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- In *HMRC v S Warshaw* [2020] UKUT 366 the Upper Tribunal endorsed the decision of the First-tier Tribunal and found that cumulative fixed-rate preference shares were "ordinary share capital" for the purposes of entrepreneur relief and capital gains tax.
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- In *Executors of the late Sheriff G L Cox v HMRC* [2020] UKFTT 442 (TC) the First-tier Tribunal had to consider whether a holiday letting activity qualified for business property relief or was a business of making and holding investments.
- In *Hamish Taylor v HMRC* [2020] UKFTT 416 (TC) the entitlement to a deduction for travel and subsistence was considered the First-tier Tribunal.
- In *HMRC v Development Securities plc and others* [2020] EWCA Civ. 1705 the England and Wales Court of Appeal considered whether a non-UK-incorporated company is centrally managed and controlled from the UK, such that it becomes a UK tax resident company.

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- In *Lexel AB v Skatteverket* C-484/19 the Court of Justice of the European Union held that an anti-abuse provision in the Swedish interest deduction limitation rules was contrary to the EU freedom of establishment.

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- The French Administrative Supreme Court (Conseil d'Etat) rejected the decision of the Paris Administrative Court of Appeal in the *"Valueclick"* case and found that an Irish company operating in the digital economy sector had a permanent establishment in France and was therefore subject to French corporate income tax.

Compliance Deadlines

- **Helen Byrne** details key tax-filing deadlines for April to June 2021.

International Tax Update

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- Updates on Covid-19-related measures include:
  - The OECD has published "Guidance on the Transfer Pricing Implications of the COVID-19 Pandemic".
  - The OECD published an updated and expanded version of its guidance looking at the possible effects of Covid-19 on a variety of tax treaty matters.
  - The Belgian Parliament approved new tax legislation intended to support economic recovery following the Covid-19 pandemic.
  - A draft Bill on Covid-19 tax has been submitted to the Austrian Parliament.
- Developments relating to the OECD/G20 BEPS project include:
  - The G20/OECD Inclusive Framework on BEPS released two detailed Blueprints in relation to its ongoing work to address the tax challenges arising from the digitalisation of the economy
  - The OECD has published "Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues"
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- HMRC confirmed that new regulations will amend the current DAC 6 regulations from 31 December 2020.
- The European Commission has launched a 12-week public consultation on the introduction of a digital levy.
- The Spanish Parliament has approved the tax applicable to determined digital services where users contribute to the value creation of the company providing those services.
- Draft legislation published by Germany's Ministry of Finance had raised expectations that the potential German tax exposure for royalty payments between two non-German entities and intellectual property transfers related to rights that are registered in a German public book or register would be abolished. These hopes were diminished by the release on 20 January 2021 of the Government-approved draft of the legislation, which no longer addresses this aspect.
- The French Administrative Supreme Court has recognised for the first time the existence of a permanent establishment in respect of a digital player in relation to the *Valueclick* case.
- The European Council issued a press release announcing changes to the EU list of non-cooperative jurisdictions for tax purposes.

VAT Cases & VAT News

Gabrielle Dillon gives us the latest VAT news and reviews the following VAT cases.

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- *Kaplan International Colleges UK Ltd v The Commissioners for Her Majesty's Revenue & Customs* C-77/19 concerned the interpretation of Article 132(1)(f) of the VAT Directive, which provides exemption for cost-sharing groups, and arose out of a refusal by HMRC to grant exemption to Kaplan International Colleges UK Ltd.
- *FRANCK d.d. Zagreb v Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak* C-801/19

dealt with the interpretation of Article 135(1)(b) and (d) of the VAT Directive.

» *QM v Finanzamt Saarbrücken* C-288/19 examined the provision of a company car without payment by employee.

Tax Appeals Commission Determination

» Tax Appeal 06TACD2021 was an appeal against Revenue's refusal to refund input VAT incurred on the purchase of a van for use in the appellants' farm partnership trade.

Accounting Developments of Interest

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President's Pages

Sandra Clarke
Irish Tax Institute President

Introduction

We are now in Q2 2021: Covid-19 is still with us and Brexit has certainly not gone away – new year, same challenges. At least, we have a deal on Brexit, even if its implications for trade on both sides of the Irish Sea – and, particularly, between Great Britain and Northern Ireland – are causing problems for business. Pressure is mounting to find work-arounds for the difficulties that have emerged, and let us hope that cool heads can work together to find solutions.

The virus, on the other hand, is beyond our control. Lockdown no. 3 has been the toughest yet. New variants have taken their toll on lives and livelihoods and the race between further mutations and a steady supply of vaccines make it difficult to keep alive the hope that we all felt when the vaccines arrived on the scene before Christmas. However, I know that we will all dig deep to get through this period of uncertainty and frustration to see the restrictions lifted.

It is worth reminding ourselves about what we managed to achieve for clients and, indeed, the Exchequer over the past hellish 12 months. In the most appalling business environment and against all the odds, we played a critical role in the collection of €56.2bn in taxes and duties for the Exchequer and in achieving an overall level of compliance that was only marginally down on the prior year.

Given the devastating impact of Covid-19 on the economy and on so many businesses, as well as the labyrinth of compliance obligations relating to all of the Government supports, we should be proud of that achievement and we should draw encouragement from it in the difficult year ahead. The work that we do as the interface between our clients and the State is important, not just for their businesses but also for the broader economy and society.

Policy and Representations: EII Submission

The overriding objective now should be to prepare the ground for recovery. In that regard, the Policy and Representations team made a submission to the Department of Finance's public consultation on the operation of the Employment Investment Incentive (EII). This is a scheme that must be primed and ready to help start-ups and smaller businesses to access the investment they need to take advantage of a recovery.

We know that funding for start-ups has fallen substantially during the pandemic. Tax incentives such as the EII will have to be much more attractive and user-friendly to encourage more private investment in high-tech micro businesses, as well as our smaller SMEs.

One of the biggest problems with the scheme is that, notwithstanding the changes made in the last two years, the rules and administration process remain complex and onerous. The level of expertise and skill required to navigate the complexities of the scheme is beyond micro and small business owners, and the cost of buying in that expertise can be beyond their budgets.

As a result, a scheme that should be a key enabler has become a barrier – or, at the very least, a stumbling block – in the way of achieving the Government's stated policy of supporting small businesses and start-ups. In 2016, 209 companies qualified for investment under the Scheme. The latest available data, for 2018, show that this number was down to 37.

In our submission, we have recommended that the administration process relating to the Scheme be streamlined for small and micro businesses to make it more accessible to them. To ease the burden on these businesses, we believe that Revenue should adopt non-mandatory template forms (e.g. business plan, cash-flows) for EII purposes.

We also recommended that personnel with the required technical and commercial knowledge of the complicated EII rules be assigned, to ensure consistency in dealing with applications in a timely manner that meets an appropriate Revenue customer service standard.

Ireland's Corporation Tax Roadmap Update

There have been many consultations on and rewrites of the EII since it was introduced in 2011. The fact that the scheme still falls short of meeting its purpose, despite previous consultations and an independent review, demonstrates that the policy creation process itself could be improved. For that reason, we were delighted to read Minister Donohoe's commitment to developing a new framework for domestic stakeholder engagement in the recently published update to "Ireland's Corporation Tax Roadmap".

We took the opportunity to write to the Minister setting out our ideas on what constitutes a good consultation process. We recommended early and frequent engagement with flexible structures – including the use of sub-groups to undertake detailed tax technical work. We also said that there should be a genuine exchange of ideas, with officials responding to submissions and providing feedback to the parties that have taken the trouble to engage with them.

This kind of meaningful consultation and engagement would make the process of drawing up legislation and designing Government schemes much more effective and efficient, and that is exactly what will be required to get our economy up and running when we have the pandemic under control.

The updated Corporation Tax Roadmap sets out very clearly the progress that Ireland has made, over a short period, in the reform and modernisation of our corporation tax system, and we all agree that we should have a competitive tax system that is in step with evolving international standards. There has been much change in recent years, and it is of great value for businesses and their tax advisers to have clarity on the future direction of corporation tax in Ireland.

We look forward to giving our feedback on the tax reform commitments outlined in the Roadmap. In early March, we responded to the Department of Finance's Feedback Statement on the implementation of the final measure of the Anti-Tax Avoidance Directive (ATAD), Article 4 Interest Limitation Rule (ILR). This is a complex measure that will affect most businesses and, without doubt, early and frequent engagement will be crucial to securing a successful outcome that works for business and the Exchequer.

Brexit

The practical implications of Brexit for businesses trading with the UK are becoming clearer by the day and as expected, there are difficulties arising. The issues got a timely and very constructive airing in our joint webinar with our colleagues in CIOT and ATT which was streamed on 9 March. The panel included Rose Tierney of Tierney Tax Consultancy based in Monaghan, who knows all there is to know about cross border tax, John O'Loughlin, Partner in charge of Global Trade and Customs for PwC Ireland, and Sally Jones who is Trade Strategy and Brexit lead for EY UK. There was no shortage of questions from the audience of over 500 who tuned on the day from both sides of the border and across the Irish Sea. The panel had some valuable insights for practitioners and their clients on how to mitigate current problems and avoid future ones. You can listen back to the webinar here.

I know from my own clients' experience that the new customs regime is adding cost to imports from other EU countries that are transported across the UK landbridge. For many SMEs, this is a serious impact where they are not in a position to pass on the cost to the customers. Some of the earlier Revenue systems' issues which caused deliveries to get stuck in Dublin Port have been addressed and there has been an improvement. Revenue has taken a pragmatic approach and we need that to continue as the new regime beds down.

There continues to be a lot of confusion about VAT & Customs on both sides of the Irish sea. Both suppliers and customers are unsure of the rules and anything outside of the norm causes difficulty. I think the Institute and CIOT can work with Revenue and HMRC to clarify matters for businesses and reduce the misunderstandings that are currently leading to delays and blockages.

Indeed, the strong collaboration that exists between our organisations means we are uniquely placed to play a role in finding solutions for our clients that will ultimately benefit the wider economies on both islands.

We always knew Brexit would make trade more difficult and costly but there are long-established trading relationships between the two islands and

Britain remains a very important market for many Irish businesses. So, it is critical that the authorities on both sides of the Irish Sea work hard to make trade as easy and as straight forward as possible under the new arrangements. Solutions will have to be found within the terms of the Trade and Cooperation Agreement because there is no alternative.

Tax Administration

In late January the new Chairperson of the Tax Appeals Commission, Ms Marie-Claire Maney, attended a meeting of Council to present her plans for the Commission and the organisation of its work. It was great to have the opportunity to engage with Ms Maney so early in her role as Chairperson, and we had a very constructive exchange of views.

It was good to see our Revenue Branch Network meetings get off to an early start this year. Meetings between Institute Branch representatives and senior officials of Revenue's Medium Enterprises Division (MED) and Large Corporates Division (LCD) both took place in early March. A joint virtual event between the Institute and Revenue is in the planning.

Events

In normal circumstances this issue of *Irish Tax Review* would feature photos from our Annual Dinner of members and guests dressed up in their finery. Speaking for myself, the last Friday night in February this year was a far cry from the same night in the Clayton Hotel last year. There is no way of replicating a dinner with upwards of 1,200 guests on Zoom!

I really am sorry that neither the Annual Dinner nor the Annual Conferring Ceremony could take place during my presidency. Both are memorable occasions that light up the Institute's calendar. But, under the circumstance, it is a small price to pay when so many have lost so much over the last year.

I am, however, looking forward to the virtual conferring and our Annual Tax Summit which takes place virtually on three consecutive Fridays in April. The theme is 'Remote yet Connected'. It is a comforting title and we have got very proficient at virtual events in the Institute. Still, if vaccination allowed, I would dearly love an in-person event with fellow members before my terms ends. We dare to hope.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

Welcome to our first digital *Irish Tax Review* (*ITR*), a product of our commitment to adapt to the needs of our members. By going digital, we are future-proofing *ITR*, reducing our carbon footprint, and allowing you to access *ITR* where, when and how you want.

We are entering the second quarter of 2021. Some of the consequences of Brexit have been revealed, and when you combine this with the continued lockdown of businesses and new strains of Covid-19, you have the perfect recipe for a complex start to the year. The Institute continues to work remotely, and like many other organisations, we can do so effectively for as long as public health restrictions obtain.

From the safety of our homes, we congratulated the third-level winners of the Fantasy Budget, joined the CIOT and the ATT for a discussion on Brexit, and met with Revenue to raise the concerns of our members through the Institute's Branch Network.

Education

Our students and Education team got the year off to a good start with all of our CTA students receiving their December exam results. Council is delighted to welcome 231 new CTAs to the over 30,000-strong worldwide CTA family. We will mark this great achievement with a virtual conferring in the coming weeks.

The winter student courses are coming to an end, and registration for our summer courses opened early in March. There has been a high level of interest so far with registration still open.

Promoting a career in tax to third-level students continues to be part of our work. Throughout January we supported employer firms and their summer internship programmes on our social media, in tandem with raising awareness about the opportunities and benefits the career has to offer. In March, our Fantasy Budget winners were announced - UCD were the overall winners with LIT and UCC finishing second and third, respectively. Our President, Sandra Clarke, and Education Director, Martina O'Brien, congratulated the winning teams on a Zoom call, posing for a "group photo" that impressively spans the country.

Professional Services

With Brexit and the signing of the Finance Bill 2020 into law, 2021 offers plenty areas of interest for our members. We started the year with the last webinar in the Finance Act series, and soon our consolidated editions of the Finance Act 2020 legislation will be published. Our sincere thanks go to the editors for their sterling work in consolidating and updating them: David Fennell, *Direct Tax Acts*; Maria Reade, *Law of Value-Added Tax*; and Aileen Keogan and Emmet Scully, *Law of Capital Acquisitions Tax, Stamp Duty and Local Property Tax*. Your essential legislation titles can be ordered from taxinstitute.ie or by contacting Michelle Byrne (mbyrne@taxinstitute.ie).

Our new 14-part online Practical Corporation Tax programme, running from the end of February to April, was designed for CTAs who wish to refresh their knowledge of and stay up to date on fundamental and business-critical corporate tax issues. With on-demand access, the full programme is still available on our website.

Maintaining and strengthening our connection with our international CTA family is a priority for us, especially in a post-Brexit world. In that context, we were delighted to collaborate with the CIOT and the ATT in hosting a very productive webinar on the practical impact of the Trade and Cooperation Agreement for businesses and their tax advisers. The panel of tax, trade and business experts, from both sides of the Irish border and across the Irish Sea, offered their perspectives on post-Brexit trade and customs arrangements. There was great attendance and engagement by practitioners from both islands. We look forward to working with our international colleagues on future events and discussions.

Evolution of *Irish Tax Review*

The transition of *ITR* from traditional print to digital format on the back of member feedback was more than a sustainability measure – although that is a real positive. We wanted to evolve to meet your needs. The responsive design means you can read it on your phone, tablet or computer, and the search function enables you to find articles relevant to your topic of choice. Most importantly, it gives you, the reader, more control and flexibility over how and when you access *Irish Tax Review*. We would welcome your feedback when you have had a chance to use the new platform.

Institute Revenue Branch Network Update

After the resumption of the Branch Network meetings online in Q4 2020, we issued a bulletin in February to update members on current developments, including summary notes for the four Annual Branch Network meetings from Q4 2020.

Since the bulletin, our Personal Division Branch representatives met with officials from Revenue's Personal Division to resume discussions on assignee-related matters raised at their meeting last year. Our Branch representatives and senior officials from Revenue's Medium Enterprises Division (MED) and Large Corporates Division (LCD) met in early March to kick off their year of engagement.

Policy and Representation

The 2021 cycle of TALC meetings commenced in February with a decision to commit to virtual calls for the rest of 2021. The work of the sub-committees for 2021 is well under way, reflecting the concerns of our members.

Marie-Claire Maney, Chairperson of the Tax Appeals Commission, accepted an invite to a meeting of Council in January. Engaging and exchanging views with Ms Maney this early on in her new role was invaluable, and we look forward to working with the Chairperson in the future.

After the publication of Ireland's updated "Corporation Tax Roadmap", we wrote to the Minister for Finance to welcome his commitment to introducing a new domestic stakeholder engagement process and to make some recommendations about how it should work.

Additionally, we made submissions to the Department of Finance in response to its public consultation on the EII scheme, taking account of the views of our EII sub-group, which met in January. We also responded to the consultation on the implementation of the ATAD Interest Limitation Rule, which we prepared with the help of our International Tax Working Group. All our submissions are published on our website here.

Tax Talk

Since the last edition of *ITR*, we have recorded two additional episodes of our podcast series, Tax Talk. In January, ahead of the OECD/G20 plenary meeting, we focussed on global tax reform with our guests Pascal Saint-Amans, Feargal O'Rourke and Tom Reynolds. They had a friendly but robust discussion on the implications of the latest proposals for business and for Ireland. All agreed that there was now a need for certainty in international tax and that failure to reach agreement would be bad news for world trade. You can listen to it here.

Our latest episode looks at taxpayers' rights which is central to the purpose of the Institute and a growing global concern. Our guests

Albert Raedler, Kieran Twomey and Nina Olson provided insights from an Irish, EU and US point of view. They all agreed that the European Commission's Taxpayers' Rights initiative is a step in the right direction, but individual member states still need a domestic solution to ensure fairness. Kieran believed the US system had much to recommend it. Reflecting on 19 years as US Taxpayer Advocate, Nina agreed it worked well but reiterated that there still needs to be oversight to ensure complying taxpayers are not met with undue administrative burden. Tax Talk is available on popular podcast apps or on our website here.

International Women's Day

Currently, just over half of the Institute's membership is female. This shows a healthy gender balance, but what is it like for women to work in tax and has it changed in recent years? To mark International Women's Day, we spoke to a cross-section of our membership to get their insights and learn about their experiences. After speaking to each of them, we created three videos covering women's impact on the tax profession, the pandemic's effect on women, and the working environment for women in tax. You can watch each video on our website.

Annual Tax Summit 2021

As the first Institute event to fall foul of the pandemic, we were determined to hold the Annual Conference in 2021, no matter the landscape. Given the continuing public health restrictions, it was clear that a virtual event was the best solution.

The Annual Tax Summit 2021, aptly themed "Remote, Yet Connected", will take place over three consecutive Friday mornings in April – 16, 23 and 30. Considering the amount of time spent on calls and virtual meetings, each morning will be approximately two hours of great discussions. You can attend all three sessions or just the mornings most relevant to you: just book your spot on our website or by contacting us at conference@taxinstitute.ie.

Looking Forward

We have a lot to look forward to in the second quarter. First and foremost, the Annual Tax Summit 2021 . We'll host a virtual ceremony to mark and welcome our new CTA members, as our current students complete their exams and new students take a step closer to their future in tax.

In collaboration with our international CTA colleagues, we're delighted to jointly host a new series of Global CTA Tax Webinars. A combined effort from the Tax Institute (Australia), the Taxation of Hong Kong, the Chartered Institute of Taxation (UK), and ourselves, we will dive into the common tax challenges and opportunities for CTAs across the globe. First up, and unsurprisingly so, is International Corporate Tax in May. Watch for more details coming soon.

Legislation & Policy Monitor

Lorraine Sheegar
Tax Manager – Tax Policy and Representations, Irish Tax Institute

News Alert

Ireland's Corporation Tax Roadmap update published

On 7 January 2021 the Minister for Finance, Paschal Donohoe TD, published "Ireland's Corporation Tax Roadmap: January 2021 Update". The updated Roadmap considers the ongoing global tax reform work and sets out the next steps in the continuing process of modernising and strengthening Ireland's corporation tax system.

It outlines further actions that Ireland will be taking as part of international tax reform efforts, including further commitments to:

- Implement interest limitation rules in Finance Bill 2021.
- Legislate for new international tax transparency rules for digital platforms.
- Publish a consultative paper in Q1 2021 on the reverse hybrids aspect of ATAD anti-hybrid rules, followed by a feedback statement by mid-2021, with legislation to be introduced in Finance Bill 2021.
- Adopt the authorised OECD approach for transfer pricing of branches and legislate for it in Finance Bill 2021.
- Launch a consultation in 2021 on the possibility of moving to a territorial regime.
- Consider the broader issues relating to outbound payments from Ireland and Ireland's wider withholding tax regime in 2021.
- Give consideration in 2021 to introducing additional restrictive measures, if required, including the denial of tax deductions or imposition of withholding taxes where material payments are made from Ireland to countries on the EU list of non-cooperative jurisdictions.
- Publish a new tax treaty policy statement having particular regard to treaty policy for developing countries.
- Establish a new domestic stakeholder engagement process in 2021.

Article 4 interest limitation feedback statement published

On 23 December 2020 the Department of Finance launched a feedback statement on "ATAD Implementation: Article 4 Interest Limitation". The feedback statement focuses on the final ATAD measure, an interest limitation rule, which will be implemented in Finance Bill 2021. Article 4 of ATAD requires Member States to introduce a fixed ratio rule that links a company's allowable net interest deductions (i.e. deductible interest expenses in excess of taxable interest income) directly to its level of economic activity, based on taxable earnings before deducting net interest expense, depreciation and amortisation (EBITDA).

Interested parties were invited to make a written submission to the Minister for Finance by Monday, 8 March 2021, to ensure that Ireland's interest limitation rule, when introduced with effect from 1 January 2022, meets the standards required under ATAD while also being clear and operable in practice and remaining consistent with Ireland's long-standing focus on the taxation of activities with substance in Ireland. At the time of writing, the Institute is drafting its response to this feedback statement.

Public consultation on EII published

On 23 December 2020 the Department of Finance launched a public consultation on the Employment Investment Incentive (EII) scheme. The consultation document notes that the Minister for Finance, Paschal Donohoe TD, is aware that the Covid-19 pandemic has affected private investor confidence and, in turn, the flow of available private equity investment into Irish companies.

The focus of the consultation process is on:

- enhanced support for start-ups through EII,
- broadening the eligible funds from irrevocable trusts/designated investment funds by opening EII funds to other relevant regulated fund structures,
- the relationship between the Renewable Energy Support Scheme (RESS) and EII,
- how EII might respond to the changing environment in which it operates and
- any other matters considered relevant.

Interested parties were invited to make a written submission by 12 February 2021 on how EII might be further enhanced to take account of the changing business environment. At the time of writing, the Institute is drafting its submission to this public consultation.

Selected Acts

Finance Act 2020[1]

Finance Act 2020 was signed into law by the President on 19 December 2020. The Act gives effect to the provisions in Finance Bill 2020, a summary of which was provided in the last edition of “Legislation & Policy Monitor”. Some changes were made to the Bill at Committee Stage, the most notable of which were:

- Changes to the Covid Restrictions Support Scheme (CRSS).
- Modifications to the amendment to s541 TCA 1997 (debts) to provide that any transfers that fall within the provisions of paragraph (a) of the section will be ignored, when considering the amount of the acquisition cost in computing any gain on a disposal of the debt. It also provides that the section will apply to disposals made on or after the date the Act is passed and not 14 October 2020, as previously announced.
- Amendments in respect of the migration of shares and securities in Irish-registered companies from a central securities depository (CSD) in the UK to a CSD in Belgium (transition from Crest to Euroclear), to include a change to the definition of “shares” and to insert a new chapter in Part 6 of the Stamp Duties Consolidation Act 1999 to provide for special measures relating to dematerialised securities.
- Amendments to s28B of the Emergency Measures in the Public Interest (Covid-19) Act 2020 to include the legislative text to provide for the enhanced rates of the Employment Wage Subsidy Scheme (EWSS).

Important changes were also made to the Bill at Report Stage, the most notable of which were:

- An amendment to s15 of the Bill (transfer pricing) to provide that the section is now subject to commencement by Ministerial Order, instead of applying to chargeable periods commencing on or after 1 January 2021. The Institute wrote to the Minister for Finance on 2 November, after the publication of the Bill, and on 18 November, after Committee Stage, to raise members’ concerns about the impact of the proposed legislation on Irish businesses and their ability to utilise cash within their groups.
- Changes to the stamp duty provisions in respect of the migration of shares and securities in Irish-registered companies from a CSD in the UK to a CSD in Belgium (i.e. the transition from Crest to Euroclear), to

1 See other articles related to Finance Act 2020 by Caitriona Moran, Frank Mitchell, Anna Holohan & David Rogers in this issue.

confirm in legislation that the exemption from the charge to stamp duty for American Depositary Receipts (ADR) continues to apply and to clarify that no stamp duty charge will arise on the migration of the shares. The Institute had sought for these amendments to be reflected in the Bill at Report Stage in a submission to the Department of Finance and Revenue. (See also article by Rachel Fox & Caitriona Moran, "Finance Act 2020: Post-Brexit Share Migration", in this issue.)

Policy News

Brexit: EU–UK Trade and Cooperation Agreement

On 24 December 2020 the President of the European Council, Charles Michel, and the President of the European Commission, Ursula von der Leyen, signed the EU–UK Trade and Cooperation Agreement on behalf of the European Union. The agreement sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes. It is underpinned by provisions ensuring a level playing field and respect for fundamental rights.

The Trade and Cooperation Agreement consists of three main pillars:

- a free trade agreement – a new economic and social partnership with the UK,
- a new partnership for citizens' security – a new framework for law enforcement and judicial cooperation in criminal and civil law matters and
- a horizontal agreement on governance.

Foreign policy, external security and defence cooperation are not covered by the agreement as the UK did not wish to negotiate on this matter.

On 1 January 2021 the UK left the EU Single Market and Customs Union, as well as all EU policies and international agreements. The Withdrawal Agreement, including the rules on the Protocol on Ireland and Northern Ireland contained in the Annex, remains in place.

