

Re: The Proposed Retrospective Taxation of the Covid PUP under Section 3 of the Finance Bill 2020

Introduction

Section 3 of the Finance Bill 2020 proposes to amend section 126 of the Taxes Consolidation Act 1997 in order to allow for the taxation of the Covid Pandemic Unemployment Payment (hereafter “the Covid PUP”), including retrospective taxation of claims for the payment from March 2020.

Section 126(3) of the 1997 Act (as amended) presently provides that certain social welfare payments (including Jobseeker’s Benefit and “pay-related benefits”) paid under the Social Welfare Consolidation Act 2005 shall be treated as income for the purposes of assessing liability for income tax.

Sections 126(6A) and (6B) of the 1997 Act (as amended) specifically exempts certain social welfare payments from being subject to income tax. Amongst the payments subject to this exemption are Jobseeker’s Allowance, Working Family Payment and Supplementary Welfare Allowance payments. Any payments made under section 202 of the Social Welfare Consolidation Act 2005 (including Urgent Needs Payments) are also subject to this exemption. The payments subject to this exemption are largely social assistance payments i.e. those payments which are means tested and which are not subject to claimants having made a certain number of PRSI contributions in order to be eligible for the payment. The payments subject to taxation, therefore, are largely social insurance or “benefit” payments which are not means tested but which are subject to a claimant having made a certain number of PRSI contributions.

The overall effect of section 126 is that while some social welfare payments are considered income for the purposes of the tax code, most social assistance payments are exempt from being subject to taxation.

In March 2020, the Department of Employment Affairs and Social Protection introduced the Covid PUP in response to the Covid-19 Pandemic. On 5 August 2020, the Social Welfare (Covid-19) (Amendment) Act 2020 was signed into law. The 2020 Act created a specific statutory scheme in relation to the Covid PUP. It is notable that the 2020 Act refers to the previous Covid PUP Scheme as “the payment known as the pandemic unemployment payment paid under section 202 [of the 2005 Act] in respect of that week”.

Section 3(1) of the Finance Bill 2020 proposes to amend section 126 of the 1997 Act in order to allow for the taxation of the Covid PUP. Specifically, it adds the following to the list of payments which are to be treated as income for the purposes of assessing liability for income tax:

“(iib) the payments, commonly known as the pandemic unemployment payments, made under section 202 of the Act of 2005 on and after 13 March 2020 to the relevant date (within the meaning of section 7 of that Act),”

“(iic) Covid-19 pandemic unemployment payment (within the meaning of the Act of 2005),”

Further, section 3 of the 2020 Bill amends the table contained in section 126 of the 1997 Act (which lists the social welfare payments exempt from income tax) so that the line therein referring to the exemption for Urgent Needs Payment is followed by the caveat that the exemption does not apply to “the payments referred to in subsection (3)(a)(iib)”.

Section 3(2) of the 2020 Bill provides that the rules created by section 3(1) regarding the taxation of the Covid PUP prior to the introduction of a specific statutory basis for the payment “shall be deemed to have come into operation on and from 13 March 2020”. Section 3(3) provides that the rules regarding the taxation of the Covid PUP paid pursuant to the legislative scheme introduced by the Social Welfare (Covid-19) (Amendment) Act 2020 “shall be deemed to have come into operation on and from 5 August 2020”.

The effect of the section 3 of the 2020 Bill is to amend section 126 of the 1997 Act so as to allow for the taxation of the Covid PUP. These rules apply retrospectively to claims for the payment since its introduction in March 2020.

