sale would otherwise not have occurred.

Main Legislative Provisions

The legislation distinguishes between those who generate profits/gains from a trade of dealing in or developing land and those who generate capital gains on the disposal of non-trading land with a number of key distinctions between the two. Although the 80% tax charge on profits/gains attributable to a land re-zoning applies to both categories, it is applied in a different manner as outlined below.

Sections 644AB and S649B Taxes Consolidation Act (TCA) 1997 (to be amended by Finance Bill 2010) provide for the 80% tax charge in the context of a "relevant planning decision" defined as follows:-

'relevant planning decision'*, in relation to land and in accordance with the Planning and Development Act 2000 (in this definition referred to as the 'Act of 2000'), means–*

(a) a change in the zoning of land in a development plan or a local area plan made or varied under Part II of the Act of 2000 from non-development land-uses to development land-uses or from one development land-use to another development land-use including a mixture of such uses, or

(b) a decision to grant permission, in accordance with Section 34(6) or 37(2) of the Act of 2000, for a development that would materially contravene a development plan.

"Development land-use" and "non development land-use" are defined as:-

'development land-use' means residential, commercial or industrial uses or a mixture of such uses

'non-development land-use' means a land-use which is agricultural, open space, recreational or amenity use or a mixture of such uses;

The original legislation in the NAMA Act 2009 applied only to decision to rezone land from either a non-development land-use to a development land-use, or from one type of development land-use to another type of development land-use.

The Finance Bill 2010 amendments extend the provisions to the granting of planning permission by planning authorities (as opposed to a re-zoning decision) in cases which contravene the local area development plan.

Relevant dates for the purposes of the 80% Tax Charge

It is important to note that the provisions apply only to re-zonings made or varied on or after 30 October 2009 and to the granting of planning permission by planning authorities on or after 4 February 2010 (as opposed to a rezoning decision) in cases which contravene the local area development plan. Profits/gains attributable to re-zonings pre 30 October 2009 and/or to material contraventions pre 4 February 2010 are therefore outside the scope of the 80% tax charge.

Profits/Gains from a Trade of Dealing in or developing Land

In the context of profits/gains arising from a trade of dealing in or developing land, the profits/gains **attributable** to a "relevant planning decision" are subject to an 80% income tax charge. This income tax charge applies to both individuals and companies with an exemption from PRSI/Levies for individuals. The profits/gains are disregarded for all other purposes of the Taxes Acts other than the administrative provisions in relation to assessment, collection and enforcement. In this regard, there is no provision for the offset of other trading losses against profits/gains attributable to a "relevant planning decision". In the unlikely event of losses attributable to a "relevant planning decision", such losses are ring-fenced against future profits/gains attributable to a "relevant planning decision".

The crucial question is therefore what portion of any overall profit/gain on a land disposal, if any, is attributable to a "relevant planning decision" as it is only this portion which is subject to the 80% tax charge. Any portion of a gain not so attributable will be taxable in the normal manner.

By way of example, in the context of a land dealing trade, the profits on a land disposal may be broadly broken down into the following categories:-

- Construction operations on the land;
- Increases in the market value of land from date of acquisition excluding those attributable to a "relevant planning decisions", e.g. inflationary factors, improved macro-economic environment;
- Skill and expertise of land dealer in developing land, preparing the land for sale, marketing the land and negotiating with a purchaser;
- Increases in the market value of land from "relevant planning decisions";
- Increases in the market value of land attributable to re-zonings pre 30 October 2009 and/or planning decisions in contravention of a local development plan pre 4 February 2010.

The legislation provides that "an apportionment shall be made in a manner that is just and reasonable" with no further guidance provided as to what constitutes just and reasonable. The phrase "just and reasonable" is used elsewhere in the Taxes Acts in similar situations, e.g. in the now defunct S.644A residential development land provisions. Given the disparity in tax rates between those profits/gains attributable to a "relevant planning decision" and other profits/gains, the apportionment issue is likely to give rise to debate with Revenue in the context of future profits/gains.

Another area of potential uncertainty is whether the profits/gains attributable to a "relevant planning decision" are calculated at the date of disposal or at the date of the "relevant planning decision", i.e. are the profits/gains determined at the date of the "relevant planning decision" and chargeable at the date of ultimate disposal (which may be some years down the road), or are these both determined and chargeable at the date of disposal. This is far from an academic point as the uplift attributable to a "relevant planning decision" may vary considerably from date of the decision and the date of ultimate sale. In the absence of further guidance, the more realistic view is the latter such that the gain attributable to the "relevant planning decision" is determined and chargeable at the date of ultimate disposal.