Regarding the entry into application of the Trade and Cooperation Agreement, the European Commission will apply it on a provisional basis until 28 February 2021. The Commission will propose Council decisions on the signature and provisional application, and on the conclusion, of the agreement. The European Council, acting by the unanimity of all 27 Member States, must adopt a decision authorising the signature of the agreement and its provisional application as of 1 January 2021. Once this process is concluded, the Trade and Cooperation Agreement between the EU and the UK can be formally signed. The European Parliament will then be asked to give its consent to the agreement. As a final step on the EU side, the European Council must adopt the decision on the conclusion of the agreement.

European Commission launches public consultation on digital levy

The European Commission launched an inception impact assessment to request feedback on the introduction of a digital levy. After this, the Commission launched a public consultation on this initiative, in the form of a questionnaire. An impact assessment will also be conducted to inform the Commission's decision on the parameters of the digital levy.

In its conclusions on 21 July 2020, the European Council had tasked the Commission to bring forward proposals for additional own resources for the European budget. The digital levy is one of such proposals. The stated aim of this initiative is to help address the issue of fair taxation related to the digitalisation of the economy, and is not intended to interfere with the ongoing work at G20/OECD level on the reform of the international corporate tax framework.

The Commission is interested in gathering views on the main problems related to taxing the digital economy, for Member States and business. It also asks for feedback on possible solutions to these problems. This public consultation will feed into the work under way on the digital levy proposal for mid-2021. The deadline for responding to the public consultation is Monday, 12 April 2021.

OECD public consultation meeting on Pillar One and Pillar Two Blueprints

The OECD/G20 Inclusive Framework on BEPS held a public consultation virtual meeting on 14 and 15 January 2021 to discuss the key themes and comments received from stakeholders in response to the public consultation on the Reports on the Pillar One and Pillar Two Blueprints undertaken last December.

The Blueprints for Pillar One and Pillar Two reflect the progress that has been made by the 137 members of the Inclusive Framework on BEPS to progress technical solutions to agree new allocations of taxing rights between jurisdictions to reflect the digitalised economy (Pillar One) and to agree global anti-base erosion rules for a minimum effective tax rate to address remaining BEPS challenges (Pillar Two).

Pillar One Blueprint

In respect of Pillar One, there was strong support for an international consensus-based solution (with removal of unilateral measures). Feedback suggested uncertainty around policy objectives and principles. Simplification to reduce complexity and compliance costs was a major theme among the responses received by the OECD.

There were divergent views on scope, for example, with some commentators arguing for a wide scope and some arguing for modifications to the existing scope. Most commentators supported a global revenue threshold in excess of €750m. There was support for a phased-in approach starting with larger multinational enterprises. There was widespread support for accounting for pre-regime losses and profit shortfalls and for unlimited loss carry-forward. Finally, a number of NGOs consider that the reform is too narrow, in particular, regarding the amount of profits to be redistributed.

Pillar Two Blueprint

In respect of Pillar Two, there was broad support for the approach set out in the Blueprint, notwithstanding various differences in interpretation of a minimum rate. Specific comments were received on excluded entities and shipping, e.g. clarifications and revisions suggested by the funds industry, minor revisions to the definition of non-profit organisations, support for a carve-out for international shipping and clarification to address diversified businesses.

There were suggestions that phased implementation, such as a higher global revenue threshold in the initial years, be used as a potential simplification measure. Simplification was a key topic of this public consultation. The OECD received over 150 pages in response to the simplification options in the Blueprint. In addition, businesses raised concerns about complexity and the administrative burden associated with Pillar Two calculations.

In relation to the Subject to Tax Rule (STTR), concerns were raised about the risks of over-taxation, and there were calls for a narrow scope of application for the STTR. Implementation and rule coordination were other key messages received, with support for the coordinated approach suggested for the Income Inclusion Rule (IIR) and the Under-taxed Payments Rule (UTPR). There was strong support for treating the US Global Intangible Low-Taxed Income (GILTI) measure as a qualified IIR, with some commentators suggesting deactivating GILTI when it is applied to US sub-groups or crediting GILTI tax against GloBE tax, if GILTI is applied, or that GILTI should preclude the application of the STTR.

Revenue eBriefs Issued from 1 November 2020 to 22 January 2021

No. 200 EU Mandatory Disclosure of Reportable Cross-Border Arrangements

Revenue has updated the "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" manual, which provides general guidance on the operation of the EU mandatory disclosure regime (DAC6). Appendix II, which sets out a list of exemptions and reliefs that are excluded from the scope of Hallmark A.3 where certain criteria are met, has been updated.

No. 201 Guidelines for Agents or Advisors Acting on Behalf of Taxpayers

Revenue's "Guidelines for Agents or Advisors Acting on Behalf of Taxpayers" has been updated to reflect changes to the use of the term "TAIN" (i.e. "TAIN" means both and "Tax Agent Identification Number" and "Transaction Advisory Identification Number"). The update to the meaning of TAIN recognises the role of solicitors as intermediaries in transactional taxes and their need to access and use ROS in relation to CAT and the new eCG50.

Appendix 1 has been added to provide easy access for agents/advisers to the client link notification forms. Appendix 2 has links to information to assist agents using ROS, for example, on registration, payroll and the recent facility to update client addresses on ROS.

No. 202 Research and Development Credit

Revenue has updated the "Research and Development Credit" manual to include a new section 2.1 to address the early payment of 2020 instalments of excess R&D tax credits due to Covid-19. Minor updates have also been made to paragraphs 1 and 3.

No. 203 ROS Support for the 2020 Pay and File Period, Extended Opening Hours and Income Tax Warehousing

Revenue published details on the phoneline opening hours and contact details for ROS supports and income tax warehousing matters in the lead-up to the 10 December deadline.

No. 204 Tobacco products imported in passengers' accompanied baggage

Revenue's "Manual on the Control and Examination of Baggage" provides general instructions relating to the examination of travellers' baggage. The manual has been amended to update system references from the AEP system to the Automated Import System (AIS), which is effective from 23 November 2020. In addition, Appendix 3 (excise duty and VAT to be charged on imported tobacco products in a traveller's baggage) has been amended to reflect the Budget 2021 changes in excise duty and the temporary reduction in the standard rate of VAT in effect from 1 September 2020 to 28 February 2021.

No. 205 Revenue Online Service – Pay and File 2020

Revenue's "ROS Pay and File Useful Tips" manual has been updated to include information on the updated Statement of Net Liabilities (SNL) on the ROS Form 11 to make the relevant declaration to warehouse the balance of income tax due for 2019 and 2020 preliminary income tax (in sections 7.5, 7.6 and 7.7).

The manual also notes a display error in the Calculate screen in ROS in section 8.9 and includes details of the extended opening hours of the ROS Technical Helpdesk (in section 9).

No. 206 VAT Treatment of the Hiring of Means of Transport

Revenue has updated the "VAT Treatment of the Hiring of Means of Transport" manual to improve readability and to include additional information on the short-term hire of passenger vehicles.

No. 207 Import Duties Payment Methods

Revenue has renamed the "AEP System Payment Methods" manual to "Import Duties Payment Methods". In addition, details on making VRT payments using ROS or myAccount and links to the amended/updated eCustoms accounts forms have been included in the manual.

No. 208 VAT eCommerce Rules – 1 July 2021[2]

Revenue has created a new manual titled "VAT eCommerce Rules – 1 July 2021" to give an overview of the new VAT eCommerce rules that will come into effect on 1 July 2021. More detailed guidance on these changes will be made available by Revenue before the go-live date of 1 July 2021.

No. 209 Return Filing Dates – Forms 11 and CT1

Revenue has updated the manual "Return Filing Dates – Forms 11 and CT1 Surcharge for Late Filing; Surcharge where there is a delay in uploading iXBRL financial statements through ROS" to reflect the extended date of 10 December 2020 for the electronic filing of Form 11 for 2019 and to include information on the waiver of the surcharge for the late filing of CT1 returns and iXBRL financial statements due from 23 March 2020 onwards, which applies until further notice.

No. 210 Automated Import System (AIS) Introduction

Revenue has updated a number of manuals to incorporate the changes arising from the introduction of a new Automated Import System (AIS) for declaring customs imports. These changes take effect from 23 November 2020.

The following manuals have been updated:

- Customs Manual on Valuation,
- Anti-Dumping and Countervailing Duties Manual,
- Customs Manual on Preferential Origin and
- Customs Import Procedures Manual.

No. 211 Return of Values – Investment Undertakings

Revenue's "Return of Values – Investment Undertakings" manual, which provides guidance for investment undertakings in relation to the return of certain information required by s891C TCA 1997, has been updated to include the full list of excepted unit holders.

No. 212 Irish Real Estate Fund (IREF) Guidance

Revenue's "Irish Real Estate Fund (IREF) Guidance Note" has been updated to include:

- guidance on the changes made to the IREF regime in Finance Act 2019,
- updated guidance on the factors to be considered when assessing whether EU pension schemes or funds are equivalent to Irish pension schemes or funds and
- additional guidance on key definitions.

The Form 1 IREF 2019 is also now available on the Revenue website in the Related Forms panel.

No. 213 Surcharge on undistributed income of service companies

Revenue has updated the manual "Surcharge on undistributed income of service companies" to clarify that for the purposes of determining income as professional or non-professional in nature, income should be considered on a client-by-client basis relative to the services provided. For example, where a company provides only book-keeping or payroll services to a client, that income will be considered to be non-professional in nature.

No. 214 Review of Opinions/Confirmations

Revenue's "Review of Opinions or Confirmations" manual has been updated to provide guidance to taxpayers who wish to continue to rely on an opinion or confirmation issued by Revenue in the period between 1 January and 31 December 2015, in respect of a transaction, period or part of a period on or after 1 January 2021. An application must be made by a taxpayer for the renewal or extension of the opinion on or before 31 March 2021.

2 See article by Dermot Donegan & Denise Corrigan "Q&A: VAT and the eCommerce Package", *Irish Tax Review*, 33/4 (2020).

No. 215 Professional Services Withholding Tax: Interim Refunds

Revenue has updated the manual "Professional Services Withholding Tax (PSWT) General Instructions" to include a link to information on the Revenue website regarding the submission of claims for PSWT interim refunds during the Covid-19 pandemic. Section 4.2 of the manual has also been updated to clarify that PSWT withheld may not be used as a payment of preliminary tax.

No. 216 Country by Country reporting – updates to CbC User Guide and CbC XML Schema

Revenue's "Country-by-Country (CbC) Reporting" manual has been updated at paragraph 22 to include details of the release of CbC User Guide Version 2.0 and CbC XML Schema Version 2.0, which will be in use from 1 February 2021.

To facilitate the migration to the new schema version, the Revenue electronic CbC Reporting filing system in ROS will be unavailable from midnight on 15 January 2021 until 31 January 2021. The CbC Reporting filing system will reopen on 1 February 2021. Up to 15 January 2021, all CbC Reports, including correction reports, should be prepared and filed using CbC XML Schema Version 1.0.

No. 217 Capital Acquisitions Tax – valuation date, contingent events and qualifying expenses of incapacitated persons

Revenue has updated a number of CAT manuals, as follows:

- Revenue's "Valuation Date" manual has been updated with a new paragraph at 8.2.2 to provide guidance on determining the valuation date where a benefit transfers on a death but not as part of the administration of an estate (i.e. s30 CATCA 2003).
- Revenue's "Contingencies affecting gifts or inheritances" manual now includes explanatory material that provides context for the example given regarding the revision of a CAT liability after the occurrence of a contingent event (i.e. s29 CATCA 2003).
- Revenue's "Exemption relating to qualifying expenses of incapacitated individuals" manual has been updated to reflect an Appeal Commissioner's determination in relation to the treatment of qualifying expenses of incapacitated persons (i.e. s84 CATCA 2003) but also to clarify that Revenue's position after the determination remains unchanged.

No. 218 Omnibus Station Licence duty amended

Revenue's "Guide to Excise Licences" manual has been updated at Table 2 to reflect the amended rate for the duty payable for the Omnibus Station Licence, from €500 to a rate based on turnover.

No. 219 Guidelines on Irish Bankruptcy Procedures

Revenue published new "Guidelines on Irish Bankruptcy Procedures", outlining the conditions that must be met when making an individual bankrupt.

No. 220 Manual on Civil Aviation

Revenue has updated Appendix 5 (Draft Board Order) and Appendix 6 (Conditions of Approval applicable to Aerodromes) of the "Civil Aviation Manual" in line with the Customs Act 2015.

No. 221 Income Tax Relief for Medical and/or Dental Insurance

Revenue's "Income Tax Relief for Medical and/or Dental Insurance" manual has been updated to include information contained on Revenue's Covid-19 Information webpage regarding the tax treatment of refunds of healthcare insurance premiums made due to Covid-19 circumstances. The manual also includes updated examples.

No. 222 Automated Import System (AIS) – manuals updated

Revenue has updated the following manuals to incorporate changes arising from the introduction of the new Automated Import System (AIS) on 23 November 2020:

- Temporary Storage Facilities Manual,
- Instruction Manual on End-Use Procedure,
- Guidance Manual on Customs Warehousing,
- Part 2 – Transit Customs Operational Guide,
- Instruction Manual on Inward Processing,
- Instruction Manual on Outward Processing and
- Instruction Manual on Authorised Economic Operators.

No. 223 Filing Guidelines for DAC2-Common Reporting Standard (CRS)

Revenue has amended the "Filing Guidelines for DAC2-Common Reporting Standard (CRS)" manual to include the XML Schema Version 2.0 update and the applicable migration dates.

The CRS XML Schema Version 1.0. and User Guide Version 2.0 are applicable for all exchanges, including correction reports, until 31 January 2021. The CRS XML Schema Version 2.0. and User Guide Version 3.0 will apply for all DAC2-CRS reports, including correction reports, from 1 February 2021 onwards.

To facilitate the migration to Schema Version 2.0, Revenue's electronic filing system on ROS for DAC2-CRS will be unavailable from midnight on 15 January 2021 until 31 January 2021. The DAC2-CRS filing system will reopen on 1 February 2021.

No. 224 DWT: Obligation on certain persons to obtain tax reference numbers

Revenue's "Dividend Withholding Tax (DWT) – Details of Scheme" manual has been updated to clarify that the obligation in s172BA TCA 1997 to obtain tax reference numbers in respect of relevant distributions made on or after 1 January 2021 is currently suspended.

No. 225 Guidance Manual on Customs Simplified Procedures

Revenue's manual "A Guide to Customs Simplified Procedures" has been revised to provide updated information on the simplified procedures based on the Union Customs Code (UCC) and to incorporate changes arising from the introduction of the new Automated Import System (AIS) on 23 November 2020.

No. 226 Large Corporates Division: Co-Operative Compliance Framework

Revenue has published a "Large Corporates Division: Co-Operative Compliance Framework" manual containing general information on the procedures and operation of the Co-operative Compliance Framework (CCF) by the Large Corporates Division (LCD). This manual is effective from 18 December 2020.

No. 227 VAT Treatment of Guest and Holiday Accommodation

Revenue has published a new manual titled "VAT Treatment of Guest and Holiday Accommodation". Revenue has also updated three manuals, " Emergency Accommodation and Ancillary Services", "Letting of immovable goods" and "Cancellation of a holiday home election", to improve readability and to reflect new guidance issued in relation to guest and holiday accommodation.

No. 228 EU mandatory disclosure regime (DAC6) – Updates to XSD file and User Guide

Revenue made the following updates to the "DAC6 XSD file" and "DAC6 XSD User Guide":

- The "DAC6 XSD file" has been amended so that the DisclosureID field will not be mandatory where a DisclosureID has not been issued previously, whether by Revenue or the Competent Authority of another Member State.
- The "DAC6 User Guide" has been amended to clarify that Revenue will issue an ArrangementID and/or DisclosureID for each filing where an ArrangementID and/or DisclosureID has not been issued previously.
- Where a DAC6 Return is filed by uploading an XML file, the submission should be

filed using the updated "DAC6 XSD file" (converted to an XML file).

The "DAC6 XSD file" and "DAC6 XSD User Guide" are available on the Revenue website.

No. 229 Relief for investment in corporate trades

Revenue's manual "Relief for investment in corporate trades" has been updated to reflect changes made by Finance Act 2019 and to incorporate guidance previously set out in the manuals "Relief for Investment in Corporate Trades: Investor Conditions", "The Employment and Investment Incentive (EII) – Relief for Investment in Corporate Trades" and "Startup Refunds for Entrepreneurs (SURE)".

The manual also provides guidance on temporary measures available to companies that may have availed of the EII scheme and for whom the ability to meet the conditions to qualify for the second tranche of relief may be impacted as a result of Covid-19. This is applicable for companies that had share issues in 2017 and/or 2018 and the "relevant period" for those share issues would end in the period from 1 March 2020 to 31 March 2021.

No. 230 VAT – Postponed Accounting

Revenue has updated the "VAT – Postponed Accounting" manual, which provides guidance on the conditions attached to the use of postponed accounting arrangements by accountable persons who import goods into the State. Postponed accounting arrangements may be applied to all imports from all "third countries", including Great Britain (UK not including NI).

No. 231 VAT Treatment of Restaurant and Catering Services

Revenue published a number of new manuals that outline the VAT treatment that takes effect from enactment of Finance Act 2020:

- VAT Treatment of Restaurant and Catering Services,
- Certain Sanitary Products,
- VAT Treatment of Services Relating to Vessels and Aircraft and
- VAT Treatment of Admission to Amusement Parks and Fair Grounds.

The manual "VAT Treatment of Food and Drink supplied by Wholesalers and Retailers" was also updated.

No. 232 Update on certain COVID-19 measures related to personal tax matters

Revenue updated the concessions on its Covid-19 information webpage for the personal tax topics listed below. The updates primarily clarified that the concessions ceased on 31 December 2020 and included further guidance, with examples, on the concession relating to an individual's force majeure presence in the State due to Covid-19.

Personal tax topics updated on Revenue's Covid-19 information webpage include:

- The Statutory Residence Test – COVID-19 force majeure circumstances,
- Taxation of Benefit-in-Kind (BIK),
- Real-time foreign tax credit for Restricted Stock Units (RSUs),
- Share-scheme reporting,
- Special Assignee Relief Programme (SARP),
- Transborder Workers Relief (extended to 2021 in certain conditions),
- Operation of PAYE for foreign employments and Multi-State workers,
- PAYE Dispensation Applications and PAYE Exclusion Orders,
- Scholarship Exemption and
- Exemption in respect of retraining costs as part of a redundancy package.

No. 233 Transfers of assets, other than trading stock, within group (S.617)

The manual "Transfers of Assets, Other Than Trading Stock, Within Group (S.617)" has been updated to remove a Revenue practice in relation to non-resident groups as this was legislated for in Finance Act 2017.

Paragraph 4.5 has been updated to reflect that s617 TCA 1997 was amended by s31 Finance Act 2017 to provide for the application of relief in respect of certain transfers involving non-resident groups from 1 January 2018. As this matter is now dealt with in legislation, the practice of availing of the relief based on a submission to Revenue is now withdrawn and will cease to apply to transfers from 1 January 2021.

No. 234 Finance Act 2020 – VAT Notes for Guidance

Revenue's "Value-Added Tax Notes for Guidance – Finance Act 2020" are now available on the Revenue website.

No. 235 Filing Guidelines for DAC6 (EU Mandatory Disclosure of Reportable Cross-Border Arrangements)

Revenue has created a new manual "Filing Guidelines for DAC6 EU Mandatory Disclosure of Reportable Cross-Border Arrangements" to provide guidance on how to set up a DAC6 reporting obligation and file a DAC6 return on ROS.

No. 236 Research and Development Tax Credit

Revenue's "Research and Development (R&D) Tax Credit" manual has been amended to reflect the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 and to update guidance on plant and machinery in section 5.3, as regards plant and machinery not brought into use for the purposes of the trade within the time limit of the expenditure becoming payable due to delays in the process caused solely by the Covid-19 pandemic.

No. 237 Guidelines for VAT Registration – with Postponed Accounting

Revenue has updated the manual "Guidelines for VAT Registration" to include procedures relating to postponed accounting and reflect the release of a VAT Number Verification facility for domestic-only Irish VAT registrations.

No. 238 EU mandatory disclosure regime (DAC6) tax and duty manual updated

Revenue's "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" manual was updated, and where the updates are material, they are set out in Appendix V. The manual has also been amended to reflect updated guidance relating to Hallmark Category C.

No. 239 Sea-going Naval Personnel Tax Credit

Revenue has a new the manual "Sea-going Naval Personnel Tax Credit", which provides an overview of s472BB TCA 1997, to include the qualifying conditions for the tax credit, the quantum of the credit, together with worked examples.

No. 240 Earned Income Tax Credit

Revenue's "Earned Income Tax Credit" manual has been updated to reflect the change made to the tax credit by Finance Act 2020. The credit available has increased to €1,650 in respect of the year of assessment 2020 and subsequent years.

No. 241 Collection of Customs Debt

Revenue has updated the "Collection of Customs Debt" manual to reflect the changes when entering codes for direct and indirect representation to import declarations in the new AIS system.

No. 242 Customs Procedures – Manuals update

Revenue has updated the following customs procedures manuals to incorporate changes arising from Brexit and the end of the transitional period on 31 December 2020:

- Manual on the Control and Examination of Baggage,

- Customs Import Procedures Manual and
- Customs Export Procedures Manual.

No. 243 Help to Buy (HTB)

Revenue's "Help to Buy (HTB)" manual has been updated to reflect the extension of the enhanced HTB relief to 31 December 2021, as provided in Finance Act 2020, with updated examples.

No. 244 Section 56 Zero-rating of Goods and Services

Revenue's manual "Section 56 Zero-rating of Goods and Services" has been updated to reflect legislative changes to s56 of the VAT Consolidation Act 2010, arising from the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, which came into effect on 1 January 2021.

No. 245 Childcare services relief updated

Revenue's "Childcare Services Relief" manual has been updated to state that where an individual minded children in their own home (i.e. in the home of the children) in accordance with official guidance issued by the HSE on the protection of children from the coronavirus, the individual may still qualify for the relief if they continue to mind the children in their own home on public health grounds while the pandemic persists.

No. 001 Preferential origin – removal of Equatorial Guinea from GSP

Revenue has updated the "Customs Manual on Preferential Origin" to remove Equatorial Guinea from the list of GSP.

No. 002 Stock relief – farming trades updated

Revenue's manual "Stock relief – farming trades" has been updated to include an example showing how to calculate the amount of stock relief due for an accounting period, to explain the meaning of "trading stock" and the type of items that may be included in the stock valuation. The manual also includes legislative provisions for reference and a new section titled "Potential abuse of relief".

No. 003 Guidelines for Agents or Advisors acting on behalf of taxpayers – updated Forms PAYE A1 and A2

Revenue's "Guidelines for Agents or Advisors acting on behalf of taxpayers" have been updated to advise that the client authorisation provided by a signed Form PAYE A1 or A2 remains in force for a maximum period of four years, unless Revenue is formally notified of its cessation by the client or agent earlier than that time. Forms PAYE A1 and A2 have also been updated to reflect this development.

No. 004 COVID-19 measures related to personal tax matters

At the end of December Revenue updated the concessions on its Covid-19 information webpage relating to personal tax matters (as outlined in eBrief No. 232/2020). These updates primarily clarified that the concessions ceased on 31 December 2020 and included further guidance on an individual's force majeure presence in the State due to Covid-19.

Having regard to the current Level 5 public health restrictions, Revenue has reviewed and further updated the concessions relating to benefit-in-kind (BIK) to confirm that these will remain in place for the time being. These relate to:

- BIK on provision of Covid-19 testing,
- BIK on facilitation of flu vaccination,
- BIK on employer-provided vehicles,
- Use of company cars by employees in the motor industry,
- Payment of taxi fares by an employer,
- Small Benefit Exemption and
- BIK on employer-provided accommodation.

Revenue will continue to regularly review all Covid-19 related matters, and if any further measures are considered necessary in the future, published guidance will be updated accordingly.

No. 005 Customs Charges for Official Attendance

Revenue's manual "Customs Charges for Official Attendance at Merchants' Request" has been updated to reflect that, from 1 January 2021, charges for attendance by customs officers shall not be applied, pending a review of this procedure by July 2021.

No. 006 List of Flat-Rate Schedule Expenses

Revenue's manual "List of Flat Rate Schedule E Expenses" is no longer relevant. The list of current flat-rate expenses is available on the Revenue website.

No. 007 eRCT system – re-opening a closed contract

Revenue has updated the manual "Electronic Relevant Contracts Tax System" to include additional screens and guidance on how to reopen a closed contract (where required if a delayed payment is being notified).

No. 008 Extension to filing date for revised VAT Return of Trading Details (RTD)

The VAT Return of Trading Details (RTD) is currently being updated to reflect the temporary change in the VAT rate from 23% to 21% on 1 September 2020. The revised RTD will be available from 10 February 2021, and the filing date of the RTD is being extended to 10 March 2021.