Information available to Claimants re potential taxation of the Covid PUP

Section 126 of the Taxes Consolidation Act 1997 provides that only social welfare payments paid under the Social Welfare Consolidation Act 2005 may be subject to taxation. As noted above, no legislation was introduced in relation to the Covid PUP scheme until 5 August 2020. Prior to the introduction of this legislation, no information published by the Department of Social Protection indicated that the payment was being paid pursuant to the Social Welfare Consolidation Act 2005. The first reference to the Covid PUP having been paid pursuant to the 2005 Act was contained in the Social Welfare (Covid-19) (Amendment) Act 2020. The 2020 Act refers to the Covid PUP scheme in place from 13 March 2020 to 5 August 2020 as “the payment known as the pandemic unemployment payment paid under section 202 [of the 2005 Act]”. Prior to the publication of that legislation, there had been no reference to the Covid PUP as having been paid under the 2005 Act and it appeared that it had been paid pursuant to a purely administrative, non-legislative scheme. Prior to 5 August 2020, then, claimants cannot have been expected to know that the payment had been paid pursuant to the 2005 Act and was therefore subject to taxation.

Further, it can be argued that the characteristics of the Covid PUP scheme between 13 March 2020 and 5 August 2020 are such that the payment could not have been paid pursuant to the section 202 of the 2005 Act. Per section 189 of the 2005 Act, in order for the Department to award an SWA payment (including a payment under section 202 of the 2005 Act), they must have conducted a means test prior to awarding the claim which established that a claimant’s means are insufficient to meet their needs. The Covid PUP was never subject to any form of means testing nor were claimants ever asked to declare that their means were insufficient to meet their needs. If the Covid PUP cannot be properly categorised as having been paid pursuant to section 202 of the 2005 Act during the period 13 March 2020 to 5 August 2020, it follows that Covid PUP payments during that period cannot be subject to taxation pursuant to section 126 of the 1997 Act.

Notwithstanding the absence of information as to the legislative basis for the Covid PUP scheme during the period 13 March 2020 to 5 August 2020, there was also a dearth of specific information in relation to whether the payment would be subject to taxation. Prior to the enactment of 2020 Act, claimants can only be expected to have relied on the official information published by the Department of Social Protection in order to ascertain whether the payment would be subject to taxation. However, neither the application form for the payment nor the webpage in relation to the payment on gov.ie offered any guidance in this regard.

The application form for the Covid PUP contains no specific references to the possible or potential liability to taxation of the payment. Between 24 and 29 March 2020 the following sentence was added to the Covid PUP information page on gov.ie (and has remained on that page since): “The COVID-19

Payment Unemployment Payment will replace your employment income and will be regarded by the department as equivalent to employment income". This statement, however, cannot be construed as putting recipients on clear notice that the Covid PUP would be taxed. While some social welfare payments are considered "income" for the purposes of the tax code, social assistance payments are generally exempt from being subject to taxation. The Covid PUP scheme has characteristics of both social insurance payments and social assistance payments. Like social insurance payments, the payment is not means tested. Like social assistance payments, there is no requirement to have made a certain number of PRSI contributions in order to access the payment. It is therefore the case that, based on the official information published in relation to the scheme, claimants could not have known how the payment was categorised for social welfare purposes and whether it would be subject to income tax as a result.

In answering a parliamentary question in relation to the whether the Covid PUP would be subject to income tax on 20 May 2020, the Minister for Finance stated as follows:

"Payments made under the Pandemic Unemployment Payment (PUP) Scheme are an income support and share the characteristics of income. Other income earners in receipt of comparable "normal wages" are taxable on those wages. In the interest of equity, therefore, payments made under the PUP scheme are subject to income tax. However, tax will not be collected in real-time while the scheme is in operation. In the case of the PUP, the taxation position will follow the general taxation rule for social welfare payments and, thus, while liable to income tax, the payments will be exempt from PRSI and the Universal Social Charge."

However, this statement was subsequently contradicted by the contents of the Social Welfare (Covid-19) (Amendment) Act 2020 which described the original Covid PUP scheme as having been paid pursuant to section 202 of the 2005 Act (a category of payment which is specifically exempt from income tax). Further, the official information published in relation to the Covid PUP subsequent to the Minister's statement remained unclear as to the liability to tax of the payment.

It follows, that claimants who were entitled to rely on the official information published in relation to the PUP (as opposed to the political statements in relation to the matter), could not have been aware that the payment would be subject to taxation.