Dividends paid by a company out of profits/gains derived from a trade of dealing in or developing land, which have suffered the 80% tax charge, will be exempt from further income tax (including PRSI/Levies) in the hands of individual shareholders. This exemption should apply equally where the profits/gains have suffered the 80% tax charge in lower-tier subsidiaries and are paid up through a chain of companies and out to the individual shareholders. No such exemption applies to the extent that the gains derive from the disposal of land otherwise than as part of a trade of dealing in or developing land. The legislation does not provide that dividends will be deemed firstly to come out of profits which have suffered the 80% windfall tax where other profits are available for distribution.

Windfall Gains on Disposal of Non-trading Land

In the case of non-trading land, the chargeable gain on a disposal of non-trading land is subject to the 80% windfall tax where the non-trading land;

has been the subject of a "relevant planning decision" since its acquisition by the person making the disposal; **or**

was acquired from a connected person at a price other than market value and has been the subject of a "relevant planning decision" during the ownership of either person.

The gain is the lesser of the actual overall gain and the "windfall gain" being the increase in the market value of the land attributable to the "relevant planning decision". This provision is required to prevent the 80% rate applying to gains in situations where the actual economic gain proves to be less than the windfall gain.

For example, land which was bought for €2m may fall in value to €1m and subsequently increase to €1.6m on foot of a relevant planning decision. A sale of this land will result in an economic loss of €0.4m and a windfall gain of €0.6m (€1.6m - €1m) such that the 80% windfall tax applies to the lesser of the two, i.e. Nil.

Losses attributable to a "relevant planning decision" are ring-fenced against future gains attributable to a "relevant planning decision".

Exemption for Qualifying Land

The legislation provides that gains on "qualifying land" are outside the scope of the 80% tax charge. "Qualifying land" comprises:-

Land disposed of under a compulsory purchase order "where the Revenue Commissioners are satisfied that the disposal would not have been made but for the exercise of those powers...";

Land disposed of by NAMA or by a 75% subsidiary company;

A site not exceeding 0.4047 hectares (one acre) and whose market value at time of disposal does not exceed €250,000 provided the disposal of the site does not form part of a larger transaction or series of transactions.

Summary

The impact of the 80% windfall tax provisions on the Irish development land market will take a period of time to become clear given the lack of transactional activity in the market and the paucity of re-zoning decisions.

It is likely that the provisions have already had an impact on the valuation of un-zoned land.

There are a number of elements in the legislation which require further clarification, specifically the timing of the calculation of gains attributable to "relevant planning decision", the apportionment of profits/gains in a land trading context and the calculation of gains in a non-trading context. It is to be hoped that Revenue provides further clarification in these areas in due course. ◆

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HSE – Ancillary Support Scheme (Nursing Home Loan) for Long Term Residents - Valuations

Some members may have been requested to provide valuations for property and land assets for long term care home residents who wish to use the Ancillary Support Scheme provided by the HSE as a way to partially fund their care home costs. As residents or their representatives are encouraged to seek independent legal advice on this issue, many of the instructions for these valuations are being issued by solicitors.

The Professional Services Council representatives have discussed this matter and would advise members to use best practice valuation methods in complying with such instructions, which include:–

1. Establishing the basis and purpose of the valuation
2. Inspecting the property and identifying the boundaries by way of site map
3. Verifying all material factors to the valuation, including title
4. Preparing a valuation report

The purpose of this Loan is to ensure that the care home residents do not have to sell assets such as their home during their lifetime. The loan generally becomes repayable

1. after the death of the resident,
2. if the property is sold or transferred (prior to death),
3. if the resident or their partner are deemed to be bankrupt, or
4. if the HSE determines that it has been given false/misleading information relating to the application for the loan.

Valuers should take note that they have a duty of care to the party for whom they are undertaking the valuation and for any party who will rely on the valuation, in this case the HSE, and that any requests for short-form valuations or desk-top valuations will not suffice to ensure best practice, which includes a full inspection of the property.

Members are also encouraged to circulate their credentials to local solicitors and residential care facilities confirming their ability to carry out these valuations and the Institute intends to contact the Law Society and HSE to encourage the use of qualified valuers for this important work.