Acts Passed from 1 November 2020 to 22 January 2021

No, 21 Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020

No. 22 Credit Union Restructuring Board (Dissolution) Act 2020

No. 23 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020

No. 24 Health Insurance (Amendment) Act 2020

No. 25 Finance (Miscellaneous Provisions) Act 2020

No. 26 Finance Act 2020

No. 27 Planning and Development, and Residential Tenancies, Act 2020

No. 28 Central Mental Hospital (Relocation) Act 2020

No. 29 Appropriation Act 2020

No. 30 Social Welfare Act 2020

No. 31 Investment Limited Partnerships (Amendment) Act 2020

No. 32 Harassment, Harmful Communications and Related Offences Act 2020

Selected Bills Presented from 1 November 2020 to 22 January 2021

No. 54 Organisation of Working Time (Amendment) (Right to Disconnect) Bill 2020

No. 55 Working from Home (Covid-19) Bill 2020

No. 67 Social Welfare Commission Bill 2020

No. 76 Personal Insolvency (Amendment) Bill 2020

Selected Statutory Instruments Made from 1 November 2020 to 22 January 2021

No. 510 Employment Permits (Amendment) (No. 2) Regulations 2020

No. 524 European Union (Renewable Energy) (Amendment) Regulations 2020

No. 525 European Union (Interchange Fees for Card-based Payment Transactions) (Amendment) Regulations 2020

No. 534 Data Protection Act 2018 (section 60(6)) (Central Bank of Ireland) Regulations 2020

No. 545 Redundancy Payments Act 1967 (Section 12A(2)) (Covid-19) (No. 4) Order 2020

No. 551 Social Welfare (No. 2) Act 2019 (Section 16) (Commencement) Order 2020

No. 557 Social Welfare (Temporary Provisions) Regulations 2020

No. 572 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 15) (Covid-19 Pandemic Unemployment Payment – new band of payment and reference period) Regulations 2020

No. 573 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 16) (Covid-19 Pandemic Unemployment Payment – Ancillary Provisions) Regulations 2020

No. 626 Companies Act 2014 (Fees) Regulations 2020

No. 627 Companies Act 2014 (Forms) Regulations 2020

No. 628 Companies Act 2014 (Form and Content of Documents Delivered to Registrar) Regulations 2020

No. 629 Companies Act 2014 (Section 897) Order 2020

No. 630 Companies (Statutory Audits) Act 2018 (Commencement) Order 2020

No. 631 Companies (Amendment) Act 2019 (Commencement) Order 2020

No. 633 Credit Guarantee (Amendment) Act 2020 (Extension of Guarantee Date) Order 2020

No. 634 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 1) (Commencement) Order 2020

No. 657 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 7) (Commencement) Order 2020

No. 659 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 6) (Commencement) Order 2020

No. 662 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 22) (Commencement) Order 2020

No. 669 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 12) (Commencement) Order 2020

No. 672 Companies Act 2014 (Section 12A(1)) (Covid-19) Order 2020

No. 673 European Union (Tax Dispute Resolution Mechanisms) (Amendment) Regulations 2020

No. 676 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 21) (Commencement) Order 2020

No. 677 European Union (Amendment of Pre-notification of Imports) Regulations 2020

No. 678 Personal Insolvency Act 2012 (Prescribed Fees) (Amendment) Regulations 2020

No. 680 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 5) (Commencement) Order 2020

No. 682 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Construction Products – Market Surveillance) Regulations 2020

No. 687 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 16) (Commencement) Order 2020.

No. 688 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 15) (Commencement) Order 2020

No. 693 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Parts 17, 18, 19 and 20) (Commencement) Order 2020

No. 699 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 14)(Commencement) Order 2020

No. 700 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 2) (Commencement) Order 2020

No. 710 European Union (Capital Requirements) (Amendment) Regulations 2020

No. 711 European Union (Capital Requirements) (No. 2) (Amendment) Regulations 2020

No. 713 European Union (Bank Recovery and Resolution) (Amendment) Regulations 2020

No. 723 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Parts 8, 9, 10 and 11) (Commencement) Order 2020

No. 728 European Union (Withdrawal Agreement) (Citizens' Rights) Regulations 2020

No. 730 Protection of Employees (Employers' Insolvency) Act 1984 (Transfer of Personal Data) Regulations 2020

No. 734 Value-Added Tax Regulations 2010 (Regulation 14A) (Amendment) Regulations 2020

No. 735 Value-Added Tax Regulations 2010 (Regulation 34A) (Amendment) Regulations 2020

No. 736 Value-Added Tax Regulations 2010 (Regulation 15) (Amendment) Regulations 2020

No. 737 Value-Added Tax Regulations 2010 (Regulation 37) (Amendment) Regulations 2020

No. 746 Social Welfare (Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland) Order 2020

No. Financial Provisions (Covid-19) Act 2020 (Commencement) Order 2020

No. 19 Investment Limited Partnerships (Amendment) Act 2020 (Commencement) Order 2021

Determinations of the Tax Appeals Commission Published from 2 November 2020 to 22 January 2021

Content prepared by Tara Duggan, Tax Technical Author, Irish Tax Institute

Case reference	Tax head/topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
175TACD2020[3]	**Domicile Levy**	Appeal against an assessment to the domicile levy on the basis that the appellant was not a "relevant individual" liable to the domicile levy Section 531AA TCA 1997	No
176TACD2020[3]	**Domicile Levy**	Appeal against assessments to the domicile levy on the basis that the appellant was not a "relevant individual" liable to the domicile levy Section 531AA TCA 1997	Yes
177TACD2020	**Income Tax**	Appeal against assessments to income tax on the basis that the appellant was neither resident nor ordinarily resident in the State and/or carrying on a trade in Ireland during certain years. Section 18 TCA 1997 Sections 818 and 819 TCA 1997	Unknown
178TACD2020	**Customs and Excise**	Appeal against liability to customs duty arising from incorrect claims for refunds under the Inward Processing Drawback system Section 2 European Communities Act 1972 Council Regulation 2658/87 Council Regulation 2913/92 Council Regulation 2454/93	Unknown
179TACD2020	**Income Tax – Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption" Section 195 TCA 1997	Unknown

3 See also article "Direct Tax Cases", in this issue.

180TACD2020	**Income Tax**	Appeal against the denial of a PAYE credit of proprietary directors for unremitted PAYE by a company now in a creditors' voluntary liquidation and subsequent refusal to allow amendment of pre-liquidation returns by persons other than the liquidator Section 997A TCA 1997 Section 959V TCA 1997	Unknown
181TACD2020	**Income Tax – "Rent a Room" Relief**	Refusal of repayment of income tax on the basis that a valid claim for repayment had not been made within the four-year limitation period Section 865 TCA 1997	Unknown
182TACD2020	**VRT**	Valuation of a vehicle for the purposes of ascertaining the open-market selling price in respect of the calculation of vehicle registration tax Section 133 FA 1992 (as amended) Section 146 FA 2001	Unknown
183TACD2020	**Income Tax – Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption" Section 195 TCA 1997	Unknown
184TACD2020	**VRT**	Valuation of a vehicle for the purposes of ascertaining the open-market selling price in respect of the calculation of vehicle registration tax Sections 132 and 133 FA 1992 (as amended)	Unknown
185TACD2020[3]	**CGT**	Appeal against assessments to CGT in relation to a payment received from a non-resident discretionary trust Section 579A TCA 1997 Section 590 TCA 1997 Section 956 TCA 1997	Yes

186TACD2020	**VRT**	Valuation of a vehicle for the purposes of ascertaining the open-market selling price in respect of the calculation of vehicle registration tax Section 133 FA 1992 (as amended) Section 141 FA 1992 (as amended) Section 146 FA 2001 (as amended)	Unknown
187TACD2020	**Mandatory E-filing Exemption**	Appeal against the denial of an exclusion from the Mandatory Electronic Requirements to file returns and make payments electronically Section 917EA TCA 1997 SI No. 223 of 2011	Unknown
188TACD2020	**Income Tax**	Appeal against assessment to income tax Chapter 5 of Part 41A TCA 1997	Unknown
189TACD2020	**Income Tax**	Refusal of repayment of income tax on the basis that a valid claim for repayment had not been made within the four-year limitation period Section 865 TCA 1997	Unknown
190TACD2020[3]	**Corporation Tax**	Appeal against a surcharge imposed for the late filing of financial statements via electronic means known as iXBRL Section 884 TCA 1997 Section 959I TCA 1997 Section 1084 TCA 1997	Unknown
191TACD2020	**Income Tax**	Refusal of repayment of income tax on the basis that a valid claim for repayment had not been made within the four-year limitation period Section 865 TCA 1997	Unknown
01TACD2021	**CGT**	Appeal of an assessment to CGT on the basis that the appellant never received the proceeds of the disposed asset that triggered the liability to CGT Sections 28, 29 and 31 TCA 1997 Section 532 TCA 1997	Unknown

02TACD2021	**Customs & Excise**	Appeal against the refusal to refund Inward Processing Drawback Claims Articles 236(2) and 239 of the Customs Code 1992 Article 521 of the Implementing Regulation	No
03TACD2021	**CGT**	Appeal against the refusal of a claim that a dwelling-house was the sole residence of a dependent relative qualifying for relief on the disposal of a principal private residence Section 604 TCA 1997	Unknown
04TACD2021	**Income Tax**	Appeal against assessments to income tax raised against the appellant Section 18(2) TCA 1997 Section 926 TCA 1997	Yes
05TACD2021	**Income Tax**	Appeal against the denial of relief from income tax in respect of maintenance payments to the appellant's children Section 1025 TCA 1997	Unknown
06TACD2021	**VAT**	Appeal against the refusal to issue a refund of VAT in respect of the purchase of a motor vehicle for use in the appellant's partnership trade Section 59 VATCA 2010 Section 66 VATCA 2010 Section 76 VATCA 2010 Section 120 VATCA 2010 SI No. 639 of 2010	Unknown
07TACD2021	**Income Tax**	Appeal against the refusal to grant tax relief for a once-off pension contribution made to an employer's occupational pension scheme against income of a prior year of assessment in which the appellant was not in receipt of reckonable earnings Section 770 TCA 1997 Section 774 TCA 1997	Unknown

08TACD2021	**Stamp duty**	Appeal against an assessment to stamp duty on a share cancellation scheme where the acquisition agreement was entered into before the introduction of the domestic charging provision Section 31D SDCA 1999	Yes
09TACD2021	**Income Tax**	Appeal against the withdrawal of the joint basis of assessment in circumstances where the taxpayer was legally married but separated and living apart from his spouse for the relevant years of assessment Section 461 TCA 1997 Sections 1015–1018 TCA 1997	No
10TACD2021	**CGT**	Appeal relating to the creation of a settlement in circumstances where property was conveyed subject to a "full right of residence of and occupation" reserved in favour of the transferor for his lifetime Section 5 TCA 1997 Section 10 TCA 1997 Sections 28 and 29 TCA 1997 Sections 575 and 576 TCA 1997	Yes
11TACD2021[3]	**Income Tax**	Refusal to allow relief from income tax for gifts made to the State Section 19 TCA 1997 Section 112 TCA 1997 Section 483 TCA 1997	No
12TACD2021	**Income Tax**	Appeal against the withdrawal of the joint basis of assessment in circumstances where the taxpayer was legally married but separated and living apart from his spouse for the relevant years of assessment Section 461 TCA 1997 Sections 1015, 1017 and 1019 TCA 1997	No

13TACD2021	**Income Tax**	Appeal against the withdrawal of the joint basis of assessment in circumstances where the taxpayer was legally married but separated and living apart from his spouse for the relevant years of assessment Section 461 TCA 1997 Sections 1015, 1017, 1018 and 1019 TCA 1997 Sections 1025–1026 TCA 1997	Unknown
14TACD2021	**Income Tax & CGT**	Appeal against assessments to income tax and CGT based on Revenue estimates	Yes

Direct Tax Cases: Decisions from Irish High Court and Tax Appeals Commission Determinations

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Tax Appeals Commission Determinations

01	**Legitimate Expectation – Judicial Review**	High Court
02	**Domicile Levy – Meaning of "World-wide Income" and "Income Tax"**	Tax Appeals Commission
03	**CGT – Time Limits, Impermissible Pleading**	Tax Appeals Commission
04	**Corporation Tax – Late Filing of iXBRL Statements – Appeal Against Surcharge as an Appealable Matter**	Tax Appeals Commission
05	**Income Tax – Forgoing Income – Gifts to the State**	Tax Appeals Commission

01 Legitimate Expectation – Judicial Review

The case of ***Perrigo Pharma International DAC v The Revenue Commissioners and Others*** [2020] 552 IEHC concerned the validity of a notice of amended assessment issued by Revenue. Revenue contended that a transaction that had been treated as part of the trade of the applicant for the purposes of its corporation tax returns should have been treated as a capital transaction. The transaction in question involved the sale of interests in intellectual property (IP).

The applicant challenged the validity of the assessment based on the grounds that it was (a) in breach of the applicant's legitimate expectations, (b) so unfair as to amount to an abuse of power and (c) amounted to an unjust attack on its constitutionally protected property rights.

The applicant contended that the assessment was a breach of its legitimate expectations on the basis of three categories of representation:

- the receipt of a "Shannon Certificate" by the Minister for Finance represented that the disposals of IP were trading in nature and so were covered by that special tax regime;
- Revenue *Tax Briefing*, Issue 57 (October 2004) ("TB 57") represented that trading activities already meeting the requirements of the Shannon special tax regime would qualify for the 12.5% tax rate when that tax regime came to an end; and
- a representation arose as a consequence of the course of dealings between the parties. The financial statements were submitted

with the tax returns and showed that IP was treated as trading stock. They suggested that Revenue had declared itself satisfied with the contents of the tax return as it had not amended the assessment previously.

The applicant also submitted that the issuance of the assessment was an unjust exercise of Revenue's discretion and was considered an unjust attack.

The court determined that the Shannon Certificate was clear in that the operations of the certificate holder were not automatically taken as being trading in nature. In terms of TB 57, the court determined that Revenue was not representing that any activity carried on by the holder of the Shannon Certificate would be treated as trading. The court did not accept the argument that a representation arose as a consequence of the course of dealings between the parties, because the non-objection of Revenue should not imply that the ongoing transactions would not be subject to the possibility of an adverse assessment, as every taxpayer faces the prospect of their tax return being reopened and inspected within the relevant four-year period. Therefore, the applicant could not ground a claim for legitimate expectation. Furthermore, the court found no grounds to say that Revenue must have known that the IP disposals formed part of the applicant's trade.

The applicant therefore failed to establish that there was anything in the course of dealings between the parties that would make it unfair for Revenue to exercise its statutory powers to issue an amended assessment.

The court determined that, as the applicant failed to establish a basis for either legitimate expectation or the abuse of power, the argument based on the Constitution must also fail. Accordingly, the court concluded that the applicant failed to establish a basis to interfere with the assessment issued in respect of the disposal of IP, and so the claim was dismissed.

02 Domicile Levy – Meaning of "World-wide Income" and "Income Tax"

Tax appeals **175TACD2020** and **176TACD2020** both relate to liability to the domicile levy. Where, in a tax year, the "world-wide income" of an Irish-domiciled citizen exceeds €1m and, *inter alia*, their "liability to income tax" is less than €200,000, they are potentially liable to the domicile levy provided for in Part 18C TCA 1997. In both of these appeals the Appeal Commissioner considered the meaning of "world-wide income" for this purpose and whether losses that are deductible under s381 TCA 1997 are to be taken into account in arriving at the amount of "world-wide income" for this purpose.

"World-wide income" is defined in s531AA TCA 1997 as meaning "the individual's income, without regard to any amount deductible from or deductible in computing total income...". This general prohibition and the clause that follows it are then followed by the word "and", which prohibits the inclusion of a series of specific deductions set out in sub-sections (a)(i)–(v). The appellants submitted that because s381 losses were not expressly prohibited by sub-section (a) they should be allowable in computing world-wide income. Revenue submitted that a deduction pursuant to s381 was a deduction in computing total income and, as such, was excluded from the calculation of "world-wide income" in accordance with s531AA.

The Appeal Commissioner concluded that sub-section (a) is an addition to the general statutory prohibition on amounts "deductible from or deductible in computing total income". The absence of an express reference to s381 in sub-section (a) does not therefore mean that a s381 deduction may be taken in computing the quantum of "world-wide income" for the purposes of the domicile levy.

The question of whether the universal social charge (USC) is "income tax" was also addressed in assessing whether the taxpayers' "liability to income tax" in certain tax years exceeded €200,000. The appellant submitted that, based on the dictionary definition, the expression "income tax" should be construed as a tax on income. Revenue submitted that the USC is a tax on income but is not "income tax".

The Appeal Commissioner concluded that the expression "income tax" should not be construed to mean a tax on income. Income tax is a creation of statute and is contained in the income tax code. A separate tax on income, titled "universal social charge", is contained in Part 18D TCA 1997. Although both are taxes on income, they are separate and distinct taxes. The Appeal Commissioner therefore determined that the domicile levy assessments raised shall stand.

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of the determination 176TACD2020. No such request was stated to have been made in relation to the determination in 175TAC2020.

03 CGT – Time Limits, Impermissible Pleading

Tax appeal **185TACD2020** concerned assessments to capital gains tax (CGT) in relation to an appointment of €1.1m made to the appellant from a non-resident discretionary trust of which he was a beneficiary. The payment was ultimately funded out of proceeds of a sale of shares by a company held by the discretionary trust. The appellant received the payment from the trust on 7 April 1999. The appellant did not include the payment in his tax returns for the years ended 5 April 1999 or 5 April 2000, nor did he pay tax on same.

In 2014, pursuant to proceedings in accordance with s908 TCA 1997, under High Court Orders obtained by Revenue, it was furnished with details of the payment of €1.1m received by the appellant. In 2016, after a period of correspondence with the appellant, Revenue raised two assessments to CGT, one in respect of the tax year ended 5 April 1999 and an alternative assessment under ss590 and 579A TCA 1997 in respect of the tax year ended 5 April 2000.

Impermissible pleading – dual assessments

As a preliminary point, the appellant submitted that Revenue's case, which was based on the two assessments (the second of which was raised on an alternative basis to the first), contained impermissible pleading contrary to the rules in relation to such pleadings as discussed in *IBB Internet services Ltd and others v Motorola* [2011] IEHC 253.

The position taken by the Appeal Commissioner on this point was that a hearing before the TAC is not a plenary hearing and the scope of the jurisdiction of an Appeal Commissioner is confined to determining the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner. The onus of proof is on the appellant to demonstrate that he is not liable to CGT on the payment received.

Application of ss955 and 956

The appellant argued that Revenue, in making enquiries or taking actions outside the statutory limitation period, was statute barred from so doing in accordance with s956 TCA 1997. It was submitted that the appellant had not engaged in negligent conduct, nor had he been negligent in the preparation of his tax returns, as he had relied on the advice of his tax agent and on assurances of a fellow beneficiary, who had obtained legal advice that the payment was not subject to tax and that there was no requirement to include details of the payment in his tax return.

The Appeal Commissioner held that the High Court proceedings pursuant to s908 TCA 1997 did not constitute the making of enquiries by the Inspector for the purposes of s956(1)(b)(i) TCA 1997. The information on the payment of €1.1m received on foot of the Orders and the non-inclusion of that payment in the appellant's returns meant that the Inspector had, at the time of raising the enquiries, "reasonable grounds for believing that the return [was] insufficient due to its having been completed in a… negligent manner" for the purposes of s956(1)(c) TCA 1997.

In addressing Revenue's right to raise assessments outside of the statutory time limits, in light of the appellant's failure to disclose the payment received, the Appeal Commissioner was satisfied that the return did not contain "a full and true disclosure of the facts" in accordance with s955(2)(b)(i) TCA 1997. Revenue was not therefore precluded from raising the assessment.

Turning to the assessments, the first assessment was raised on the basis that the appellant was the beneficial owner of the shares disposed of by the company held by the discretionary trust and that the payment represented the proceeds of the disposal of the appellant's shareholding. The Appeal Commissioner determined that there was insufficient evidence to allow this assessment to stand.

On the second assessment, the Appeal Commissioner held that the provisions of ss590 and 579A TCA 1997 apply. In accordance with these provisions, the chargeable gain realised on the disposal of the shares is attributable to the trustees and the capital payment received by the appellant is subject to CGT for the tax ended 5 April 2000. As a result, the second assessment was allowed to stand.

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of the above determination.

04 Corporation Tax – Late Filing of iXBRL Statements – Appeal Against Surcharge as an Appealable Matter

Tax appeal **190TACD2020** concerned a surcharge for late filing of financial statements via electronic means known as iXBRL. Certain companies have a mandatory requirement to file electronic financial statements ("iXBRL statements") together with their CT1 return in order to deliver a complete tax return. Revenue deems iXBRL statements that are filed within three months of the specified return date to have been filed on time. If filed late, a 10% surcharge on the corporation tax liability applies under s1084(2)(a)(ii) TCA 1997, subject to a maximum amount of €63,485.

The appellant's CT1 return for the tax year ended 30 September 2018 was filed on time. However, the iXBRL statements were not filed until 28 February 2020, after receipt of a letter from Revenue requesting their submission as part of a compliance review. Revenue then issued an amended assessment to corporation tax for the year ended 30 September 2018 seeking additional tax of €63,485.

The appellant submitted that, on the day on which the CT1 return was filed, a member of staff had attempted to upload the iXBRL statements to ROS. Not realising that there was an issue, the staff member had not retained any record of having attempted to submit the statements. The appellant contended that Revenue had failed to notify it at the time that the submission of the iXBRL accounts had been unsuccessful.

Revenue submitted that, when uploading iXBRL statements, the system returns a message in the case of successful filing or an error message if the filing is unsuccessful. However, the appellant had not put forward any evidence to indicate that it had received either message.

Revenue also contended that there is no provision in s1084 TCA 1997 for an appeal against the application of the surcharge. Therefore the appeal was not valid. However, the Appeal Commissioner considered the appeal as having been made in relation to an appealable matter and therefore constituting a valid appeal.

The Appeal Commissioner concluded that the appellant is a significant business and ought to be aware of the consequences of failing to file its iXBRL statements, in the same way as it was aware of its obligations to file its CT1 return and pay the appropriate tax arising. Accordingly, the Appeal Commissioner determined that Revenue was correct in making an assessment for additional tax as a surcharge in accordance with s1084(2)(a)(ii) TCA 1997.

It is not known if the Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of the above determination.

05 Income Tax – Forgoing Income – Gifts to the State

Tax appeal **11TACD2021** concerned a claim for relief for gifts made to the State pursuant to s483 TCA 1997. The appellant asserted that the act of foregoing his entitlement to his ministerial pension constituted a "gift of money made to the Minister for Finance for use for any purpose for or towards the cost of which public moneys are provided" and that he was therefore entitled to claim relief under s483 against his other income.

Revenue disagreed with the appellant's interpretation and raised an assessment taxing the appellant's full pension, including the foregone pension, and granted corresponding relief for the gift in accordance with s483. Revenue submitted that the appellant was seeking to procure a double benefit by removing foregone pension from the charge to tax while seeking to claim relief for that loss of income against his other income.

The Appeal Commissioner determined that the appellant had foregone his pension for the period. As a consequence, the appellant had no legal claim to the pension foregone for the period in question and could not therefore be assessed to tax on the element of pension foregone as no pension was "payable" to him. In this regard, the appellant was held to have disposed of his right to a future pension stream as opposed to having made a contemporaneous "gift of money" for s483 purposes.

The assessments to tax were therefore amended to exclude the element of pension foregone and to deny the entitlement to relief pursuant to s483.

The Tax Appeals Commission has not been requested to state and sign a case for the opinion of the High Court in respect of the determination.

 

Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**CGT – "Ordinary Share Capital" and Cumulative Preference Shares**	UK Upper Tribunal
02	**Income Tax – Transfer of Assets Abroad**	UK Upper Tribunal
03	**Inheritance Tax – "Wholly or Mainly" Test for Business Property Relief**	UK First-tier Tribunal
04	**Income Tax – Travelling Expenses**	UK First-tier Tribunal
05	**Corporation Tax – Corporate Residency**	England and Wales Court of Appeal
06	**Freedom of Establishment – Swedish Interest Deduction Limitation Rules**	CJEU
07	**Permanent Establishment – Decision of the French Courts**	French Administrative Supreme Court

01 CGT – "Ordinary Share Capital" and Cumulative Preference Shares

In ***HMRC v S Warshaw*** [2020] UKUT 366 the UK Upper Tribunal endorsed the decision of the First-tier Tribunal and found that cumulative fixed-rate preference shares were "ordinary share capital" for the purposes of entrepreneur relief and capital gains tax. The First-tier Tribunal decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 32/3 (2019).

The taxpayer had applied entrepreneurs' relief on a share disposal. HMRC rejected the claim. The sole issue in the appeal, as it was before the First-tier Tribunal, was whether the preference shares carried a "right to a dividend at a fixed rate". If the answer was in the affirmative, then the preference shares were excluded from the definition of "ordinary share capital", and the taxpayer was not entitled to entrepreneurs' relief. If, as the First-tier Tribunal determined, the answer was negative, the contrary consequences would ensue, and HMRC's appeal would fail. In this regard, the definition of "ordinary share capital" that was examined by the Tribunal is largely similar to the definition of “ordinary share capital” found in s2 TCA 1997.

The shares in question were 10% cumulative preference shares. Under the company’s constitution, the dividends were cumulative and were computed on a compound basis. This characteristic meant that if the company had inadequate profits in a certain year, payment was pushed out to a future year. This meant that the 10% dividends would ultimately be paid on an increased amount (the aggregate of the subscription price and the unpaid dividends).

The Upper Tribunal rejected HMRC’s appeal, agreeing with the First-tier Tribunal that the preference shares did not carry a right to a dividend at a fixed rate. The Upper Tribunal determined that the rate must be fixed not just as a percentage but also as to the amount to which it is applied to. The compounding nature of the shares in question in the case meant that the 10% rate was applied to a differing amount. These rights, which were accorded to the shares in the Articles of Association, meant that the shares were considered to be “ordinary share capital”.

02 Income Tax – Transfer of Assets Abroad

In ***HMRC v Rialas*** [2020] UKUT 367 the UK Upper Tribunal determined that there was no income tax charge under the transfer of assets abroad rules where the taxpayer had made arrangements to allow the transfer of shares that belonged to his business partner to a non-resident company that was controlled by a trust of which he was a beneficiary. The legislation analysed in the case is the UK equivalent of s806 TCA 1997.

At all material times for the purposes of this appeal, the taxpayer was resident but not domiciled in the UK. He was a shareholder in a UK trading company. Relations with his business partner and fellow shareholder soured. Subsequently, the taxpayer established an offshore discretionary trust in Cyprus and incorporated a new company, which was controlled by the trust. The newly incorporated company was, at all times, tax resident outside the UK. The taxpayer and his family were the beneficiaries of the trust. External finance was raised by the newly incorporated company, which then purchased the business partner’s shares at full market value. Dividends were paid up from the UK-resident trading company to the newly incorporated, non-UK tax resident company.