Issues Arising

FLAC has concerns about the fairness of retrospectively subjecting the Covid PUP to assessment for income tax in circumstances where it was not clear to claimants that the scheme would be subject to income tax prior to the introduction of the Finance Bill 2020.

Indeed, an analysis of the relevant legal and constitutional principles suggests that the proposed retrospective application of section 3 of the Finance Bill 2020 may constitute an unconstitutional interference with the rights of claimants of the Covid PUP.

Retrospective Legislation and Property Rights

Article 40.3.2° of the Constitution requires the State to protect the property rights of citizens from “unjust attack”. Claims for the Covid PUP were paid on a weekly basis to those who fulfilled the relevant criteria from March 2020. Once the conditions of the payment are fulfilled by the claimant and the payment received, the right to the money received may be characterised as a “vested property right” which is entitled to the constitutional protection of Article 40.3.2°. The Courts have interpreted the constitutional protection of property rights as giving rise to a general prohibition on retrospective legislation which interferes with those rights.

Further, in considering the constitutional protection of property rights and how that protection interacts with the reference in Article 43.2 of the constitution to “the principles of social justice”, the authors of *Kelly: The Irish Constitution*¹ highlight the analysis of the Supreme Court in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*². Specifically, they note that, in that case, it was held that “[t]he property of persons of modest means must necessarily... be deserving of particular protection, since any abridgement of the rights of such persons will normally be proportionately more severe in its effects”.

It is clear that many claimants for the Covid PUP suffered significant financial hardship as a result of the Covid-19 pandemic. Indeed, the payment was introduced specifically to mitigate that hardship. It would seem therefore that the property of those persons, in the form of their vested right to the Covid PUP, may be considered as deserving of “particular protection” under the Constitution. It follows that any analysis in this regard should also consider whether a measure which retrospectively interferes with property rights is proportionate. It is notable, then, that the tax liability imposed by section 3 of the 2020 Bill may disproportionately effect those who have suffered the greatest financial hardship as a result of the Covid-19 pandemic. Such claimants may now be faced with an unexpected tax liability without having been afforded the opportunity to plan around same. While FLAC acknowledged that it is permissible for the Oireachtas to prospectively subject the Covid PUP to income tax and the Oireachtas has a wide discretion in relation to the financial measures deemed necessary for the economic wellbeing of the State, that discretion is significantly trammelled by the constitutional consideration involved when introducing legislation with retrospective effect.

The Courts have yet to consider the provisions of Article 40.3.2° in the context of retrospective tax legislation. However, the analysis of another author, writing in the *Irish Tax Review*³, suggests that there are only two limited situations in which retrospective tax legislation can be held to accord with the provisions of the Constitution:

“The first is where the provision is what is described as ‘curative’ legislation. That is, legislation that will ratify prior official conduct or make a remedial adjustment in an administrative scheme. In such situations, the legislature is simply removing unintended statutory flaws and giving full effect to the legislative intent behind the initial or original legislation.

The second situation is where the legislation is an ‘objective imperative’ to prevent the State going bankrupt. Part of a taxpayer’s property rights is the right to know where he or she stands. That is, a right to know in advance what the tax implications of his or her actions will be. Any interference with that right should

¹ *Kelly: The Irish Constitution* (5th Edition, Bloomsbury, 2018) at [7.8.75].

² *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105 at 202.

³ Brady, P., *The Constitution and Retrospective Tax Legislation*, Ir. T.R. (2009), 22(5), 93-96.

only be justified when prospective legislation is inadequate to prevent an extreme financial crisis for the State. The latter situation could arise where, for example, a major tax charging provision was found void from its enactment”

It is doubtful that the circumstances in which the retrospective provisions of section 3 of the Finance Bill 2020 have been introduced could properly be placed in either of those categories.

In all the circumstances, there would appear to be significant questions to be addressed as to whether the retrospective provisions of section 3 meet the constitutional threshold necessary to allow for introduction of such a measure.

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November 2020