HMRC assessed the taxpayer to income tax on the dividends received by the non-UK tax resident company during its ownership of shares in the UK trading company, on the basis that (i) the taxpayer was the transferor of assets abroad (or had procured the transfer) that resulted in dividends being received by a person abroad; and (ii) the taxpayer had the ability to enjoy that income (via the trust).

The Upper Tribunal found that the taxpayer neither transferred the shares to the newly incorporated company nor procured that transfer. Put simply, he had no power over the business partner as to his decision to sell or to whom he should sell his shares to.

HMRC appealed to the Upper Tribunal on grounds that the taxpayer facilitated, by way of arrangement, the transfer of assets abroad. HMRC also appealed the First-tier Tribunal’s decision that the UK equivalent of s806 TCA 1997 infringed the taxpayer’s EU law rights to free movement of capital.

Rejecting HMRC’s appeal, the Upper Tribunal held that the taxpayer was in no way responsible for the transfer of the shares by his former business partner. Furthermore, and relying on the authority of *Fisher and others v HMRC* [2020] UKUT 62, the Upper Tribunal determined that the taxpayer should not be treated as if he, himself, had carried out that transfer, based on his inability to “influence” the vendor.

Having rejected the substantive appeal, the Upper Tribunal decided not to consider the free movement of capital argument.

03 Inheritance Tax – "Wholly or Mainly" Test for Business Property Relief

In ***Executors of the late Sheriff G L Cox v HMRC*** [2020] UKFTT 442 (TC) the First-tier Tribunal had to consider whether a holiday letting activity qualified for business property relief or was a business of making and holding investments. The *Cox* case is the latest in a long line of cases that have considered this matter – see, for example, the decision in *Maureen Vigne v HMRC* [2017] UKFTT 632 (TC), as reviewed in "Direct Tax Cases", *Irish Tax Review*, 30/4 (2017).

In the present case, the taxpayer argued that the property was eligible for business property relief on inheritance, whereas HMRC disagreed and contended that the property was used in a business that consisted "wholly or mainly of... making or holding investments". The taxpayer submitted that holiday-makers benefited not merely from the accommodation but also from many other services. These included the use of gardens, laundry, book lending, dog-sitting, babysitting, therapies, sports equipment, tennis courts, golf, an arts festival, and specially arranged restaurant visits and picnics. In this regard, the taxpayer attempted to categorise the holiday letting activity as akin to a hotel, in terms of the provision of services.

HMRC disagreed with the taxpayer's argument and stated that the activities listed were "just normal holiday activities that are possible at most holiday accommodation and were not provided by the business", with the consequence that any comparisons to a suite in an exclusive hotel were inappropriate.

When faced with a lack of objective evidence to substantiate the taxpayer's assertions, the First-tier Tribunal agreed with HMRC, and it found nothing exceptional about the business to elevate it beyond the designation of an investment activity.

04 Income Tax – Travelling Expenses

The entitlement to a deduction for travel and subsistence was recently considered in the case of ***Hamish Taylor v HMRC*** [2020] UKFTT 416 (TC). The taxpayer claimed expenses relating to travel between his home in Melrose, Scotland, and a hotel in Swindon in his income tax return.

The taxpayer had chosen Swindon to be his base to undertake work at various sites as there was better remuneration on offer in the area. Put slightly differently, the taxpayer lived in Melrose but chose to carry out his trade primarily at sites around Swindon. However, the taxpayer had to work long days and arranged local accommodation in Swindon. Ultimately, the taxpayer claimed deductions for his travel expenses from Scotland and his Swindon accommodation expenses.

However, the HMRC rejected the expenses claim, on the basis that the expenses were not incurred "'wholly and exclusively" for the purposes of his trade. To support his argument, the taxpayer cited the case of *Horton v Young* [1971] 47 TC 60, which involved the taxpayer working as a sub-contractor bricklayer at various building sites within 55 miles of his home. HMRC distinguished the *Horton* case and argued that the taxpayer operated out of Swindon, not his home address in Melrose. Therefore, the travel between Melrose and Swindon and accommodation in Swindon were not wholly and exclusively incurred. The taxpayer had just chosen Swindon as a convenient base for his work at different sites.

The First-tier Tribunal found in favour of HMRC. The taxpayer had decided to stay in Swindon to increase the opportunity of securing higher pay and to reduce his journey time from Melrose.

05 Corporation Tax – Corporate Residency

In December 2020 the England and Wales Court of Appeal delivered its decision in ***HMRC v Development Securities plc and others*** [2020] EWCA Civ. 1705. The judgment considers the issue of whether a non-UK-incorporated company is centrally managed and controlled from the UK, such that it becomes a UK tax resident company. The Upper Tribunal decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 32/3 (2019).

The judgment upholds HMRC's appeal and affirms the decision of the First-tier Tribunal (FTT). The FTT's decision was that the board of directors of a number of Jersey-incorporated companies did not exercise central management and control but had instead followed the instructions of the UK parent company. It was, therefore, considered UK tax resident. The FTT decision defeated some tax planning by the taxpayer companies, which relied on the Jersey companies being considered non-UK resident.

As in Ireland, a company can be "resident" in the UK for corporation tax if it is non-UK incorporated and is "centrally managed and controlled" in the UK – the point on "central management and control" being a question of fact. The Court of Appeal decision clarifies that the correct starting point for considering where a company is tax resident is *De Beers Consolidated Mines v Howe (Surveyor of Taxes)* [1906] 5 TC 198. In that case, the House of Lords set out the test for corporate residence as being where the central management and control (or the "real business") of a company takes place as a matter of fact and not as determined by a company's constitutional documents.

Although the Upper Tribunal restored the FTT's decision, the Court of Appeal judgment is restricted in scope, in that it merely determines that the reasons the Upper Tribunal had for overturning the FTT's decision were incorrect. It was held that the Upper Tribunal had misunderstood the FTT's basis for its conclusion. The Upper Tribunal stated that the FTT's decision was based on what it found to be the uncommercial nature of the transactions. This was held not to be the case. In this regard, the Court of Appeal decision does not necessarily endorse the FTT decision. In fact, out of the three judgments given in the Court of Appeal decision, only one suggests that the FTT was right to find that the subsidiaries were UK tax resident.

It remains to be seen whether there will be a further appeal to the Supreme Court.

06 Freedom of Establishment – Swedish Interest Deduction Limitation Rules

In ***Lexel AB v Skatteverket*** C-484/19 the Court of Justice of the European Union (CJEU) delivered a judgment holding that an anti-abuse provision in the Swedish interest deduction limitation rules was contrary to the EU freedom of establishment. These rules were applicable from 2013 to 2018.

The taxpayer, a Swedish company, was part of a French group. In 2011 the taxpayer acquired the shares of a Belgian company, which were disposed of by a Spanish member of the group. The acquisition was financed by intra-group debt (French FinCo). The Swedish taxpayer claimed a deduction for the interest, and the French FinCo offset losses against the interest income received. The Swedish tax authorities rejected the interest deduction on the basis of a domestic anti-abuse rule that applies where the main reason for the borrowing was to generate significant tax benefits for the group.

The CJEU immediately noted that if the lender had been Swedish tax resident, then the interest payments would have been deductible. The Swedish rules, therefore, provided for a difference in treatment, which infringed the freedom of establishment principle in Article 49 of the Treaty on the Functioning of the European Union. Referring to the non-artificial nature of the transaction at hand, and the lack of preciseness of the anti-abuse rule in targeting wholly artificial arrangements, the CJEU found that the difference in treatment could not be justified. Therefore, the Swedish rules were held to be contrary to the freedom of establishment principle.

07 Permanent Establishment – Decision of the French Courts

In a judgment dated 11 December 2020 (no. 420174), the French Administrative Supreme Court (Conseil d'Etat) rejected the decision of the Paris Administrative Court of Appeal in the "***Valueclick***" case and found that an Irish company operating in the digital economy sector had a permanent establishment in France and was therefore subject to French corporate income tax.

The Conseil d'Etat was required to adjudicate on France's taxing rights on Valueclick International, a Irish tax resident company. Valueclick International, a wholly owned Irish subsidiary of a US company, carried on business in France through a group company with which it had entered into an intra-group services contract. Further to this agreement, the French group company, Valueclick France, provided the Irish company with marketing services for the distribution in France of the group's various products, together with administrative and back-office services, *inter alia*, in return for payment.

The French tax authorities argued that Valueclick France was acting either as a fixed place of business or as a dependent agent of Valueclick International within the meaning of the France–Ireland double taxation treaty (DTT). The court considered the France–Ireland DTT and determined that a French entity should be considered a dependent agent habitually exercising "the authority to conclude contracts" in the name of a foreign entity if the transactions, even though they are not formally concluded by the French entity in the name of the foreign entity, are habitually decided by the French entity and are merely approved, on a routine basis.

Although the lower court had found that there was no French permanent establishment on the grounds that the Irish company signed the contracts with the French clients, the Supreme Court, applying the above logic, observed that Valueclick International merely validated the contract by a signature, which was automatic in nature. Therefore, Valueclick International, an Irish company, had a permanent establishment in France.

However, it is worth noting that the French Supreme Court explicitly based its decision on OECD Commentary dating to after the signing of the 1968 France–Ireland DTT (see paragraphs 32.1 and 33, published on 28 January 2003 and 15 January 2005). This represents a change in the interpretation of DTTs in French case law, from a static interpretative approach to a dynamic interpretative approach.

Compliance Deadlines

Helen Byrne
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General

Apr 7	Under mandatory reporting rules, promoters of certain transactions may be required to submit quarterly "client lists" in respect of disclosed transactions made available in the relevant quarter. Any quarterly returns for the period to 31 March 2021 are due on 7 April.
Apr 30	Due date for DAC 6 periodic report on marketable securities. Stay and Spend credit scheduled to expire. Due date for submission to Revenue of returns of debit and credit card transactions (by merchant acquirers) for the year 2020.
May 1	Carbon tax increase on solid fuels.
Jun 30	Deadline for FATCA and CRS reporting obligations for 2020. Claims under the VAT compensation schemes for charities for VAT paid on expenditure in 2020 must be submitted by 30 June 2021.

Relevant Dates for Companies

Apr 14	Dividend withholding tax return filing and payment date (for distributions made in March 2021).
Apr 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 May 2021. If this is paid using ROS, this date is extended to 23 April 2021. Due date for payment of initial instalments of preliminary tax for companies (not of "small" companies) with a financial year ending on 31 October 2021. If this is paid using ROS, this date is extended to 23 April 2021.
Apr 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 July 2020 if filed using ROS (otherwise, 21 April 2021). Certain elections, including the close company election contained in s434 TCA 1997 regarding the treatment of dividends/distributions, are required to be included with the return. (Subject to special Covid-19 measures.[1]) Due date for any balancing payment in respect of the same accounting period. Loans advanced to participators in a close company in the year ended on 31 July 2020 may need to be repaid by 23 April 2021 to avoid the assessment (on the company) of income tax thereon. A concessional three-month filing extension for iXBRL financial statements (**not** Form CT1) may apply. For 30 April 2020 year-ends, this should extend the iXBRL deadline to 23 April 2021. (Subject to special Covid-19 measures.[1])
Apr 30	Last date for filing third-party payments return 46G for companies with a financial year ended on 31 July 2020. Latest date for payment of dividends for the period ended on 31 October 2019 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only). (Subject to special Covid-19 measures.[2]) CbC reporting notifications relating to the fiscal year ending on 30 April 2021 must be made to Revenue (where necessary) no later than 30 April 2021, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 30 April 2020 must be filed with Revenue (where necessary) no later than 30 April 2021. Covid-19 interim corporation tax loss relief claims for losses in the year ended on 30 November 2020 must be made by 30 April 2021.

May 14	Dividend withholding tax return filing and payment date (for distributions made in April 2021).
May 21	Due date for payment of preliminary tax for companies with a financial year ending on 30 June 2021. If this is paid using ROS (otherwise, 21 May 2021), this date is extended to 23 May 2021. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 30 November 2021. If this is paid using ROS, this date is extended to 23 May 2021.
May 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 August 2020 if filed using ROS. Certain elections, including the close company election contained in s434 TCA 1997 regarding the treatment of dividends/distributions, are required to be included with the return. (Subject to special Covid-19 measures.[1]) Due date for any balancing payment in respect of the same accounting period. Loans advanced to participators in a close company in the year ended on 31 August 2020 may need to be repaid by 23 May 2021 to avoid the assessment (on the company) of income tax thereon. A concessional three-month filing extension for iXBRL financial statements (**not** Form CT1) may apply. For 31 May 2020 year-ends, this should extend the iXBRL deadline to 23 May 2021. (Subject to special Covid-19 measures.[1])
May 31	Last date for filing third-party payments return 46G for companies with a financial year ended on 31 August 2020. Latest date for payment of dividends for the period ended on 30 November 2019 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only). (Subject to special Covid-19 measures.[2]) CbC reporting notifications relating to the fiscal year ending on 31 May 2021 must be made to Revenue (where necessary) no later than 31 May 2021, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 31 May 2020 must be filed with Revenue (where necessary) no later than 31 May 2021. Covid-19 interim corporation tax loss relief claims for losses in the year ended on 31 December 2020 must be made by 31 May 2021.

Jun 14	Dividend withholding tax return filing and payment date (for distributions made in May 2021).
Jun 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 July 2021. If this is paid using ROS, this date is extended to 23 June 2021. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 31 December 2021. If this is paid using ROS, this date is extended to 23 June 2021.
Jun 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 30 September 2020 if filed using ROS (otherwise 21 June 2021). Certain elections, including the close company election contained in s434 TCA 1997 regarding the treatment of dividends/distributions, are required to be included with the return. (Subject to special Covid-19 measures.[1]) Due date for any balancing payment in respect of the same accounting period. Loans advanced to participators in a close company in the year ended on 30 September 2020 may need to be repaid by 23 June 2021 to avoid the assessment (on the company) of income tax thereon. A concessional three-month filing extension for iXBRL financial statements (**not** Form CT1) may apply. For 30 June 2020 year-ends, this should extend the iXBRL deadline to 23 June 2021. (Subject to special Covid-19 measures.[1])
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Note 1

At the time of writing, Covid-19 measures provided that the application of a surcharge for late CT1 corporation tax returns and iXBRL financial statements for accounting periods ending from June 2019 onwards (i.e. due by 2 March 2020 onwards) is suspended until further notice.

Note 2

At the time of writing, it was provided that for accounting periods ending from 30 September 2018 onwards, Revenue will, on application, extend this period by a further nine months where a distribution is not made by the due date as a result of Covid-19 circumstances affecting the company.

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International Tax Update

01 Covid-19 Measures

Guidance on transfer pricing implications of Covid-19 pandemic

On 18 December 2020 the OECD released "Guidance on the Transfer Pricing Implications of the COVID-19 Pandemic". The guidance focuses on how the arm's-length principle and the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TP Guidelines") apply to issues that may arise from or be exacerbated by the Covid-19 pandemic. The guidance focuses on four priority issues:

- comparability analysis,
- losses and the allocation of Covid-19-specific costs,

- government assistance programmes and
- advance pricing agreements (APAs).

The guidance recognises the practical challenges for the application of the arm's-length principle as a result of the economic conditions arising from the Covid-19 pandemic and government responses. It is not an expansion of the OECD TP Guidelines but an application of the arm's-length principle.

Businesses will welcome any additional clarity as they seek to apply the transfer pricing rules for 2020 and other financial years affected by the Covid-19 pandemic. However, it remains clear that each situation and transaction is likely to have to be considered and accurately delineated, alongside an assessment of which party bears economically significant risks, in some detail. The guidance sets out the possibility that a limited-risk entity might at arm's length make a loss in some circumstances.

The guidance recommends practical approaches to dealing with the difficulties that will arise in relation to comparability, including the use of comparisons with forecast information and reasonable commercial judgement. These will be helpful as businesses seek to navigate applying transfer pricing rules to Covid-19 periods. In addition, the guidance emphasises the potential need for collaborative and flexible approaches to APAs, both existing and future, recognising many businesses' desire for certainty.

Collecting relevant contemporaneous evidence remains a priority for businesses and will be particularly valuable in preventing or resolving any future disputes.

The OECD TP Guidelines should continue to be relied on when performing a transfer pricing analysis, but it is recognised that, for financial years affected by the Covid-19 pandemic, novel issues may arise and some transfer pricing issues may be intensified. The four priority issues identified should be considered together within the framework of the TP Guidelines in order to find a reasonable estimate of an arm's-length outcome. The guidance represents the consensus view of the 137 countries participating in the G20/OECD Inclusive Framework on BEPS.

OECD guidance on Covid-19: permanent establishments, residence and employment income

The OECD published an updated and expanded version of its guidance looking at the possible effects of Covid-19 on a variety of tax treaty matters. An initial version was published last April as an urgent response to the pandemic, but nine months later the government health responses that caused the initial tax treaty concerns (in particular, travel restrictions affecting the location of employees) have remained widespread. The updated tax treaty matters discussed include permanent establishments, company and individual tax residence, and employment income. The document considers some additional fact patterns not covered previously and also includes samples of relevant national guidance published by tax authorities (including referencing Ireland).

Belgium: Recovery reserve measure adopted by Parliament

On 12 November 2020 the Belgian Parliament approved new tax legislation intended to support economic recovery following the Covid-19 pandemic. The legislation must be published in the Official Gazette and will apply from the tax year 2022 (i.e. companies may start establishing the reserve at the earliest with the results of the financial year ending on 31 December 2021). For one or more of tax years 2022, 2023 and 2024, Belgian companies may exempt profits from tax by allocating the profits to the recovery reserve. This should facilitate the restoration of pre-Covid-19 equity levels.

To benefit from the new provision, companies must establish and maintain the new recovery reserve in their accounts for as long as the exemption is granted. There are certain limitations on the measure's application, and the maximum amount of profit that may be allocated to the reserve is limited to the amount of book losses recorded in the company's financial statements for financial year 2020 (2021 for companies closing their financial years between 1 January 2020 and 31 July 2020), subject to an overall cap of €20m.

Companies recording no book losses for financial year 2020 or 2021 are not eligible for this regime.

Austria: Parliament considers draft Bill on Covid-19 tax measures

Based on a parliamentary initiative, a draft Bill on Covid-19 tax measures (Covid-19-Steuermaßnahmengesetz) was submitted to the Austrian Parliament. The Bill aims to prolong the application of existing measures to support taxpayers during the Covid-19 pandemic and provides for other amendments to tax laws. The key elements of the Bill are:

- the temporary application of a reduced VAT rate of 5% in the gastronomy, culture and publishing sectors shall be extended until 31 December 2021;
- introduction of a VAT exemption for Covid-19 *in vitro* diagnostics and Covid-19 vaccines until the end of 2022;
- application of the reduced VAT rate of 10% to repair services (including repair and modification) relating to bicycles, shoes, leather goods and clothing as from 1 January 2021;
- necessary adjustments to the Austrian VAT Act to reflect the consequences of Brexit after 31 December 2020;
- already granted deferral of taxes and waivers of late interest penalties shall be extended until 31 March 2021;
- the measure that rules on relief for commuting expenses, e.g. lump-sum deduction, travelling tax credit and deduction for commuters, remain fully applicable regardless of the time and days spent at home due to the Covid-19 pandemic shall remain applicable until 31 March 2021; and
- documents or official acts in connection with the Covid-19 pandemic remain exempt from stamp duties.

02 BEPS – Recent Developments

OECD issues Pillar One and Pillar Two Blueprints

On 12 October 2020 the G20/OECD Inclusive Framework on BEPS released two detailed Blueprints in relation to its ongoing work to address the tax challenges arising from the digitalisation of the economy. The Blueprints were presented to the G20 Finance Ministers on 14 October 2020, and work to address the political and remaining technical issues was undertaken. The OECD's aim is to bring the process to a conclusion by mid-2021.

The Pillar One Blueprint sets out "building blocks" for potential future international agreement on rules for taxable presence (nexus) in countries and profit allocation between countries to address tax challenges arising from digitalisation. The Pillar Two Blueprint proposes a set of interlocking international tax rules designed to ensure that large multinational businesses pay a minimum level of tax on all profits in all countries. Both Blueprints set out proposals that do not yet have the political agreement of the Inclusive Framework countries.

On 16 December the OECD published the responses received to its consultation on the Pillar One and Pillar Two Blueprints [see also the article by Anne Gunnell and Lorraine Sheegar in this issue on the Institute's submission]. Moreover, on 14–15 January 2021 the OECD held a two-day virtual public consultation meeting to discuss the Blueprints.

OECD publishes report on taxation of virtual currencies

On 12 October 2020 the OECD announced the release of "Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues", a report prepared for presentation to the G20 Finance Ministers and Central Bank Governors. The report aims to help policy-makers wishing to improve their tax policy frameworks in relation to virtual currencies and it includes key insights and relevant considerations.

The OECD announcement indicates that the report was prepared with the participation of more than 50 jurisdictions and is "the first comprehensive analysis of the approaches and policy gaps across the main tax types (income, consumption and property taxes) for such a large group of countries". It also addresses the tax implications of emerging issues relating to stablecoins, central bank digital currencies, the consensus mechanisms used to maintain blockchain networks, and decentralised finance.

Updates on the Multilateral Instrument

The MLI entered into force in respect of Oman on 1 November 2020 and in respect of Kazakhstan on 1 October 2020.

Jordan deposited its instruments of ratification for the MLI with the OECD on 29 September 2020. The MLI will enter into force in respect of Jordan on 1 January 2021.

Egypt deposited its instrument of ratification for the MLI on 30 September 2020. The MLI will enter into force in respect of Egypt on 1 January 2021.

Germany and Pakistan deposited their instruments of ratification for the MLI on 18 December 2020. The MLI will enter into force for Germany and Pakistan on 1 April 2021.

03 DAC 6

UK DAC 6 changes: HMRC to reduce scope of mandatory reporting in post-Brexit world

HMRC has confirmed that new regulations will amend the current DAC 6 regulations from 31 December 2020. The key impact is the removal of four out of five reporting "hallmarks" from the original Council Directive (EU) 2018/822. This is a much narrower implementation than previously envisaged and one that was not expected.

Hallmark D is the sole survivor. It is concerned with the circumvention of reporting under the OECD Common Reporting Standard and/or obscuring beneficial ownership. Given that the activities covered are generally prohibited under other existing laws, it is not one that is expected to arise widely.

Although on the surface this looks like good news for UK businesses that are already struggling to implement broad rules on a short timeline, there are some drawbacks:

- For UK HQs that had planned to control reporting centrally, reporting will now be a more localised affair, possibly with less clear guidance and exposure to jurisdictional variance.
- UK businesses could remain liable to report in jurisdictions that have implemented rules with an extra-territorial element, e.g. Poland.

In summary, reporting under DAC 6 will still be required for a limited time but only for arrangements that meet hallmarks under category D, in line with the UK's obligations under the free trade agreement. Moreover, in the coming year, the UK will consult on and implement the OECD's mandatory disclosure rules as soon as practicable, to replace DAC 6 and transition from European to international rules.

04 EU Digital Levy

On 18 January 2021 the European Commission launched a 12-week public consultation on the introduction of a digital levy (open until 12 April 2021), in the form of a questionnaire. An impact assessment will also be carried out to inform the Commission's decision on the parameters of the digital levy.

Work is ongoing at G20 and OECD level to find a global solution that can support a reform of the international corporate tax framework to address some of the challenges related to the digitalisation of the economy. A number of elements remain to be agreed, but there are indications that the OECD agreement will focus on large multinational enterprise groups and a limited number of pre-defined activities linked to digitalisation. In the absence of a global agreement, some Member States have in the meantime introduced certain temporary tax measures affecting businesses that are part of the digital economy.

In its conclusions of 21 July 2020, and in view of a need to support the EU's borrowing and repayment capacity, the European Council tasked the Commission with putting forward proposals for additional own resources. The digital levy is one of them. The new initiative is aimed at addressing the issue of fair taxation related to the digitalisation of the economy but is not intended to interfere with the ongoing work at G20 and OECD level on a reform of the international corporate tax framework. The main objective of the initiative is to come forward with a measure that allows for a fairer contribution from the companies that operate in the digital sphere for the purposes of the recovery and to support a more stable medium-term outlook.

05 Spanish Parliament Approves Digital Service Tax

The Spanish Parliament has approved the tax applicable to determined digital services (DST) where users contribute to the value creation of the company providing those services. The DST is an indirect tax (and is therefore not covered by tax treaties) compatible with VAT and imposed on the supply of determined digital services to users established in Spain.

DST is imposed at a rate of 3% on revenues (net of VAT and other, similar taxes) arising from digital services (i.e. online advertising, intermediation and transmission of data), with certain exemptions, relating to:

- online selling of goods and services through the web page of the provider of those goods and services when the provider does not act as an intermediary;
- providing underlying supplies of goods or services directly between users, within the framework of an online intermediation service;
- providing online intermediation services, where the sole or main purpose of those services supplied by the entity making the interface available to users is to supply digital content, communication services or payment services;
- providing regulated financial services by financial entities;
- providing data transmission services, when supplied by regulated financial entities; and
- providing digital services between companies forming part of the same group with a 100% direct or indirect participation.

The tax applies to entities with net revenues exceeding €750m and net revenues exceeding €3m subject to DST in the previous year. Certain administrative obligations for taxpayers are imposed, including the appointment of a representative if one is not established within the European Union. Severe penalties are imposed in the case of failure to establish systems, mechanisms or agreements that permit the location of devices of users in Spain. The law will enter into force three months after its publication (i.e. 16 January 2021).

06 Germany: Draft Law Approved by Government Would not Mitigate Extra-territorial Taxation Issues

Draft legislation published by Germany's Ministry of Finance (MoF) on 19 November 2020 had raised expectations that the potential German tax exposure for royalty payments between two non-German entities and intellectual property (IP) transfers related to rights that are registered in a German public book or register would be abolished. These hopes were diminished by the release on 20 January 2021 of the Government-approved draft of the legislation, which no longer addresses this aspect.

Under German rules for limited liability taxpayers, the transfer of rights registered in a German public book or register, together with royalty payments for such rights, is subject to German taxation. In addition, IP that is being exploited in a German permanent establishment or other German facility may give rise to a German limited tax liability. This tax is often referred to as ETT (extra-territorial transfer tax) or ORIP (offshore receipts in respect of intangible property), although these terms are not used in the legislation. In the case of ETT (i.e. on the alienation of the IP) the tax must be declared via the German tax return filed by the non-German transferor. In the case of royalty payments (ORIP) the tax must be withheld at the time of payment and remitted quarterly by the licensee even if the withholding tax (WHT) obligation may be mitigated under a relevant tax treaty, unless the licensor provides the licensee with a valid German WHT exemption certificate as required under Germany's domestic WHT rules, allowing the application of a reduced or 0% royalty WHT rate.

Despite strong technical arguments that may be advanced regarding why German extra-territorial taxation should not apply where the only German nexus is the existence of registered rights in a German public book or register, the MoF on 6 November 2020 issued a decree in which it confirmed its view that this is sufficient nexus and that tax return filings or WHT declarations are required in such cases. Later that month, the MoF published draft legislation proposing significant amendments to the German WHT rules that would have abolished German extra-territorial taxation for German registered rights. These apparently contradictory announcements left many taxpayers confused and awaiting further clarification. The proposed relaxation of the rules has been removed from the Government-approved draft legislation, indicating that taxpayers should expect that the current legislation would continue to apply. There have been suggestions that there may have been some push-back during the governmental coordination process from German states (*Länder*) objecting to the relaxation of the German extra-territorial taxation rules.

The draft legislation is subject to the formal legislative process, requiring the approval of both chambers of the German Parliament. Changes to the proposals may be introduced during this process; however, taxpayers are required to comply with the current rules and must file an income tax/WHT return (as appropriate) and make tax payments where German-registered rights are transferred or licensed between foreign parties. The MoF guidance published in November 2020 highlights these obligations and reminds taxpayers to comply with the rules.

07 French Supreme Court PE Case Decision

The French Administrative Supreme Court on 11 December 2020 overturned the decision of the Paris Administrative Court of Appeal and recognised for the first time the existence of a permanent establishment in respect of a digital player. The *Valueclick* case involved Valueclick International Ltd (Valueclick Ireland), an Irish company operating in the digital marketing sector, which had signed an intra-group services agreement with Valueclick France according to which Valueclick France was to provide various services to Valueclick Ireland (i.e. marketing support, management, and back-office and administrative assistance), remunerated on the basis of an 8% cost-plus fee. The agreement provided that it could not have the effect of establishing between the parties relations such as those between a principal and an agent, nor of authorising the French company to contract or commit itself in the name of the Irish company or to represent it towards a company in respect of which it would be authorised to contract or commit itself.

The French tax authorities considered that Valueclick Ireland was merely an invoicing and contracting entity whose marketing activity was carried out in France with the resources of the French company. It based its analysis on the characterisation in France of both a fixed place of business in the premises of the French company and a dependent agent habitually exercising, in France, authorities enabling it to conclude contracts in the name of the Irish company (French General tax Code (CGI), Article 209 and France–Ireland income tax treaty, Article 2).

The Paris Administrative Court, adhering to a strictly legal analysis, in line with prior case law (*Zimmer*), considered that the employees of the French company did not have the authority to act in the name and on behalf of the Irish company and therefore ruled out the existence of a permanent establishment in France.

The French Administrative Supreme Court did not rule on the existence of a fixed place of business but only on the existence of a dependent agent. It referred first to paragraphs 32.1 and 33 of the OECD comments to its Model Tax Convention published in 2003 and 2005 (i.e. years after the conclusion of the France–Ireland income tax treaty in 1968, which is contrary to its usual practice). The court considered that, in the light of these comments, a French company that habitually decided on transactions that the Irish company merely endorsed, even if it did not formally enter into contracts in its name, must be regarded as having authorities enabling it to enter into a commercial relationship.

In practice, although the Irish company set the model for contracts concluded with advertisers in order to give them the benefit of the services it provided as well as the general terms and conditions, the choice of concluding a contract with an advertiser and all the tasks necessary for its conclusion were the responsibility of the employees of the French company; the Irish company merely validated the contract by a signature, which was automatic in nature.

The French Administrative Supreme Court concluded that the Paris Administrative Court of Appeal committed an error of law by holding that the French company did not constitute a permanent establishment of the Irish company.

08 EU Amends List of Non-cooperative Jurisdictions

On 6 October 2020 the European Council issued a press release announcing changes to the EU list of non-cooperative jurisdictions for tax purposes. Anguilla and Barbados have been added to the list, and the Cayman Islands and Oman have been removed, having passed the necessary reforms to improve their tax policy framework.

Anguilla and Barbados are included in Annex I (“black list”) following peer-review reports published by the Global Forum on Transparency and Exchange of Information for Tax Purposes, which downgraded the ratings of Anguilla and Barbados to “non-compliant” and “partially compliant”, respectively, with the international standard on transparency and exchange of information on request.

The Cayman Islands has been removed from the EU list after it adopted reforms to its framework on collective investment funds in September 2020.

Oman is considered to be compliant with all of its commitments after it ratified the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as amended), enacted legislation to enable automatic exchange of information and took all of the necessary steps to activate its exchange-of-information relationships with all of the EU Member States.

Twelve jurisdictions now remain on the black list: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

With regard to Annex II (“grey list”), owing to the ongoing Covid-19 pandemic, the Council decided to extend several deadlines for these commitments. The Council also decided to remove Bosnia and Herzegovina and Mongolia from Annex II after those countries deposited their instruments of ratification of the OECD Convention on Mutual Administrative Assistance in Tax Matters.

VAT Cases & VAT News

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VAT Cases

01 Cost-Sharing Exemption and Supply of Services to VAT Group

The decision in ***Kaplan International Colleges UK Ltd v The Commissioners for Her Majesty's Revenue & Customs*** C-77/19 was published on 18 November 2020. This case concerned the interpretation of Article 132(1)(f) of the VAT Directive, which provides exemption for cost-sharing groups, and arose out of a refusal by HMRC to grant exemption to Kaplan International Colleges UK Ltd (KIC).

The Kaplan corporate group provides educational and career development services, and KIC is the holding company of the group. The Kaplan group comprises nine UK-established subsidiary companies; each company runs a higher-education college in the UK in collaboration with some British universities, and these services are exempt from VAT under the education exemption. Eight of the colleges are wholly owned by KIC (but have their own management and governance structure), and one is jointly owned by KIC (45%) and the University of York (55%). The eight colleges are also members of a VAT group, of which KIC is the remitter.

KIC concluded contracts with educational recruitment agents to recruit international students. The agents worked with KIC representative offices in various locations around the world. KIC applied the reverse charge to the services received from the agents and accounted for UK VAT. In 2014 a company was set up in Hong Kong (KPS), which was owned by the nine colleges and operated under a membership agreement. KPS only supplied services to the nine member colleges. Some of KIC's functions were transferred to KPS, including dealing with the recruitment agents. The agents invoice KPS without VAT, and KPS in turn invoices the colleges (via KIC as VAT group remitter) for the services received from the agents and representative offices.

HMRC decided that the receipt of services by KIC from KPS did not come within the scope of the cost-sharing exemption. KIC argued that it did not have to account for VAT on the receipt of the services due to the creation of KPS. The matter came before the First-tier Tribunal, which referred a number of questions to the

CJEU. It was not disputed that KPS provided services to the colleges that were directly necessary for their exempt education activities, and KPS claims from the colleges only the exact reimbursement of their share of the joint expenses. The first two questions referred dealt mainly with the territorial scope of the exemption, and the decision of the court in relation to the third and fourth questions meant that the territorial issue did not have to be dealt with.

The first question posed was whether the cost-sharing exemption could apply to services supplied by the cost-sharing group to its members who were also members of a VAT group. The second question was whether, if the exemption applies, the fact that the VAT group remitter is not a member of the cost-sharing group has an impact on the application of the exemption, and if so, whether that impact can be eliminated by national legislation. The court noted that a cost-sharing group is a taxable person in its own right and separate from its members and supplies services on an independent basis (for the benefit of its members). To qualify for exemption under Article 132(1)(f), all of the members of the cost-sharing group have to carry on activities that are in the public interest (as it falls under the public interest category of exemptions).

It was noted that the wording of Article 132(1)(f) does not indicate that the exemption would not apply where the members formed a VAT group. But the existence of the VAT group cannot extend the exemption to services supplied to entities that are not members of the cost-sharing group. The court held that exemption cannot apply to supplies of services received by members of a VAT group that are not also members of the independent group of persons carrying on such activities in the public interest.

It noted that where VAT group provisions are applied, the group is treated as a single taxable person and therefore supplies by third parties to a member of the VAT group are considered to be made to the VAT group to which the member belongs.

> “Therefore, for VAT purposes, services supplied by an independent group of persons to members of a VAT group cannot be regarded as being supplied to those members individually, but must be regarded as being supplied to the VAT group as a whole.”

As the services are deemed to be supplied to the VAT group as a single taxable person that includes the remitter, where that entity is not a member of the cost-sharing group the exemption under Article 132(1)(f) cannot be extended to an entity that is not a member of the cost-sharing group.

In this case the national legislation provided that the VAT group remitter is to possess the characteristics and status of the members of the cost-sharing group. However, as the cost-sharing group is an EU concept, the exemption extends to a VAT group only where all members of the VAT group are also members of the cost-sharing group. The court held that:

> “the exemption laid down in that provision is not applicable to supplies of services made by an independent group of persons to a VAT group, within the meaning of Article 11 of that directive, where not all the members of the VAT group are members of that independent group of persons. The existence of provisions of national law which require that the representative member of such a VAT group possess the characteristics and status of the members of the independent group of persons concerned, for the purposes of application of the exemption laid down for independent groups of persons, has no bearing in that regard.”

02 Financial Services Exemptions Applicable to Certain Transactions

On 17 December 2020 the CJEU published its decision in the case of ***FRANCK d.d. Zagreb v Ministarstvo financija Republike Hrvatske Samostalni sektor za drugostupanjski upravni postupak*** C–801/19. This case dealt with the interpretation of Article 135(1)(b) and (d) of the VAT Directive. Article 135(1)(b) provides exemption for "the granting and the negotiation of credit and the management of credit by the person granting it", and Article 135(1)(d) provides exemption for "transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection". A dispute arose between FRANCK d.d., Zagreb ("Franck"), and the Croatian Ministry of Finance when the latter determined that VAT was due in respect of the remuneration received by Franck in return for making available funds obtained from factoring companies holding bills of exchange to Konzum. Franck, a trading company engaged in the processing of tea and coffee, made funds available to Konzum, a retail chain, in return for the simultaneous conclusion of three types of contracts.

Under a "financial loan agreement" Konzum (as designated lender) issued a bill of exchange to Franck (designated as the borrower) and undertook to pay the sum mentioned in that bill of exchange to it in cash. Under a "contract for the assignment of trade receivables", the parties to the contract were Franck, Konzum and a factoring company. Franck transferred the bill of exchange to the factoring company, which, under "reverse factoring", paid 95% to 100% of the amount to Franck. Franck transferred that amount to Konzum's account while acting as guarantor of its repayment on the due date of the bill of exchange. Under a "commercial cooperation agreement", Konzum undertook to reimburse Franck for the interest and costs charged to Franck by the factoring company and to pay it a remuneration amounting to 1% of the amount mentioned in the bill of exchange.

The tax authority was of the view that the remuneration was not exempt from VAT as it considered Franck to be supplying a debt collection service and argued that it acted as intermediary between Konzum and the factoring company. Franck, however, argued that it had provided a service granting loans to Konzum, which was exempt from VAT, and as the bills of exchange issued by Konzum were negotiable instruments, the service provided by it should be exempt from VAT under Article 135(1)(d).

The three contracts under consideration were summarised as a transaction that consisted of making available funds by one taxable person (Franck) to another (Konzum), for remuneration, obtained from a factoring company following the transfer to the latter of a bill of exchange issued by the second taxable person (Konzum), the first taxable person (Franck) guaranteeing the repayment to the factoring company of that bill of exchange on its maturity. The question raised was whether the exemptions provided for in Article 135(1)(b) and (d) applied to such a transaction.

The court noted that the transactions that consisted of the provision of funds in return for remuneration constitute an "economic activity". Franck's main business activity was the processing of tea and coffee, but that did not mean that the above transaction did not fall within its economic activity. The transaction consists of a series of transactions by which Franck, Konzum and a factoring company participated in the performance of three separate types of contract. The court noted that all of the circumstances of the transactions have to be considered, and in this case it had to consider whether there is a single supply or two or more distinct supplies.

> "Accordingly, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent."

The court is to take into account both the economic objective of the transaction and the interests of the recipients of the supplies. The economic purpose of the transaction was to satisfy Konzum's capital requirements, as it was unable to borrow funds from Croatian financial institutions due to its level of indebtedness and that of the group to which it belonged. The court noted that the main service provided by Franck (to be determined by the referring court) must be regarded as being the making available to Konzum of the funds that Franck obtained from a factoring company. The other services provided by Franck under the three contracts to which it was a party must be considered as ancillary to this main service, without any objective independent of the latter.

The court pointed out that the transactions exempted under Article 135(1)(d) are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service. This means that the application of the exemption is not dependent on the status of the entity providing those services. The expression "granting and negotiating credit" is to be interpreted broadly so that its scope cannot be limited to loans and credit granted by banking and financial institutions only. Previous case law of the court has provided that the granting of credit consists, among other things, of the provision of capital against remuneration. The fact that Franck is not a banking or financial institution does not preclude the supply that it made from constituting the granting of credit. It is up to the national court to decide whether the remuneration that Franck received from Konzum was consideration for the making of funds available to Konzum. The court also noted that the fact that the funds made available were not reimbursed to Franck but to the factoring companies was not relevant.

Article 135(1)(d) exempts transactions that involve "deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments". These transactions relate to payment instruments whose mode of operation involves a transfer of money. The court stated that:

> "the bills of exchange issued by Konzum must be regarded as 'negotiable instrument' within the meaning of Article 135(1)(d) of the VAT Directive in so far as they contain an obligation on Konzum, as issuer, to pay the specified amount to the holder on their maturity. This conclusion is not invalidated by the fact that, contrary to this obligation, Konzum was referred to in the contracts relating to the bills of exchange as a lender and Franck as a borrower."

For the exemption under Article 135(1)(d) to apply, the supply by Franck must "form a distinct whole, assessed as a whole, which has the effect of fulfilling the specific and essential functions of such a transaction". Here:

> "the service consisting in the provision of funds was intrinsically linked to the issue of the bills of exchange, since it was by transferring them to the factoring companies that Franck procured from the latter the amounts which it made available to Konzum. In so far as Franck was a party to the contracts relating to the bills of exchange, it appears that it performed the specific and essential functions for a transaction relating to them, although that is a matter for the referring court to ascertain."

The court did not accept the argument that Franck was providing a debt collection service – Franck did not assume the risk of the debtors' default in return for remuneration, and Franck did not act as an intermediary for the factoring companies in that context. The remuneration that Frank received was paid by Konzum in return for providing it with funds, and the interest and costs paid by Franck to the factoring companies was subsequently reimbursed by Konzum. Therefore the court held that:

> “the exemption from VAT on granting credit and transactions concerning other negotiable instruments laid down by those provisions, applies to a transaction which consists in the making available of funds obtained from a factoring company by one taxable person to another taxable person, for remuneration, following the transmission to the latter of a bill of exchange issued by the second taxable person, the first taxable person guaranteeing the repayment to the factoring company of that bill of exchange at its maturity”.

03 Provision of Company Car Without Payment by Employee

The CJEU delivered its judgment in the case of ***QM v Finanzamt Saarbrücken*** C-288/19 on 20 January 2021. QM is an investment fund management company based in Luxembourg. It is mainly engaged in VAT-exempt transactions and deals with its VAT obligations using a simplified system. Under this system it is not entitled to input VAT recovery. Two of its employees are resident in Germany, and QM provided company cars to these employees, who were permitted to use the cars for both business and private purposes. One employee could use the car free of charge, and the other employee had to cover the cost of use of the car, with this taken from his salary annually. QM had no entitlement to input VAT recovery on the cars. QM registered for VAT in Germany in respect of its taxable activities there and also accounted for the provision of the cars to the employees in its tax returns. The Saarbrucken tax authority raised tax assessments that were appealed by QM on the grounds that the provision of the cars was not a supply for consideration, and therefore not VATable, and that the provision of the cars was not the hire of means of transport.

The questions for determination were whether the provision by a taxable person of a car, forming part of the assets of the business, for an employee’s private use is subject to VAT; and whether, in interpreting Article 56, the provision of the car constitutes the hire of means of transport (Article 56 deals with the place of supply of short-term hire of means of transport, i.e. in the case of non-taxable persons, the place where the customer is established/ has permanent address/usually resides). The question referred to the court related only to the employee who made no payment and had no deduction made from his salary.

As there was no transfer of ownership of the cars, it was not considered to be a supply of goods, but the court considered whether it could be a supply of services. The Directive provides that a supply of services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT. It was not disputed that QM was a taxable person and acted as such in providing the cars to the employees.

The court has previously held that:

> “a supply of services is effected ‘for consideration’ within the meaning of Article 2(1)(c) of Directive 2006/112, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received.”

There could be a direct link by virtue of the employer/employee relationship where the employee permits a deduction from his salary for the service provided. In this case, the employee did not make any payment, nor was part of his salary deducted, nor did he forgo any other benefits. Such a supply cannot therefore be treated as a supply of services for consideration (under Article 2).

But could it be a supply of services for consideration under Article 26 (self-supply provisions), which covers two situations: (1) use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, for purposes other than those of his business, where the input VAT on such goods was wholly or partly deductible; or (2) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, for purposes other than those of his business.

It was clear that QM had no input recovery in Luxembourg in relation to the cars, but this was less clear in Germany. In any event, even if Article 26 did apply, it could not be considered to be the hiring of means of transport under Article 56. There is no definition for hiring of means of transport, and therefore it is to be interpreted uniformly. In determining what constitutes hiring of means of transport, the court referred to the conditions required for the letting of property – the landlord of the property must have conferred on the tenant, in return for rent and for an agreed period, the right to occupy the property and to exclude any other person from enjoyment of such a right. Applying these principles presupposes that the owner of the means of transport confers on the person hiring that means of transport, in return for rent and for an agreed period, the right to use it and to exclude other persons from doing so.

The court observed that the absence of rent being paid cannot be compensated for by the fact that, for income tax purposes, the private use of goods forming part of the assets of the business in question is viewed as constituting a benefit-in-kind and therefore, in some way, as part of the remuneration that the beneficiary has given up as consideration for the goods in question being made available to him or her. It stated that:

> "….that it (Article 56) presupposes the existence of rent that is paid in money and a benefit in kind does not equate to such a payment. Such a condition cannot be satisfied in the case of the use, free of charge, of goods forming part of the assets of the business, which would be treated as a supply of services for consideration under Article 26(1)(a)… Such a transaction does not, therefore, fall under the first subparagraph of Article 56(2)."

Even though the referring court raised the question only in relation to the employee who made no payment, the CJEU also considered what the position would be vis-à-vis Article 2 and Article 56 in the context of the employee who had part of his salary deducted in return for use of the car. The court stated that it is up to the referring court to ascertain whether there is a "genuine agreement" between those persons as to the duration of the right of enjoyment and the right to use the goods and to exclude other persons from such use, as has been held with regard to accommodation (letting of property). It noted that Article 56(2) would apply where there is a supply of services for consideration and if the employee has a permanent right to use the car for private purposes and exclude others from using it, in exchange for rent and for an agreed period of time (in excess of 30 days).

04 Entitlement to Input VAT Recovery

The TAC published determination ***06TACD2021*** on 3 December 2020. It was an appeal against a decision by Revenue to refuse to issue a refund of VAT in respect of a VAT amount of €3,926 claimed in November–December 2018. The refund amount related to the purchase of a van for use in the appellants' farm partnership trade (the husband and wife in the farm partnership were jointly assessed and were VAT registered under the partnership name). The husband was registered as a sole trader for income tax purposes, and his income tax returns included income from his trade as a farmer and the profits from the farm partnership. In the May–June 2017 VAT return, a refund amount was originally sought in respect of the purchase of the van, and the copy invoice (addressed to both parties) was submitted to Revenue in reply to an aspect query. The van was registered for VRT purposes in the husband's name only (it could not be registered in "the name of more than one registered owner"). Revenue refused the refund as the van was not registered in the partnership name.

The input credit was then included in the November–December 2018 VAT return, which was subsequently disallowed by Revenue. A copy of the original invoice was submitted to Revenue by the supplier, which was issued in the name of the husband. Revenue argued that it had been provided with an amended invoice by the appellants and that it was not a valid invoice as it was not amended in accordance with the Regulations.

The issues for consideration by the TAC were whether the input credit should be refused on the basis that the van was registered only in the husband's name, that the invoice was not in the partnership's name, that the invoice presented was not the original valid invoice and that the joint bank statement was insufficient evidence of payment by and for the partnership.

The TAC determined that the VAT input credit should be allowed. It noted that the fact that the invoice did not bear full technical compliance with the statutory instrument did not necessarily render it invalid and indicated that CJEU case law (*Pannon* case) provides that national legislation should not prevent the right to deduct input VAT on the basis of minor invoice errors. Although the invoice errors in this case were more significant than in the *Pannon* case, the principle in the *Pannon* case was adopted. Additional reasons for allowing the input credit were also provided. The TAC did not accept that the van's registration in the sole name of the husband was a valid reason for disallowing the claim. Even though evidence of payment from the joint bank account was not conclusive evidence that the partnership had paid for the van, it accepted that the purchase was made by the partnership, taking into account the nature of the farm trading activities. The fact that the submission of the amended invoice did not follow the legislative procedures should not be grounds for disallowing the input credit, taking into account the spirit of the *Pannon* case.

It is not known if the Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court.

VAT News

Ireland

Education and vocational training

Revenue eBrief 186/2020, published on 14 October 2020, dealt with the VAT treatment of education and vocational training services. The Tax and Duty Manual (TDM) on this topic has been updated and includes additional information in relation to the provision of education or training services by a provider in receipt of Exchequer funds and an additional paragraph in relation to the place-of-supply rules for lecturing services received from abroad.

Hiring means of transport

Revenue eBrief 206/2020 was released on 16 November 2020 to highlight changes to the TDM on the VAT treatment of the hiring of means of transport. It provides additional information on the short-term hire of passenger motor vehicles – hire of passenger vehicles for a short term is VATable at 13.5%, but hire of goods vehicle is liable at the standard rate.

e-Commerce

Revenue eBrief 208/2020 was published on 20 November 2020 in relation to the forthcoming new rules for e-commerce with effect from 1 July 2021. The previous issue of *Irish Tax Review* included an article by Revenue[1] outlining the main changes, and it is expected that more detailed guidance will be issued.

Holiday accommodation

Revenue eBrief 227/2020 was published on 17 December 2020 in relation to the VAT treatment of guest and holiday accommodation. A new TDM has been published on this issue, and a number of other TDMs have been updated to take account of new guidance that has issued in respect of guest and holiday accommodation. The amended TDMs are those in relation to emergency accommodation and ancillary services; cancellation of holiday home elections; and letting of immovable goods.

VAT rate changes

Revenue eBrief 231/2020, published on 21 December 2020, highlights the TDMs that have been updated as a result of the VAT rate changes occurring under the Finance Act 2020 amendments. These include the TDMs on restaurant and catering services; certain sanitary products; services relating to certain vessels and aircraft; and admission to amusement parks. The TDM on the VAT treatment of food and drink supplied by wholesalers and retailers has also been updated. Revenue eBrief 234/2020 was released the following day, which deals with the Notes for Guidance to the Finance Act 2020.

Registration

Revenue eBrief 237/2020 was released on 23 December 2020 and covered the new postponed accounting regime that will apply post-Brexit. The TDM covering the guidelines for VAT registration now includes detailed guidance on the postponed accounting procedures that will apply not just to imports from the UK but also to imports from all non-EU countries. A new VAT number verification facility has also been released, and it will be possible to verify the validity of domestic-only Irish VAT registration numbers.

VAT56 procedure

Revenue eBrief 244/2020 was published on 31 December 2020 in relation to the VAT56 procedure. There have been some legislative changes implemented to take account of the end of the Brexit transition period. The TDM on s56 zero rating of goods and services has therefore been updated.

EU

The European Commission announced proposed changes to the decision-making process of the VAT Committee. The VAT Committee is an advisory committee that agrees non-binding guidelines on the application of the VAT Directive. The Committee is composed of representatives of the Member States and the Commission. The Commission has adopted a proposal to adopt a new decision-making process. This means that some of the decisions of the VAT Committee would be taken under the comitology procedure, i.e. the decisions will be binding interpretations rather than having their current, non-binding status.

1 See article by Dermot Donegan "Q&A: VAT and the eCommerce Package", Irish Tax Review, 33/4 (2020).

Accounting Developments of Interest

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Reciprocal Arrangements with the UK for Auditing after Brexit

The Financial Reporting Council (the audit regulator in the UK) has published "Memorandum of Understanding on Reciprocal Arrangements with IAASA" (its Irish equivalent, the Irish Auditing and Accounting Supervisory Authority). Up to the time of Brexit, UK and Irish auditors with a dual-registered body enjoyed full, automatic mutual recognition. An auditor with a UK audit licence was automatically entitled to an Irish one, and vice versa.

Ater Brexit, UK auditors who wish to audit entities incorporated in the ROI will need to be separately registered under a different process as set out in ROI law. It should be noted that UK statutory auditors who are already included on the ROI audit register as of 31 December 2020 remain able, for the time being, to audit entities in the ROI without re-registration as ROI statutory auditors, and vice versa. The new agreement provides confidence to individuals and firms that they will be able to seek registration in both jurisdictions whenever it is required and that there will be minimal disruption to their ability to provide audit services. In summary, those Irish auditors who have a UK audit licence can continue to hold one, and new applicants will need to do an aptitude test in the UK, and vice versa. However, the agreement and statement are slightly ambiguous about the need for ROI auditors who are current holders of UK licences to pass an aptitude test at some time in the future, and vice versa.

Application of European Union (Qualifying Partnerships: Accounting and Auditing) Regulations 2019 to Solicitors and LLPs

These Regulations require Companies Act-like financial statements and public filing with the Companies Registration Office for limited partnerships (Limited Partnerships Act 1907) where the general partner is limited and in normal partnerships (Partnership Act 1890) where all of the partners are limited. However, for example, solicitors may trade through a limited liability partnership (LLP), which itself will enjoy limited liability. If all of the partners of the LLP are natural persons, then the European Union (Qualifying Partnerships: Accounting and Auditing) Regulations 2019 do not apply. If any of the partners in the LLP is a corporate entity or non-natural person, then the Regulations should apply.

Anti-Money Laundering: New Requirement

The European Union (Money Laundering and Terrorist Financing) Regulations 2019 (SI 578 of 2019) imposed a requirement on all designated persons (all practices and AML-regulated entities) to have a system in place “to report a contravention of this Act internally through a specific, independent and anonymous channel”. A whistle-blowing procedure will need to be put in place for all entitles covered by the legislation. Note that the legislation refers to an “internal” procedure so, for example, a junior who is unhappy that a senior is not applying the AML rules correctly will report this to the anti-money-laundering reporting officer in the firm and not to the Gardaí. The legislation does not have a requirement to report outside the firm. A one- or two-sentence addendum to the firm’s procedure manual and communication of the change to staff will provide compliance with the requirement.

Anti-Money Laundering: Monitoring

Getting ready for an AML monitoring visit from your professional body requires that you have the following items ready, examples of which are available at https://www.accaglobal.com/ie/en/technical-activities/technical-resources-search/2019/may/aml-guidance.html (it should be noted that these are standard documents and will need tailoring to the specific circumstances of your firm):

- the guidance document,
- a firm procedures manual,
- a firm-wide risk assessment,
- guidance on preparing this,
- a standard individual client risk assessment,
  - guidance,
  - example form,
- example internal reporting form for staff,
- proof of having done some training and staff training in AML,
  - guidance on the training required and
- a formal anonymous whistle-blowing procedure for reporting breaches of the AML requirements to the AML reporting officer in your practice.

Companies (Miscellaneous Provisions) (Covid-19) Act 2020

The period during which the measures in this Act, such as virtual AGMs, apply has been extended to 9 June 2021.

Credit Union AGMs

The Finance (Miscellaneous Provisions) Act 2020 has extended the date by which credit union AGMs must be held to 30 April 2021 and allows AGMs to be held virtually.

Auctioneers, Estate Agents and Property Service Agents

The Property Services (Regulation) Act 2011 (Minimum Standards) Regulations 2020 (SI 564 of 2020) have imposed additional requirements on this sector. They specify a number of rules on conduct and behaviour, the provision of information, changes to client money rules, the holding of service charge and sinking fund monies, and the holding of directorships of multi-unit developments. The Regulations were signed on 27 November 2020. Agents acting for such clients will need to familiarise themselves with the changes.

Credit Union Restructuring Board (Dissolution) Act 2020

After supporting 117 credit union merger projects involving 212 credit unions, the Credit Union Restructuring Board has reached the end of its life. This Act dissolves the Board and either ceases its functions or transfers them back to the Minister for Finance.

European Single Electronic Format

The European Parliament and the Council agreed to an amendment of the Transparency Directive allowing Member States to delay by one year the application of the European Single Electronic Format (ESEF) requirements for listed companies' annual financial reports. ESEF was initially for annual financial reports published by issuers whose securities are admitted to trading on a regulated market in the European Union for financial years beginning on or after 1 January 2020. The ESEF requirement affect the format, rather than the content, of annual reports.

IFRS Consolidations

The International Accounting Standards Board is calling for feedback on the IFRSs for group accounting:

- IFRS 10: Consolidated Financial Statements,
- IFRS 11: Joint Arrangements and
- IFRS 12: Disclosure of Interests in Other Entities.

Comments are to be received by 10 May 2021. See https://cdn.ifrs.org/-/media/project/pir-10-11-12/rfi2020-pir10-11-12.pdf?la=en.

Small-Company Audits

The International Auditing and Assurance Standards Board (IAASB) has set out plans to develop separate auditing standards for audits of less complex entities. This must be seen as a win for auditors who have long argued that the standards are too complex for a small-company audit. For many years the prevailing argument was that "an audit is an audit" and therefore only one set of standards should be in issue, with application notes for small entities where needed. Although the IAASB project is to report in 2021, it may be many years before we see small-company audit standards being promulgated in Ireland.

Guidance on Public Sector-Specific Financial Instruments

The International Public Sector Accounting Standards Board has issued "Non-Authoritative Amendments to IPSAS 41: Financial Instruments", to clarify the requirements for classifying, recognising and measuring a range of important public sector-specific financial instruments. The document includes guidance on monetary gold, currency in circulation, IMF quota subscriptions and IMF special drawing rights (SDRs).

Using Technology to Enhance Audit Quality

In "Technological Resources: Using Technology to Enhance Audit Quality", the Financial Reporting Council has concluded that the use of technology could significantly improve audit quality when deployed at the right time in the audit process and, crucially, by those with the right training.

Heightened Risk of Fraud During Covid-19

The South African Independent Regulatory Board for Auditors, the International Ethics Standards Board for Accountants and the International Auditing and Assurance Standards Board have jointly issued a staff guidance document entitled "Navigating the Heightened Risks of Fraud and Other Illicit Activities During the Covid-19 Pandemic".

Money-Laundering Risk During Covid-19

Chartered Professional Accountants Canada and the International Ethics Standards Board for Accountants have jointly released a document on "Covid-19 and Evolving Risks for Money Laundering, Terrorist Financing and Cybercrime".

Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020

As the name suggests, this Act is designed to facilitate the withdrawal of the UK from the EU, and it withdraws and replaces large sections of the 2019 Act of otherwise the same name. An extensive portion of the Act is designed to protect the Common Travel Area and the Good Friday Agreement and to facilitate the special position of Northern Ireland in areas such as healthcare and third-level student supports. The Act also has provision for the recognition of certain divorces, legal separations and marriage annulments granted in the United Kingdom and amends the employment permit legislation.

Company law is substantially amended, in that Part 17 of the Companies Act 2014 has a new Chapter 7A inserted dealing with the Central Securities Depositories Regulation. Insurance and financial services law is also amended, with changes to the Financial Services: Amendment of European Union (Insurance and Reinsurance) Regulations 2015, the European Union (Insurance Distribution) Regulations 2018 and the European Communities (Settlement Finality) Regulations 2010.

Investment Limited Partnerships (Amendment) Act 2020

This Act amends the Investment Limited Partnerships Act 1994; the Irish Collective Asset-management Vehicles Act 2015; the Investment Funds, Companies and Miscellaneous Provisions Act 2005; and the Partnership Act 1890. An investment limited partnership (ILP) is a partnership between one or more general partners and one or more limited partners. A general partner has unlimited liability for the debts and obligations of the ILP, whereas a limited partner is not liable beyond the amount of their capital contribution. The structure is used frequently to manage pension fund investments, and ILPs are regulated by the Central Bank of Ireland.

This Act imposes substantial additional requirements on ILPs and ICAVs, including one to maintain a register of beneficial owners, and inserts a number of additional offences and penalties for non-compliance to the legislation. These types of legal entities have been used in other jurisdictions to facilitate money laundering, and the amendments will deter their use for this purpose in Ireland. The legislation, which extends to 90 pages, also tidies up and modernises the legislation on these investment vehicles.

Harassment, Harmful Communications and Related Offences Act 2020

Although the headlines with regard to this Act referred to indecent images, the legislation extends to making it an offence to "[send] any threatening or grossly offensive communication to another person" that "causes alarm or distress to the other person". The offence extends to the acts of a body corporate and persons with the "functions of management" in a company and carries punishments of up to seven years' imprisonment.

Cash, as Always, Is King

The Financial Reporting Council (FRC) in the UK has published a review of UK companies' compliance with IAS 7: Statement of Cash Flows and the liquidity disclosure requirements in IFRS 7: Financial Instruments: Disclosures. The FRC notes that it continues to see errors in cash-flow statements and states that "most companies could improve their disclosures of accounting policies and judgements in relation to the cash flow statement". In respect of liquidity disclosures, the review includes some "recent examples of good reporting that companies should find helpful". The document is entitled "Thematic Review: Cash Flow and Liquidity Disclosures" and is available at www.frc.org.uk.

Fraud and Going Concern

Both of the above have come into sharp focus since the recent Wirecard case and they are addressed in a recent paper by the International Auditing and Assurance Standards Board, "Summary of Key Take-aways: IAASB Fraud and Going Concern Roundtables". The report identified the impact of technology on fraud perpetration and detection and the expectation gap between public perceptions and the auditor's responsibilities for fraud and going concern. A related IAASB discussion paper entitled "Fraud and Going Concern in an Audit of Financial Statements" closed for comments on 1 February.

Changes to Audit Standards

Effective for the audit of financial statements for periods starting on or after 15 December 2019, both ISA 570: Going Concern and ISA 540: Auditing Accounting Estimates and Related Disclosures have been amended. In summary, the changes to ISA 570 will require a more proactive and extensive approach to the audit of going concern and a change to the wording of audit reports. The changes to ISA 540 will require the exercising of more professional scepticism and more detailed analysis of the risks attaching to the use of estimates. The changes will require auditors to do two things:

- update their audit programmes for the changes and
- adopt the revised wording for audit reports as set out in an Irish Auditing and Accounting Supervisory Authority (IAASA) compendium of example audit reports.

The IAASA has issued a guidance document on "The Audit of Accounting Estimates", where it discusses the findings of audit regulators at an international, European and domestic level and notes that improvements are needed in the quality of auditors' work on estimates. The guidance is particularly relevant in light of the amendments to ISA 540. The Financial Reporting Council has also released a paper on the audit of going concern, where it notes the enhanced concentration by auditors on going concern in the light of Covid-19.

Minor Amendments to FRS 101

FRED 77 proposes to amend FRS 101 to account for changes to IAS 1 and to allow for some disclosure reduction in respect of property, plant and equipment. FRS 101 is technically "Companies Act Financial Statements", but the financial statements are prepared under IFRS with reduced disclosures. FRS 101 is used only for subsidiaries of IFRS companies.

Amendments to FRS 104

FRS 104 is used when preparing interim financial statements, such as quarterly or half-yearly statements. The amendment clarifies and enhances requirements relating to the going-concern basis of accounting for interim financial reports. It is effective for interim periods beginning on or after 1 January 2021, with early application permitted.

International Accounting Standards: Proposed Amendments

An exposure draft on lease liability in a sale and leaseback has been issued. The proposed standard aims to clarify how a seller-lessee should apply the subsequent measurement requirements in IFRS 16 to the lease liability that arises in a sale and leaseback transaction.

Standards for Audit Committees

Although there are requirements to have an audit committee in certain circumstances, and company law and other laws set out what audit committees should do, there are no real standards on how audit committees should operate. Research in the UK by the Financial Reporting Council has shown that there is considerable support for the development of such standards. See “Audit Committee Chairs’ Views on, and Approach to, Audit Quality”.

Who Is the Chief Operating Officer?

The determination of the identity of the Chief Operating Decision Maker in turn determines the identification of operating segments and the reporting of the performance of these separate segments under IFRS 8. The Irish Auditing and Accounting Supervisory Authority has published an information note, “IFRS 8 Operating Segments – Identification of Chief Operating Decision Maker”, to help companies make the identification.

Consolidated Covid-19 Guidance for Auditors and Accountants

Enormous amounts of technical guidance have been issued for Covid-19, to the extent that it is now sometimes difficult to identify what is superseded guidance and where the most up-to-date guidance is located. The Financial Reporting Council (FRC) in the UK has helpfully consolidated its Covid-19 guidance for auditors and its guidance for accountants. For auditors struggling to meet the requirements of IES 8, the non-verifiable CPD available from reading the FRC auditing guidance will fulfil the requirements for some of fifteen different prescribed audit CPD areas in that standard.

Revised Ethical Standards for Auditors

The Irish Auditing and Accounting Supervisory Authority has revised the “Ethical Standard for Auditors (Ireland) 2020”. The changes mirror changes made in the UK by Financial Reporting Council, which in turn reflect changes to the International Auditing and Assurance Standards Board standard. The new standard applies compulsory requirements for matters such as the provision of non-audit services that previously were just guidance and applies those requirements to all audits, including very small ones. The revised standard is effective for audits of financial statements for periods beginning on or after 15 July 2021, with early adoption permitted. Auditors will need to update their standard work programmes and checklists.

Revised Quality Control Standard for Auditors

The Irish Auditing and Accounting Supervisory Authority has issued an amendment to the ISQC1 standard. The revised standard is effective for audits of financial statements for periods beginning on or after 15 July 2021, with early adoption permitted. The only apparent change from the previous standard is to require that the engagement partner takes an active part in the performance of the audit.

Trustees of Defined-Benefit Schemes

The Pensions Authority has issued guidance to trustees of defined-benefit pension schemes on the implementation of the IORP II Directive. Schemes are to be split into three categories based on the risk profile. See www.pensionsauthority.ie/ for more details.

Parental Leave Changes

Changes made by the Parental Leave (Amendment) Act 2019 came into effect from 1 September 2020. From that date, employees can take 26 weeks of unpaid parental leave per child, increased from 22 weeks.

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Brexit: An Agreement But It's Not All Frictionless

Introduction

As Santa Claus was busy preparing to arrive on Irish shores and deliver much-needed joy and happiness to the children of Ireland for what was a challenging 2020, the EU and UK negotiating teams were busy putting their final touches to the "Brexit Agreement" on Christmas Eve, 24 December. To many, it may have been what they had asked for; but for others, it was the dreaded lump of coal in their Christmas stocking. So what is contained in the EU–UK Trade and Cooperation Agreement ("the TCA"), what does it mean from a customs and trade perspective, and what will companies need to do to avail of 0% tariffs for trade between the EU and the UK in a post-Brexit world?

EU–UK Trade and Cooperation Agreement

With the end of the transition period and the signing of the EU–UK Trade and Cooperation Agreement, customs formalities will now be required for the movement of goods between the UK (excluding NI) and the EU. Although the TCA removed tariffs on products of UK origin (or EU origin for products imported into the UK), customs formalities such as declarations are still required and products of non-UK/non-EU origin may be subject to customs duties.

Adjusting to this new customs regime requires new paperwork and procedures. It is already resulting in delays at borders and ports. This will mean disruption to supply chains, with goods not getting on or off our island in a timely manner. It will also affect those using the "landbridge" through the UK to and from mainland EU markets. One example of where delays have been seen is the requirement for hauliers using RORO (roll-on, roll-off) ferry services to have a Pre-Boarding Notification (PBN) number lodged in advance. Failure to comply will result in the haulier's being refused boarding until the necessary lodgements take place. With just-in-time supply chains operating between Ireland and the UK, any such delays cannot be afforded.

In the context of the TCA, the focus is on the "country of origin" rules, which must be met in order for goods to qualify for 0% duty rates, specifically:

- how to claim preferential origin under the TCA for imports and remove customs duties on purchased goods and
- how to provide customers (including inter-company) with proof of preferential origin under the TCA so that they can remove customs duties when importing or selling goods.

What does this mean?

- To benefit from zero tariffs, goods traded between the EU and the UK must "qualify" as originating under the terms of the TCA.
- Goods can qualify under certain rules of origin, which vary product by product.
- Merely consigning goods from the UK to the EU (or the EU to the UK) is insufficient to qualify for preferential origin.
- Exporters who qualify their goods as originating will be required to retain supporting documentation and potentially be subject to periodic future audits by customs authorities.
- For qualifying goods only, exporters will be required to prepare a "Statement of Origin" to be included in the shipping documentation.
- It is the responsibility of the importer in either the UK or the EU to "present" the relevant Statement of Origin to customs, thereby allowing for zero tariffs to be applied.
  - An alternative is for importers to "self-declare" the goods as originating without such a statement based on "importer's knowledge". However, this will require the importer to have access to the information necessary to prove origin (e.g. detailed bills of material, suppliers' declarations), which are unlikely to be provided by third-party suppliers. We urge importers to exercise caution in the use of such declarations, and they need to ensure that they can provide evidence of originating status in the case of an audit.

Rules of origin

For products to be considered of EU or UK origin and qualify for the zero-duty preferential tariff under the TCA, they must be either:

- wholly obtained in either the EU or the UK or
- substantially transformed in either the EU or the UK, in line with the relevant Product Specific Rules (PSRs).

Under the provisions of the TCA, materials originating in the EU may be considered as originating in the UK, so origin can be accumulated between EU and UK production. This allows goods to be moved between the EU and the UK, and back again, without affecting the preferential origin. PSRs, tolerances and "insufficient production" lists are included in the annexes to the TCA.

Example 1

Cheese manufactured in Ireland is moved to the UK. On export from Ireland, the exporter qualifies the cheese as originating under the TCA. The Irish exporter is registered on REX and prepares a Statement of Origin to be included in the shipping documentation. On import to the UK, a customs broker acting on behalf of the importer (buyer) declares that the goods are of EU preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Example 2

Steel manufactured in the UK is moved to Germany. On export from the UK, the exporter qualifies the steel as originating under the TCA. The UK exporter prepares a Statement of Origin to be included in the shipping documentation. On import to Germany, a customs broker acting on behalf of the importer (buyer) declares that the goods are of UK preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Issues Arising

The use of the UK as a landbridge, the sourcing of products through the UK from countries with which the EU currently has a free trade agreement, and the storing and distributing of both EU and non-EU goods in and from a UK warehouse all have different and significant customs compliance requirements. The risk of additional duties arising in such supply chains remains, even after the introduction of the TCA, as products may not qualify as originating under the TCA.

EU – UK – EU supply chains

The TCA does not provide for a scenario whereby a trader importing EU-originating goods to the UK from the EU and then reimporting these goods to the EU (e.g. Ireland) can qualify the goods as originating and thereby avail of 0% duties on import into Ireland without either undergoing further production or remaining under customs supervision (such as customs warehousing or transit) in the UK.

Although such goods should qualify as originating for the first leg of the journey – i.e. entitled to 0% tariffs on import to **the UK** – the fact that these former "EU" goods would not qualify as originating for the second leg, into Ireland, has taken many by surprise; and so this additional cost appears not to have been factored in to many companies' scenario planning.

Example 3

Confectionery manufactured in the EU is moved to the UK from the Netherlands. On export from the Netherlands, the exporter, which is registered on Registered Exporter System (REX), prepares a Statement of Origin to be included in the shipping documentation. On import to the UK, a customs broker acting on behalf of the importer (buyer) declares that the goods are of EU preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Once imported to the UK, the goods are placed in a distribution centre before being consolidated with other goods. On receipt of an order from an Irish customer, the goods are consigned and exported from the UK to Ireland. Under the provisions of the TCA, the goods are no longer regarded as EU-originating goods, and therefore a customs broker acting on behalf of the importer (buyer) declares that they are of non-EU preferential origin. As a result, the goods are subject to duty on import to Ireland.

We are aware that, under the Switzerland–EU free trade agreement (FTA), EU- or Swiss-originating agricultural goods were allowed to claim preference when entering Switzerland for the first time and again when being returned to the EU. This can be achieved without the use of customs planning, i.e. where the goods have been entered into free circulation in both markets. Similarly to the EU–UK TCA, there are no specific provisions in the Swiss–EU FTA to cover this, but it was agreed in separate discussions between the European Commission and Switzerland. We understand that such an approach will not be adopted under the TCA.

Double-duty risk

Products that are imported to the UK from "third countries", such as the US and China, and are subsequently exported from the UK and imported to the EU (e.g. Ireland) could be subject to double duty: (1) on import to the UK from the relevant third country; and (2) on the subsequent movement from the UK to the

EU. As the TCA works on the basis of EU or UK "originating status", such goods will not qualify under the TCA. Although this was well flagged before the publication of the TCA, many companies failed to understand how free trade agreements operate in practice.

Example 4

Clothing manufactured in China is moved to the UK from China. On import to the UK, a customs broker acting on behalf of the importer (buyer) clears the goods into free circulation. The goods are subject to duty.

Once imported to the UK, the goods are placed in a distribution centre before being consolidated with other goods. On receipt of an order from an Irish customer, the goods are consigned and exported from the UK to Ireland. Under the provisions of the TCA, the goods are not regarded as being UK or EU originating goods, and therefore a customs broker acting on behalf of the importer (buyer) declares that they are of non-EU origin. As a result, the goods are subject to duty on import to Ireland.

This example is typical of supply chain structures in Ireland, where many retail products are shipped to Ireland via UK distribution centres.

Further manufacturing

The position outlined above with respect to distribution activities can be contrasted with the rules that apply where further manufacturing or processing takes place. The TCA provides for a scenario whereby a trader imports EU-originating goods to the UK from the EU for further processing and manufacture and these goods are then reimported to the EU (e.g. Ireland). In such a scenario the EU materials **can** be regarded as being UK-originating materials, making it easier for the UK company to qualify the goods as originating under the TCA. This is allowable under a concept known as "cumulation". Such goods will now qualify as UK originating provided the UK exporter can provide a Statement of Origin. The goods can be imported to the EU and will attract 0% tariffs.

Example 5

Confectionery ingredients are manufactured in the EU and are moved to the UK from Germany, Belgium and Spain. On export from these EU countries, the exporter, which is registered on REX, prepares a Statement of Origin to be included in the shipping documentation. On import to the UK, a customs broker acting on behalf of the importer (buyer) declares that the goods are of EU preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Once imported to the UK, the goods are placed into production by the UK manufacturer, where they are combined with products of UK origin. The product manufactured is a confectionery product for sale on both the UK and the EU market. The UK manufacturer now needs to consider the rules of origin contained in the TCA. The UK manufacturer is permitted, under "cumulation", to allow both the EU and the UK materials to be regarded as UK originating. Therefore, in this example and provided the manufacturing is not regarded as being "insufficient", the confectionery is more likely to meet the origin rule for being regarded as of UK preferential origin. On export from the UK to Ireland, the exporter prepares a Statement of Origin to be included in the shipping documentation. On import to Ireland, a customs broker acting on behalf of the importer (buyer) declares that the goods are of UK preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Northern Ireland

Customs provisions concerning Northern Ireland (NI) are regulated in the Protocol on Ireland/Northern Ireland ("the Protocol") that forms an integral part of the Withdrawal Agreement. To protect the Belfast Agreement and the integrated island-of-Ireland economy, NI occupies a dual position within the Protocol. It is legally part of the customs territory of the United Kingdom – the impact of this is that, for example, goods originating in NI will be allowed to benefit from future FTAs that the UK may conclude with third countries. Consequently, NI-originating goods cannot benefit from FTAs concluded by the EU with third countries (except the TCA itself).

However, in practice, NI remains *de facto* part of the EU Customs Union and Single Market. The EU's Union Customs Code continues to apply to goods moving into and out of NI, and it remains aligned to a limited set of regulatory rules to ensure alignment with the EU Single Market. In essence, this means that a customs border is in place in the Irish Sea between Great Britain and both jurisdictions on the island of Ireland.

To understand how the customs structure in NI operates after the transition period, it is necessary to analyse it from two standpoints: outbound and inbound flows.

Outbound from NI to Great Britain

The Withdrawal Agreement allows the UK to grant qualifying NI goods unfettered access to Great Britain (England, Scotland and Wales). Unfettered access in this context means that no export or exit declarations are to be presented in NI nor import declarations in Great Britain. The current, temporary definition of "qualifying NI goods" is very broad (goods in free circulation in NI), but this will be subject to anti-circumvention provisions, for example, for goods starting their journey in the EU (e.g. Ireland) and travelling to Great Britain via NI. It is worth noting that HMRC will issue a more stringent qualifying regime in due course.

Inbound to NI from Great Britain and third countries

In relation to inbound flows into NI, there are some significant matters to take into consideration:

- When moving goods from Great Britain to NI, an import declaration, along with a safety and security declaration, must be lodged in NI. In this regard, the UK Government has implemented the Trader Support Service to support NI importers in completing this new set of declarations.
- NI importers shall be required to determine whether goods moved from Great Britain to NI or from third countries to NI can be considered as "goods not at risk" of onward movement to the EU.
- In general terms, goods will be "not at risk" when they are moved from Great Britain to NI and the applicable EU tariff is zero (including if they qualify for 0% duty under the TCA) or when they are moved from third countries to NI where the UK tariff is equal to or higher than the applicable EU tariff.
- Alternatively, goods may be considered "not at risk" where the importer has been authorised under the UK Trader Scheme and can show that the goods are destined for the NI market
  - Further consideration should be given where goods are brought into NI for processing, as there are specific conditions to be met under the UK Trader Scheme.

Import VAT

Although it is not specifically addressed in the TCA, for imports to Ireland, accountable persons who are registered for both VAT and Customs & Excise at 11:00pm on 31 December 2020 have been given automatic entitlement by Revenue to operate postponed accounting for import VAT. Postponed accounting means that import VAT is not paid at the time of importation but is accounted for in the trader's subsequent VAT return – eliminating the need for payment and reclaim and thereby creating a cash-flow benefit. This is a welcome position taken by the Irish Government. Note that a similar regime has also been introduced in the UK.

What Have We Seen?

Early reports that ports were running smoothly may have given a false sense of hope over the New Year period. January has seen issues beginning to show, with reports problems ranging from UK hauliers pausing the movement of goods due to confusion over customs procedures to lorry drivers' lunches being confiscated by Dutch customs officials.

Concerns have been raised that the UK–NI supply chain is near breaking point due to a lack of guidance on the paperwork required for customs clearance. A large haulier reported that it had resorted to YouTube videos for clarification on the requirements and claimed that one declaration took 12 hours to complete.

Revenue's relaxation of ENS (Entry Summary Declaration) requirements eased some delays for goods destined for Ireland after complaints about new systems and slow processes. However, Revenue has confirmed that all systems are working efficiently and argued that issues being experienced are due to a lack of preparation by businesses, a warning that Revenue has reiterated over the past two years.

At industry level, the main reports come from supermarkets, with one large chain withdrawing certain product lines from Irish stores to ease customs processes, and some experiencing empty shelves due to delays. Complications across industries are arising due to customs liabilities on EU goods being reimported from the UK to Ireland, as for many businesses the Irish market is supplied by UK distribution hubs. Some businesses have been able to avoid this issue by choosing direct EU routes, reflected by Rosslare port's having recorded a six-fold increase in freight on direct EU routes.

How to Maximise Brexit and TCA Readiness

Step 1: Day 1 readiness continued

As companies come to terms with the new normal, it is important that they have the appropriate structures in place to ensure continuity of trade in a post-Brexit world. Although many have taken action, the first post-Brexit weeks have demonstrated that not all companies are adequately prepared for managing cross-border trade. Therefore we set out below the minimum actions that companies should take to ensure operational continuity:

- For companies that will be importing/exporting, ensure that you have the relevant Economic Operators' Registration and Identification (EORI) numbers in place in the EU (and, if necessary, the UK) so that you can continue to move products between the UK and the EU post-Brexit.
- Make sure that you have some way to connect with the customs authorities. Appoint a customs broker, who will prepare and file customs declarations through the UK and EU customs authorities' systems, or consider installing a solution to file your declarations directly.
  - If you are an Irish entity importing to the UK (or vice versa), your broker will need to be employed as an indirect representative, which means that they have joint and several liability for any customs debt – this should be addressed immediately, given the additional risk that brokers will be taking on and to ensure that they will act in this capacity.
- Ensure that your transport company is adequately prepared to manage the Pre-Boarding Notification (PBN) number requirement and that the PBN can be lodged before shipment.
- For those exporting goods qualifying under the TCA, registration on REX is required.
- Make sure that you have a method in place to pay the duties, e.g. a deferred payment account.
- The rate of duty arising on goods depends on their customs classification. Ensure that you have confirmed the commodity codes for all goods moving into and out of the UK and vice versa.
- Ensure that your systems are adjusted to account for the change in status created by movements of goods to and from the UK – e.g. creation of customs invoices, key customs data being available for all goods

(tariff code, country of origin, Incoterms etc.) and correct VAT coding.

- If you operate in a highly regulated industry sector, review the additional regulatory requirements that may now be in place for EU–UK movements, as failure to do so may create market access issues.
- For those operating a DDP (delivered duty paid) customs model, engage with suppliers to ensure that they can deliver on this basis and have addressed all of the above steps.

Step 2: Maximise customs compliance and efficiency through 2021

Operational readiness is merely the first step. Now that Brexit is here, traders should focus on ensuring that: (1) they have the procedures in place to be customs compliant and (2) they are using the TCA or other duty mitigation mechanisms to minimise the amount of additional duty being paid as a result.

Customs compliance

For many traders, Brexit has been their first introduction to customs compliance; for others, it has created an additional burden on their existing compliance framework. Regardless, the basic building blocks are the same:

- Review the tariff classifications of all goods to ensure that the correct duty rate will be charged.
- Review cross-border sales flows to ensure that there is an acceptable customs value on which duty will be charged. This is particularly relevant where there is no sale, inter-company sales, consignment stock arrangements or where significant royalty/licence fees are paid relating to the goods.
- Review country of origin determinations. As discussed above, the TCA confers preference only to "originating goods" – now is the time to put in place an origin management system to ensure correct application.
- Check Incoterms to determine roles and responsibilities around importation and customs clearance.
- Create internal procedures to cover customs compliance and issue instructions to brokers to ensure that they complete customs declarations correctly.

Duty mitigation

The TCA affords an opportunity for traders to reduce the duty impact for originating goods. Customs duty affects the actual landed cost of goods and so creates a broader impact on pricing and product competitiveness. Therefore it is critical that an origin management system be put in place by exporters (to ensure that they are registered to issue Statements of Origin on REX and can clearly identify when goods qualify for preference under the TCA) and that importers (buyers) work with suppliers to maximise preference and their brokers to ensure that goods are imported correctly to obtain the 0% duty rate.

Where goods do not qualify as originating under the TCA, there may still be other duty mitigation opportunities available, depending on the particular supply chains – e.g. availing of customs economic procedures or operating specific customs reliefs. It may also be beneficial to take a wider, strategic look at existing supply chains to see whether they still make sense in the post-Brexit era, and whether implementing strategic sourcing of certain goods/materials or a more fundamental change to the go-to-market model is required.

Example 6

As an extrapolation from Example 3 above, confectionery manufactured in the EU is moved to the UK from the Netherlands. On export from the Netherlands, the exporter, which is registered on REX, prepares a Statement of Origin to be included in the shipping documentation. On import to the UK, a customs broker acting on behalf of the importer (buyer) declares that the goods are of EU preferential origin. As a result, the goods, which are normally subject to duty, are imported free of customs duties.

Once imported to the UK, the goods are placed in a distribution centre before being consolidated with other goods. On receipt of an order from an Irish customer, the goods are consigned and exported from the UK to Ireland. Under the provisions of the TCA, the goods are no longer regarded as EU-originating goods, and therefore a customs broker acting on behalf of the importer (buyer) declares that they are of non-EU preferential origin. As a result, the goods are subject to duty on import to Ireland.

Opportunities

Consideration should be given to the use of customs warehousing combined with transit or the use of RGR (returned goods relief) to eliminate the customs duty on the movement of the goods from the UK to Ireland.

Example 7

As an extrapolation from Example 4 above, clothing manufactured in China is moved to the UK from China. On import to the UK, a customs broker acting on behalf of the importer (buyer) clears the goods into free circulation. The goods are subject to duty.

Once imported to the UK, the goods are placed in a distribution centre before being consolidated with other goods. On receipt of an order from an Irish customer, the goods are consigned and exported from the UK to Ireland. Under the provisions of the TCA, the goods are not regarded as being UK- or EU-originating goods, and therefore a customs broker acting on behalf of the importer (buyer) declares that they are of non-EU origin. As a result, the goods are subject to duty on import to Ireland.

Opportunity

Consideration should be given to the use of customs warehousing in the UK to eliminate the customs duty payable in the UK and to avoid the double payment of customs duty in the supply chain. In this example, duty will still apply on the movement of the goods from the UK to Ireland.

Conclusion

Brexit is for life and not just for Christmas. The core objectives for businesses after 1 January are to ensure continuity of trading, to do so in a compliant and efficient manner and to understand fully the implications of the TCA and the new rules of origin requirements. Finally, it is important to assess quickly the scale of the challenge within the business and to undertake an initial prioritisation of products/suppliers/customers.

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VAT Implications of Brexit

Introduction

The media attention after the end of the Brexit transition period has quite rightly focused on the practical difficulties in transporting goods cross-border and the additional paperwork for businesses as the most tangible evidence of Brexit. Less apparent are the VAT consequences that flow from the UK becoming a non-EU Member State, or "third country", for EU VAT purposes with Northern Ireland (NI) effectively remaining in the EU for transactions involving goods but not services. The greatest impact will be on the VAT treatment of supplies of goods that move between Ireland and the UK. In this article I consider the main VAT Brexit issues, including the VAT treatment of supplies of goods and services, the non-application of certain VAT simplifications, VAT on imports and recovery of VAT.

Exports

Pre-Brexit

Historically, sales of goods that moved from Ireland to the UK were liable to either Irish VAT or UK VAT. If the customer was VAT registered in the UK, the supply would generally have qualified as a zero-rated intra-Community supply. This created VAT reporting obligations for the trader on its VAT return, Return of Trading Details, and VIES and Intrastat returns. Also, the trader had specific obligations in relation to invoices.

If the customer was not VAT registered, the sales were generally liable to Irish VAT as a local supply, unless the "distance sales" rules required that the supplier register for VAT in the UK and charge UK VAT on its sales.

Post-Brexit

Sales of goods that go from Ireland to Great Britain (GB) should be zero rated as exports and subject to 0% VAT. Schedule 2 of the Value-Added Tax Consolidation Act 2010 provides that the 0% rate applies to:

- a supply of goods that are to be transported directly by or on behalf of the person making the supply outside the Community not including a supply of goods to a traveller that the traveller exports on behalf of the supplier; and
- a supply of goods that are to be dispatched or transported directly outside of the Community by or on behalf of the purchaser where that purchaser is established outside of Ireland.

Although the VAT treatment of intra-EU sales of goods can depend on whether the customer is in business, this is not relevant for exports, and the test to be applied is whether the goods are dispatched or transported outside of the EU.

We are focusing here on the movement of goods between Ireland and GB; however, the movement of goods from any EU Member State to GB, and indeed from GB to an EU Member State, will no longer qualify as intra-Community supplies. The sale of goods that go from another EU Member State to GB are also 0% exports from the country of departure. This could mean that an Irish trader selling goods located in another EU country that move to GB may have to register for VAT in that EU country, if not already VAT registered, and charge VAT, albeit that it should be at the 0% rate.

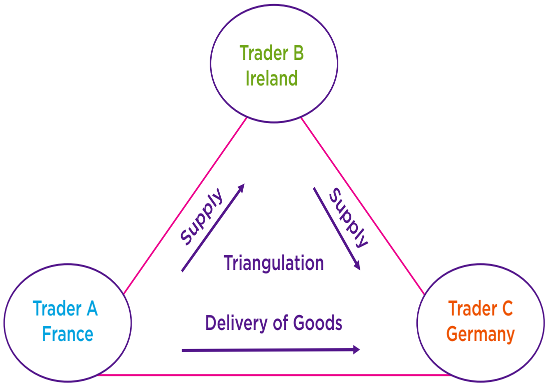
From a practical perspective, we have seen issues not only in moving goods to GB but also in evidencing the movement of those goods. Before applying the zero rate, it is important for suppliers to have evidence that the goods have left the EU or, where goods are moving from the UK, that they have left the UK. In some countries, including Ireland and the UK, the tax authorities will accept that the supplier holds commercial documentation evidencing export. Other Member States require copies of the actual export documentation expressly showing the goods being exported outside the EU. The threshold of evidence is particularly high for "indirect exports", which are exports where the purchaser is responsible for removing the goods. Many tax authorities want to see individual goods listed on export declarations, which is a requirement that often does not accord with modern logistics that ships and declares goods at container level.

Intra-Community Supplies

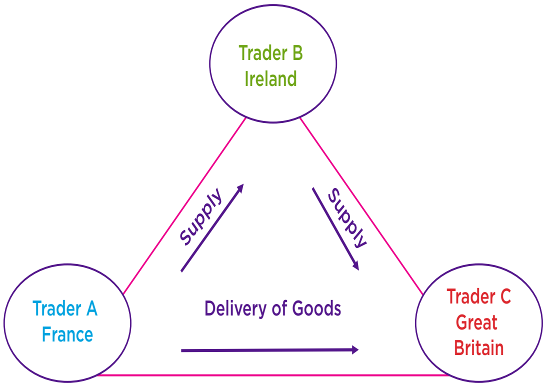
The result of sales to GB qualifying as exports is that they are not classified as intra- Community supplies and should not be included on VAT, VIES or Intrastat returns. Also, the requirement to obtain and confirm the UK customer's VAT registration number and include it on a sales invoice is eliminated. Traders whose cross-border trade is solely the sale of goods that go to GB no longer have to complete VIES or Intrastat returns. In addition, the EU simplifications that apply to intra-Community supplies should not apply where goods move to or from GB or, in the case of triangulation, where a GB trader that is not EU VAT registered is involved.

Triangulation

Triangulation is a simplification that applies to two successive sales of goods between three parties that are VAT registered in different EU Member States with a single movement of the goods from the first person in the chain to the last person in the chain. Triangulation avoids the necessity for the middle person in the chain to register for VAT in the country of arrival of the goods. As an example, take a sale of goods from trader A in France to trader B in Ireland and from trader B to trader C in Germany with the goods moving directly from France to Germany.

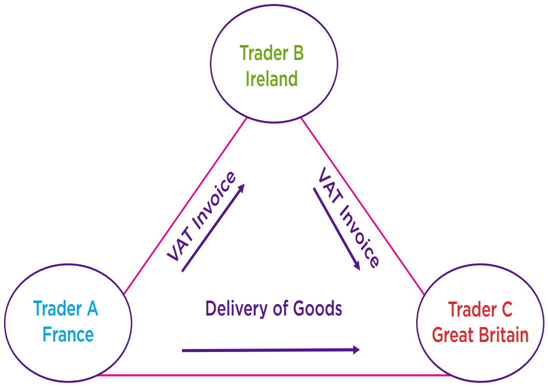


Triangulation means that trader B does not have to register for VAT in Germany. If a non-EU VAT-registered trader in GB is now involved in the chain or if the country of departure or arrival of the goods is GB, triangulation is no longer relevant. Those transactions are now exports from the country of departure and imports in the country of arrival.



Take as an example the sale of goods by a registered trader in France to an Irish VAT-registered trader, who in turn supplies the goods to a business in GB, with the goods going from France to GB.

Depending on the details of the arrangement, the sale by trader A could be subject to French VAT as a domestic sale or an export from France by the French supplier, followed by an import to GB by the Irish customer; or treated as an export from France by the Irish trader, followed by an importation of the goods to GB by the UK customer. Whereas the application of the triangulation simplification previously meant that the Irish trader had no VAT registration obligation in either France or GB, it will now end up having to register in either France or GB.



Call-Off Stock

Call-off stock is another simplification that can avoid the requirement for a business to register for VAT in another EU country in respect of goods transferred from one EU Member State to another. The goods must be transferred under a pre-existing agreement between the supplier and the intended purchaser where the goods are available for call-off by the purchaser and the ownership of the goods transfers to the purchaser after their arrival.

The simplification no longer applies where the goods are going to or coming from GB. Goods that are transported to GB, to be held in stock there, are imports, with a requirement for the supplier to register and charge VAT in GB. Goods coming from GB to Ireland will, again, be imports, with a potential requirement for the GB supplier to register for VAT in Ireland.

Imports

The importation of goods from a non-EU country to an EU country, e.g. from GB to Ireland, gives rise to a VAT charge at the point of importation. Generally, the VAT rate that applies is the rate applying to the sale of those goods, and the VAT due is payable at the time of importation. As an exception, the 0% rate of VAT should continue to apply to imports by businesses that hold a Revenue VAT 56A authorisation.

The place of supply of goods that have been imported is the country where the goods are imported. So, a business that imports goods to Ireland and sells those goods in Ireland should charge Irish VAT on those goods. Where an Irish business imports goods to GB, it should, subject to UK VAT rules, register and charge UK VAT on the supply of those goods.

The VAT treatment of sales of imported goods has given rise to two main issues: who is liable to pay the import VAT and who is entitled to recover the import VAT paid. As a result, there has been much discussion of Incoterms. Incoterms are terms of carriage generally applied in the cross-border transit of goods. Among other things, they are used to identify: who is responsible for transit; who carries the risk of loss during transit; and who is liable to complete customs formalities and pay duties arising on import. Generally, where the supplier is required to complete the entry formalities and pay the duties due on import, it will be required to register for and charge VAT in the country in which the goods arrive.

In the UK the question of who is entitled to recover the import VAT paid at the point of entry is a very topical issue. Following CJEU case law, the UK's basic position is that only the owner of the goods is entitled to recover VAT paid at the point of entry to the UK. Although there are nuances to that position, it is important to consider who can, and should, act as importer when goods move to the UK.

Postponed Accounting

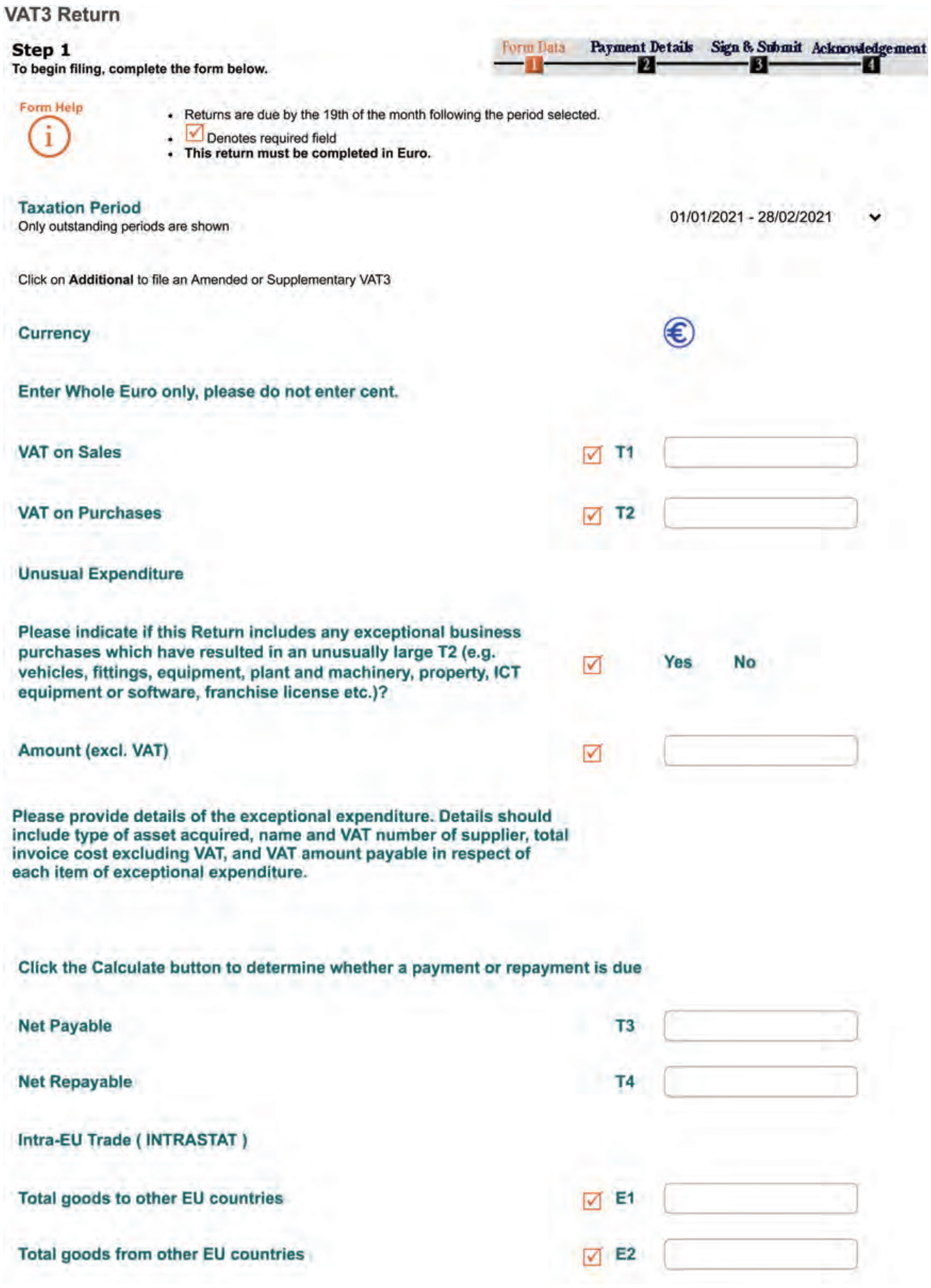
To avoid a VAT cash-flow cost on the importation of goods, Ireland (and the UK) has, effective from 1 January, introduced postponed accounting for imports from all non-EU countries by VAT-registered businesses. Those business should self-account for the VAT due in their VAT returns and can reclaim the VAT in the same return, subject to the normal rules for VAT deductibility.

In Ireland the value of goods imported subject to postponed accounting should be included in the VAT return in a new box, PA1. The VAT due should be included in boxes T1 and T2, subject to the normal rules for VAT deductibility. Also, the Return of Trading Details has been amended to include additional boxes PA2, PA3 and PA4 to capture the value of goods imported under postponed accounting. Revenue can withdraw postponed accounting from a business that does not fulfil certain conditions.

Northern Ireland

As mentioned above, NI remains in the EU VAT system for goods. As a result, sales of goods from Ireland that move to and from NI should be treated in the same way as they were treated before 1 January, assuming that they are not transiting NI to go to or come from GB. Sales and purchases to and from NI should continue to be treated as intra-Community supplies or acquisitions, and the administrative obligations that apply to such transactions should continue to apply, including VIES and Intrastat return obligations.

The Northern Irish Protocol sets out a framework on how trade flows with or through NI should be treated. It is designed



VAT3 Return

Step 1

To begin filing, complete the form below.

Form Data 1 — Payment Details 2 — Sign & Submit 3 — Acknowledgement 4

Form Help

- Returns are due by the 19th of the month following the period selected.
- ☑ Denotes required field
- **This return must be completed in Euro.**

Taxation Period — 01/01/2021 - 28/02/2021

Only outstanding periods are shown

Click on **Additional** to file an Amended or Supplementary VAT3

Currency — €

Enter Whole Euro only, please do not enter cent.

VAT on Sales ☑ T1

VAT on Purchases ☑ T2

Unusual Expenditure

Please indicate if this Return includes any exceptional business purchases which have resulted in an unusually large T2 (e.g. vehicles, fittings, equipment, plant and machinery, property, ICT equipment or software, franchise license etc.)? ☑ Yes No

Amount (excl. VAT) ☑

Please provide details of the exceptional expenditure. Details should include type of asset acquired, name and VAT number of supplier, total invoice cost excluding VAT, and VAT amount payable in respect of each item of exceptional expenditure.

Click the Calculate button to determine whether a payment or repayment is due

Net Payable T3

Net Repayable T4

Intra-EU Trade (INTRASTAT)

Total goods to other EU countries ☑ E1

Total goods from other EU countries ☑ E2

Total services to other EU countries	☑ ES1	
Total services from other EU countries	☑ ES2	
Non EU Trade		
Postponed Accounting	PA1	

Click on the **Next** button to proceed to the next step

Click on the **Back** button to return to the previous step

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Client X

19/02/2021

VAT Return of Trading Details

RTD is due for VAT Accounting Year 01/02/2020 - 31/01/2021

For traders making supplies under the 7th Directive Margin Scheme relating to the sale of second hand goods or under the Travel Agents Margin Scheme, only the margin obtained on the supply of such goods/services should be included in the figures for SUPPLIES shown.

Goods and/or Services

Have you made supplies of Goods and/or Services?

No

Acquisitions from the European Union and Non-European Union

You must record the value of goods/services at the Irish VAT rate applicable.

Did you acquire any goods or services from the European Union, avail of Postponed Accounting for any Non-EU acquisitions or import any VAT free parcels?

Yes

	€ Values Excluding VAT	
Exempt		E4
0% Home		D2

4.8%		C6
9%		BC6
13.5%		AC6
5.4%		B6
Std Rate		P2
Total		Z2

TOTAL OF ALL FIGURES RELATING TO POSTPONED ACCOUNTING THAT ARE INCLUDED IN THE VARIOUS RATE BOXES ABOVE

Postponed Accounting		PA2

Goods or Services Purchased for Resale (Irish or Intra EU acquisitions, Postponed Accounting & Non -EU Imports)

You must record the value of goods/services at the Irish VAT rate applicable.

Did you purchase Goods/Services for resale?

Yes

	€ Values Excluding VAT	
Exempt		E5
0% Home		J1
4.8%		H5
9%		BH5
13.5%		AH5
5.4%		G5

Std Rate R1

Total Z3

TOTAL OF ALL FIGURES RELATING TO POSTPONED ACCOUNTING THAT ARE INCLUDED IN THE VARIOUS RATE BOXES ABOVE

Postponed Accounting PA3

Other Deductible Goods and Services (Irish or Intra-EU acquisitions, Postponed Accounting & Imports)

You must record the value of goods/services at the Irish VAT rate applicable.

Did you purchase goods or services that are not for resale but where VAT paid can be claimed as an input credit?

Yes

€ Values Excluding VAT

Exempt E6

0% Home J2

4.8% H6

9% BH6

13.5% AH6

5.4% G6

Std Rate R2

Total Z5

TOTAL OF ALL FIGURES RELATING TO POSTPONED ACCOUNTING THAT ARE INCLUDED IN THE VARIOUS RATE BOXES ABOVE

Postponed Accounting PA4

to ensure the integrity of the EU Customs Union, given the desire not to have an EU customs border on the island of Ireland. Achieving this has thrown up some unusual VAT consequences for goods moving to or through Northern Ireland, the precise nature of which depend on the specific fact pattern of individual transactions.

Goods that are going from Ireland to GB via NI should be liable to Irish VAT at the 0% rate as exports. Business should retain proof of the goods leaving NI to support the charging of VAT at the 0% rate. However, the UK has taken the position that if goods are moved to GB from Ireland through Northern Ireland, the Irish supplier will be required to register for VAT in GB and charge VAT to the UK customer. This is in contrast to a situation where goods are sold from Ireland to GB and shipped through Dublin; in this instance, and subject to the commercial terms, the customer can act as importer and the Irish supplier would have no need to incur, register for or charge UK VAT.

Goods coming from GB via NI in a single journey also have an unusual treatment. In this case the movement of goods would give rise to an import VAT charge in Northern Ireland. The supplier would have to account for the import VAT in its UK return and charge it to the Irish customer, who would have to seek to recover it from HMRC.

This charge can be avoided if the supplier claims, and can meet the conditions of, onward consignment relief. In this instance the import to Northern Ireland would be zero rated and the Irish supplier would account for Irish acquisition VAT in its Irish VAT return.

This treatment differs, however, if goods are moved to stocks in Northern Ireland and then sold from those stocks to customers in Ireland. In this event, there will be a movement of own goods from GB to Northern Ireland, followed by an intra-Community supply from NI.

Trading with, in or through Northern Ireland will also bring administrative requirements, and NI traders may need to apply separately for an XI VAT number. Under the terms of the NI Protocol, this VAT number is needed when NI businesses trade with Irish businesses.

Supplies of Services

There are a number of place-of-supply rules that apply to the supply of services. As a general rule, the place of supply of services provided to consumers is where the supplier is established. One of the exceptions to the general rule is that the supply of telecommunications, broadcasting and electronic (TBE) services cross-border to non-taxable persons is taxable where the customer is established. This can give rise to VAT registrations in a number of EU countries for businesses supplying TBE services to non-business customers across the EU. Since 2019 an annual turnover threshold of €10,000 exclusive of VAT applies to such supplies, and sales up to the threshold are subject to VAT in the supplier's country of establishment.

MOSS (Mini One-Stop Shop) is a simplification measure that allows businesses supplying TBE services to non-taxable persons to account for the VAT due in Member States under a single MOSS registration rather than having to register for VAT in each Member State. There are two schemes within MOSS: one for businesses established within the EU and the other for non-EU-established businesses.

Business in the UK previously could have availed of the EU MOSS scheme under a UK MOSS registration. These businesses should now register under the non-EU MOSS scheme in an EU Member State. This would equally apply to businesses in NI, as they are in the UK VAT system for services. Also, non-EU businesses that were previously registered in the UK for MOSS should now register for MOSS in an EU country.

As a consequence of the above, a number of UK businesses and non-EU businesses that were previously MOSS registered in the UK have registered for MOSS in Ireland. The first MOSS returns that those business will have to submit will be for the quarter ending 30 April, which are due to be submitted and the paid on or before 20 May.

Financial Services

The supply of financial services is generally exempt from VAT, with no recovery of VAT on costs related to those financial services supplied to counter-parties in the UK. As an exception, there is recovery for VAT on costs related to certain financial services provided to non-EU counter-parties, such as a loan to a non-EU business. Effective from 1 January, businesses in Ireland are entitled to recover VAT on costs related to those financial services to counter-parties in the UK A similar rule now applies to such services provided by businesses in the UK, and they will be entitled to recover VAT on costs related to businesses in the EU.

Travel Agents

Businesses that act as principal or undisclosed agent in the supply of holidays to travellers are generally liable to account for VAT in the country where the services are provided. However, under a simplification known as the Travel Agents' Margin Scheme (TAMS) – or the Tour Operators' Margin Scheme, as it was known in the UK – businesses established in the EU have to account for VAT only in the country in which they are established and not in each country in which the underlying holiday services are provided. The VAT due is calculated on their margin, being the difference between the cost of their bought-in services supplied to a traveller and the revenue from sales of those holidays. Where the holiday takes place outside of the EU, no VAT is payable. VAT on costs that relate to the sale of EU holidays is not recoverable; however, VAT can be recovered on costs related to sales of holidays outside of the EU.

Effective from 1 January, travel agents established in Ireland or other EU Member States are not liable to pay VAT on holiday packages that take place in the UK. Furthermore, they will be entitled to increased VAT recovery as UK holidays will now be zero rated for the purposes of the scheme.

VAT Refunds

Subject to rules on VAT recovery, EU businesses can generally recover VAT incurred in other EU Member States in which they are not established nor VAT registered. Businesses in Ireland should submit their claims through Revenue. The time limit for such claims is normally 30 September following the year in which the VAT was incurred. However, for VAT incurred in the UK during 2020, the deadline has been changed and claims must be submitted by 31 March.

There is scope for Irish and other EU businesses to recover VAT incurred in the UK in 2021 and future years, again subject to rules governing VAT recovery. The claim must be submitted no later than six months after the prescribed year-end in which the VAT is incurred. The prescribed year is the 12 months from 1 July to the following 30 June, so claims for VAT incurred between 1 January and 30 June must be submitted no later than 31 December.

Conclusion

1 January 2021 has brought the most significant changes to the VAT treatment of transactions between Ireland and the UK since the Single Market was introduced on 1 January 1993. As the main changes affect movements of goods to or from the UK and via NI, we strongly recommend that all supply chains involving the UK are reviewed to confirm that the correct VAT treatment is being applied. Particularly important is ensuring that the business is VAT registered and charging VAT in the correct jurisdictions, that it is complying with all of

its VAT obligations in those jurisdictions and that the correct administrative procedures are followed. Business also need to ensure that the terms of contracts with customers and suppliers take account of changes to the VAT position, including stipulating who is liable to pay any import VAT that arises.

Although at the moment it seems difficult to paint Brexit in any form of positive light for Irish business, there are opportunities and risks. The VAT changes are no different. They will take time to adjust to, but we are already seeing the resilience and adaptability of Irish businesses as they deal with the post-Brexit landscape.

Kim Doyle
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Brexit: The Other Matters to Consider

Introduction

During the last four-and-a-half years Brexit has been ingrained in any business discussions and decisions, often with a large degree of uncertainty. Most of the focus was on how the UK's leaving the EU would impact on trade, customs tariffs, VAT and logistics, particularly on the island of Ireland. However, contained in the EU–UK Trade and Cooperation Agreement ("the Agreement") are other issues that should also be considered.

Withholding Tax

The EU Parent–Subsidiary Directive allows companies to make dividend payments or profit distributions between associated companies in different EU Member States without the requirement to withhold taxes. Companies are treated as associated where at least 10% of the shares are held for a minimum period of two years.

The EU Interest and Royalties Directive also removes the need to withhold taxes on the payment of interest and royalties between associated companies. The definition of associated is more stringent in these cases, where the company must directly hold over 25% of the capital or voting rights. Where the payment is not to a direct parent or subsidiary, if another company holds more than 25% of the capital or voting rights in both parties, both parties should be treated as associated.

Both Directives continued to apply to the UK during the Brexit transition period, which ended on 31 December 2020. This means that some payments between UK- and EU-resident associated companies will now be subject to withholding taxes.

As part of the Irish Government's preparations, any such payments to a UK company do not require tax to be withheld. However, this is not the case for other remaining EU Member States, and any withholding tax requirements revert to the rates agreed in the appropriate double taxation treaty between the relevant EU country and the UK.

In relation to UK withholding taxes on payments from the UK to EU Member States, HM Revenue & Customs (HMRC) released guidance last year stating that the UK will continue to apply the EU Directive rules in relation to payments made by UK companies to EU Member States. This means that there should be no increased UK withholding tax cost on interest and royalty payments to Member States, with any payments that previously qualified for the Directive exemptions continuing to qualify.

Businesses should undertake a review of group structures that include UK entities paying dividends, royalties or interest to EU Member States.

Transfer Pricing

Over the last few years, with the numerous threats of no deal and cliff-edge extensions, many local and international businesses have been reviewing their supply chains to protect continuity of supply, understand costs and implement changes to reduce tariff and logistics costs. Due to the historical dependence on both trade with the UK and the use of the English land bridge to import and export goods, many Irish companies have changed their structures completely. Whether this has included the incorporation of a UK company or one on the Continent to make use of EU transit reliefs, there has been a drastic change in how businesses will do things going forward.

Finance teams should now be considering what functions, risks or assets have changed as a result. Some of the questions to consider are:

- Whether more activities are being undertaken in Ireland.
- Whether there should be management charges raised in Ireland to assist with any new UK company activities. Have there been changes to the supply chain?
- Whether there should be allocations of profits for the increased risk of whichever entity is now responsible for stock management or logistics. Is there a newly incorporated entity in the UK that is needed to preserve UK trade, and is the business now a newly created group?
- Whether inter-company transactions should be reviewed and how each jurisdiction will be remunerated needs to be determined. Who is absorbing increased costs/admin services, or are these being passed on to your customers? This additional expense should be allocated depending on the entity undertaking these additional activities and costs.

The OECD Transfer Pricing Guidelines acknowledge that changes may be needed to restructure a group or create new subsidiaries to retain competitiveness and profitability. Such restructurings should be accompanied by a review of the inter-company charges and associated allocation of profits to ensure that any changes are consistent with the arm's-length principle. It is also important that intangible assets are accounted for correctly and that any exploitation in other jurisdictions has appropriate arm's-length charges in respect of the use of such assets.

DAC 6: EU Mandatory Disclosure Requirements

As part of the Agreement, HMRC made the unexpected announcement that reporting under DAC 6 would be required only for arrangements that meet hallmarks under category D. Category D broadly deals with arrangements that undermine reporting obligations and obscure beneficial ownership and shares substantial common ground with the mandatory disclosure rules developed by the OECD. The reporting requirements under hallmarks A, B, C and E have been repealed.

Although it is expected that these changes will significantly reduce the compliance burden from a UK perspective, other EU countries, including Ireland, will continue to have DAC 6 reporting requirements, so these should be considered for any cross-border arrangements involving EU Member States.

Social Security and Cross-border Workers

This is a snapshot of very complex rules which apply to workers which broadly comprise of movement within the EU and movement with countries with which Ireland has bilateral social security agreement.

The Social Welfare (Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland) Order 2020 provides for continued coordination of social security for workers who move between Ireland and the UK, allowing these workers to be able to pay social security in just one country.

Before the UK left the EU and during the Brexit transition period, EU regulations provided that workers temporarily moving between EU Member States for work purposes could pay social security in a single country, which is usually their normal country of residence. With the current global Covid-19 restrictions and the movement of employees limited, there could be additional tracking and administration required for any cross-border employees, particularly those UK employees who are managed from headquarters in Ireland.

Although agreement between Ireland and the UK was reached early – in the 2019 Irish Social Security Reciprocal Agreement – it applies only to Irish and UK nationals and it was relatively unclear how it would operate in practice. The rules were agreed to replicate the current EU social security regulations and protect benefit qualifications in both countries.

While free movement of UK and EU nationals between the UK and the rest of the EU ended on 31 December 2020. Under the Agreement, individuals working temporarily in either the UK or the EU can continue to pay social security in just one country, provided the relevant EU country has agreed to apply the “detached worker” rules by 1 February 2021. Under these “detached worker” rules, certain UK workers sent to work in the EU can continue to pay National Insurance Contributions in the UK (for up to 24 months) and be exempt from paying social security in the other jurisdiction. Likewise, workers sent to work in the UK can remain liable to social security in their EU country of residence.

Where an EU country does not apply these rules, workers will have to pay social security by obligation in the country in which they are working temporarily. However, in February the EU notified the UK that all EU countries will apply the "detached worker" rules to UK employees who are working temporarily in the EU. The process for applying for these rules remains broadly the same, with the employer applying online, on behalf of the employee whom they are sending abroad, for an A1 social security certificate.

Short-term Visits

Visa-free short-term business trips are permitted between the UK and the EU for specific purposes such as attending meetings, training seminars and trade fairs; purchasing goods or services; and taking orders for or negotiating the supply of goods or services. However, these visits will be limited to 90 days in any 180-day period. Ireland and the UK have agreed for the continuation of the Common Travel Area, therefore Irish and UK citizens are not impacted.

Work trips are also permitted for establishment purposes, intra-company transfers, contractual service suppliers and independent professionals. Within these categories there will be no market access restrictions (such as economic-needs tests and discrimination based on nationality), although a number of EU Member States have reservations (opt-outs), which mean that additional barriers may apply.

What Next?

Although we have the Agreement, which addresses the impacts of Brexit on VAT, customs, tax systems and related matters, the commentary in this article identifies that there are other matters that are not answered or where the answers given raise further questions that should be considered.


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Finance Act 2020: Post-Brexit Share Migration

Introduction

As a result of Brexit, the Irish Government passed legislation in 2019 to facilitate a market-wide migration of shares in Irish companies, listed and traded on Euronext Dublin and the London Stock Exchange, from the existing CREST settlement system, operated by Euroclear UK & Ireland Limited (EUI), to the central securities depository (CSD) operated by Euroclear Bank (i.e. "the migration"). The migration completed in mid-March 2021.

Section 62 Finance Act 2020 makes a number of legislative amendments to the Taxes Consolidation Act 1997 (TCA 1997), Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) and Stamp Duties Consolidation Act 1999 (SDCA 1999). The amendments provide for the tax-neutrality of the migration itself and, in most respects, maintain the status quo from a tax perspective post-migration. Revenue has also indicated that it will issue guidance in respect of certain other provisions, where legislative amendment was not considered necessary, so that there are no unintended tax consequences arising from the migration, for example, the recently issued guidance in respect of the close company provisions.[1]

Background

Shares in Irish listed companies that are held in dematerialised (i.e. uncertificated) form and traded in Dublin or London were settled through the CREST system operated by EUI, an English company, which acts as the CSD for such companies as required by applicable EU securities regulations.

1 Revenue eBrief No. 026/21.

As EUI is incorporated in the UK, it has ceased to be an authorised CSD under these EU regulations as a result of Brexit. An extension to 30 June 2021 was approved by the European Securities and Markets Authority for EUI to act as a "third country CSD" on a temporary basis. Consequently, Irish issuers whose shares were held directly in the CREST system needed to migrate to a new CSD system. The Migration of Participating Securities Act 2019[2] provided the legislative mechanism for the migration.

The CSD operated by Euroclear Bank in Belgium was selected as the replacement settlement system. The migration process required several steps to be taken by Irish issuers, including obtaining shareholder approval for the migration and the required changes to the company's articles of association to accommodate the new system by 24 February 2021. All participating issuers passed resolutions at their EGMs and migration completed in mid-March 2021. Transactions in the migrated securities could settle in the Euroclear Bank system from 15 March 2021.

Migration

On migration, legal title to all uncertificated shares in participating issuers transferred by operation of law to Euroclear Nominees Limited (an English company), as nominee and on trust for Euroclear Bank. As a result of this transfer, the holders of migrating shares **("migrating shareholders") ceased to hold shares directly and insead became entitled to certain Belgian-law contractual co-ownership rights** that arise automatically by virtue of the transfer of migrating shares into the Euroclear Bank system (known as "Belgian-law rights").

It is possible for a person to hold Belgian-law rights directly only if it is a participant in the Euroclear Bank system ("EB participant"). Individuals cannot be EB participants, and therefore, from a practical perspective, all Belgian-law rights that arise as a result of migration will initially be credited to the nominee of CREST Depository Limited within the Euroclear Bank system. In return, all migrating shareholders were issued with CREST Depository Interests (CDIs), a security constituted under English law and issued by EUI that represents an entitlement to the Belgian-law rights that relate to underlying shares in the issuer. CDIs are also eligible for continued settlement in the CREST system, as required by the London Stock Exchange in respect of shares in Irish issuers traded on its main market or AIM.

Migrating shareholders were entitled to choose whether:

- to continue to hold their interest via CDIs or
- to convert their holding via CDIs into a holding of Belgian-law rights as an EB participant (subject to being an EB participant), or through a custodian, broker or other nominee that is an EB participant.

The tax treatment set out in Finance Act 2020 is designed to capture both situations, and the Irish tax treatment for migrating shareholders should be the same regardless of which option is taken.

Euroclear Bank System

Belgium is a civil law jurisdiction, and consequently the CSD model operated by Euroclear Bank is structurally different to CREST. Securities held in the Euroclear Bank system are fungible – i.e. it is not possible to identify a specific share as belonging to a particular investor. The system operates on a book-entry basis whereby a securities clearance account will be maintained for each EB participant to confirm their actual entitlement to the Belgian-law rights that represent the pool of underlying shares in the issuer.

Where trades are settled in the Euroclear Bank system, there will be no change to the register of members (Euroclear Nominees Limited will remain the registered holder) and the transfer of ownership will instead be reflected by a change in Euroclear Bank's book-entry system. This is a

2 Part 4 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 also provides for miscellaneous amendments to the Companies Act 2014 to facilitate the operation of a substitute securities settlement system, compatible with the law of the European Union after the transition period.

significant difference from settlement under the CREST system, whereby trades in shares result in a change in the register of members in order to reflect the transfer of legal title.

Given the structural differences between the Euroclear Bank system and the CREST system (particularly the nature of the asset held by the underlying investor), the changes introduced by s62 Finance Act 2020 aim to counteract any potential unwanted and unintended tax consequences of the migration and maintain the status quo.

TCA 1997 Amendments

Capital gains tax – new s545A TCA 1997

This new section confirms that migration under the Migration of Participating Securities Act 2019 was tax neutral and will not be treated as a disposal of those shares for CGT. The section also provides that where there is a disposal of a co-ownership interest in underlying shares under the new system, the asset deemed to have been disposed of for CGT purposes will be the person's underlying interest in the shares.

The Finance Act changes extend references to "shares quoted on a stock exchange" in s29(1A)(b) to co-ownership interests. This should maintain the exemption for non-residents in respect of quoted shares deriving value from certain Irish assets. A similar extension in s980(2)(d) and (e) TCA 1997 confirms that the requirement for a purchaser to withhold 15% of the consideration for the sale of shares deriving value from Irish property should not apply to co-ownership interests in shares quoted on a stock exchange.

The definition of "relevant assets" in s29A(1)(a) TCA 1997 is also updated to include co-ownership interests in shares, thereby maintaining the potential CGT charge on temporary non-residents in respect of relevant assets.

Dividend withholding tax – new s172A TCA 1997

Chapter 8A of Part 6 TCA 1997 provides for the application of DWT to distributions made by Irish-resident companies. A new s172FA TCA 1997 provides a definition of a "recognised qualifying intermediary" to include:

- a qualifying intermediary that is also a recognised clearing system, within the meaning of s246A(2)(a) (which lists 13 recognised clearing systems, including CREST and Euroclear Bank); and
- a qualifying intermediary that is also a person who is wholly owned by a recognised clearing system, within the meaning of s246A(2)(a).

The purpose of the amendments is to ensure that the status quo is maintained in relation to the operation of the DWT system following the migration of shares to the Belgian CSD. The new s172FA TCA 1997 provides that:

> *"a recognised qualifying intermediary may receive relevant distributions without the deduction of dividend withholding tax and pay those relevant distributions without the deduction of dividend withholding tax to another recognised qualifying intermediary or to an authorised withholding agent so long as the recognised qualifying intermediary has obtained a notice in writing from the authorised withholding agent or the other recognised qualifying intermediary, that it is an authorised withholding agent or a recognised qualifying intermediary, as the case may be, in relation to those distributions".*

Sections 172G and 172H TCA 1997 are also updated to take account of the new definition of recognised qualifying intermediary. Section 172G(1) confirms that withholding will not apply where an Irish-resident company makes a relevant distribution, either directly or through one or more than one recognised qualifying intermediary, to an authorised withholding agent.

Settlement of market claims – s172LA TCA 1997

Section 172LA TCA 1997 provides for administrative arrangements for dealing with DWT in the case of market claims, i.e. where dividends are incorrectly paid to a person due to delays in updating share registers. New definitions for "recorded owner" and "proper owner" based on the concept of a beneficial ownership are inserted in s172LA to maintain the functioning of the market claims process post-migration and to ensure that the appropriate person is responsible for settling the market claim.

Offshore funds – s743 TCA 1997

TCA 1997 provides for specific taxation treatment of disposals of "material interests in offshore funds" defined in s743 to include arrangements under foreign law that create rights in the nature of co-ownership. A new sub-section (1A) now ensures that co-ownership rights in a fungible pool of underlying shares and securities created under the new arrangements will not be regarded as a material interest in an offshore fund.

Revenue Guidance - Close Company Provisions[3]

Revenue guidance confirms that a company will not be considered to fall within the close company provisions of Part 13, TCA 1997 solely as a result of the migration of Irish securities to Euroclear Bank.

A strict application could bring certain companies within the ambit of the close company legislation as a result of the migration because the CSD or its nominee company could be regarded as falling within the definition of "participator" in s433(1) TCA 1997. Consequently, Revenue have confirmed that neither the CSD nor its nominee company would be regarded as a participator and a company, not previously falling within the close company provisions, will not now be considered to fall within these provisions solely as a result of the migration.

SDCA 1999 Amendments

Dematerialised securities

Section 69(1) SDCA 1999 allowed for stamp duty to be charged on a transfer of title to securities through an electronic system in certain circumstances. "Title to securities" refers to both legal and equitable interests; however, an amendment was required to achieve certainty in relation to the applicability of Irish stamp duty post-migration.

A new chapter (s78A - s78J, effective from 15 March 2021 pursuant to a commencement order from the Minister of Finance.)[4] has been inserted into Part 6 SDCA 1999 to provide for special measures relating to "dematerialised securities", now defined in s78A as "securities in respect of which physical certificates or documents of title indicating ownership have been eliminated such that the securities exist only as accounting or book entry records". The new provisions confirm that stamp duty shall not be chargeable on the migration of securities to the new system under the Migration of Participating Securities Act 2019.[5] The new chapter does not impact the exemption for American depository receipts in s90 SDCA.[6]

A transfer order[7] transferring relevant securities through a relevant system or outside a relevant system (i.e. a settlement system operated by a CSD[8]) is deemed to be an executed instrument of conveyance or transfer of such securities.[9] Stamp duty is levied under the "CONVEYANCE or TRANSFER on sale of any stocks or marketable securities"[10] head of charge at the rate of 1% of the consideration or market value in the case of a voluntary disposition.[11]

The new measures provide that stamp duty shall be due and payable on the date on which the transfer order, or deemed transfer order, is executed (i.e. the 30-day timeframe in s2 SDCA 1999 does not apply); however, the Commissioners may enter into an agreement with a CSD, or other party, in relation to payments.[12]

3 Tax and Duty Manual Part 13-01-02.

4 SI No 108 of 2021.

5 Section 78J SDCA 1999.

6 Section 98I SDCA.

7 "Transfer order" is defined in s78A SDCA 1999 as "a properly authenticated instruction to transfer an interest in securities" (this [interest in securities] is defined to include "an interest or right in, or in relation to, securities which are held in, or on behalf of, a CSD, the rules of which require holders of interests or rights in, or in relation to, securities to hold those interests or rights by way of a co-ownership interest in a fungible pool of underlying securities").

8 Section 78A SDCA 1999.

9 Section 78B SDCA 1999.

10 Schedule 1 SDCA 1999.

11 Section 78D SDCA 1999.

12 Section 78E SDCA 1999.

A transfer order is deemed stamped on payment of duty. As the intention was to maintain the status quo, it would seem that the 30-day timeframe for stamping should have been maintained.

Section 78C SDCA 1999 extends stamp duty relief for recognised intermediaries (as provided for in s75(3)) and relief for clearing houses (as provided for in s75A) to transfers of dematerialised securities.

Assessments/amended assessments can be raised by Revenue in respect of insufficient or incorrect duty "at any time and for any reason", within the standard 30-day window[13] for a taxpayer appeal to the Tax Appeals Commission by submitting a Notice of Appeal in accordance with s949I TCA 1997.[14]

The new Chapter confirms that the standard four-year window for seeking refunds for overpayment of duty will apply, with the clock running from the date of execution of the transfer order or deemed transfer order.[15] It also provides that information relating to the transfer of the interest in securities must be retained for a period of six years from the date of execution of the transfer order/deemed transfer order.[16]

CATCA 2003 Amendments

Taxable gifts and inheritances

The scope of Irish CAT for gifts and inheritances is outlined in s6 (taxable gifts) and s11 (taxable inheritances) CATCA 2003. Irish-situate property is always within the scope of CAT, irrespective of the residence, ordinary residence and domicile of either the donor or the donee.[17] As, after migration, investors will technically hold (or be entitled to hold) Belgian co-ownership rights rather than the underlying shares, a legislative amendment to these sections was required to ensure that assets remain within the Irish CAT net.

Sections 6 and 11 CATCA 2003 are amended so that the shares migrated to the new CSD continue to be considered as situated in Ireland and within the scope of Irish CAT irrespective of the legal structure in which the underlying shares are held. New sub-sections have been inserted into both provisions to provide that certain shares shall be deemed situate in Ireland. "Shares" include "any legal or equitable interest or right in, or in relation to, a share, whether such interest or right is directly or indirectly held" and are deemed to include co-ownership interests in the case of shares held by a CSD whose rules require holders of interests in such shares to hold those interests by way of a co-ownership interest in a fungible pool of underlying shares.

Relief for intermediaries – s75 CATCA 2003

Section 75 CATCA 2003 provides an exemption for non-ordinarily resident and non-domiciled individuals in respect of units held in a collective investment scheme. A new sub-section 75(1A) confirms that the definition of "collective investment scheme" does not include a CSD whose rules require holders of interests in securities, held by the depository, to hold those interests by way of a co-ownership interest in a fungible pool of underlying securities.

Conclusion

On the whole, the amendments and guidance bring clarity and are to be welcomed. Irish investors and stock traders can continue to operate within the EU regulatory framework without unnecessary disruption or ambiguity arising from the migration to the new system. The changes should allow Irish investors and stock traders to continue to operate within the EU regulatory framework without unnecessary disruption or ambiguity arising from the migration to the new system.

Read more on taxfind From Irish Tax Institute *Law of Capital Acquisitions Tax, Stamp Duty and LPT, Finance Act 2020; Direct Tax Acts, Finance Act 2020*

13 The new s78F(3) SDCA 1999 refers to s949I TCA 1997, however, this section relates to the Notice of Appeal form. The 30 day timeframe for appeal is in s959AF TCA 1997.

14 Section 78F SDCA 1999.

15 Section 78G SDCA 1999.

16 Section 78H SDCA 1999.

17 Sections 6 and 11 CATCA 2003.

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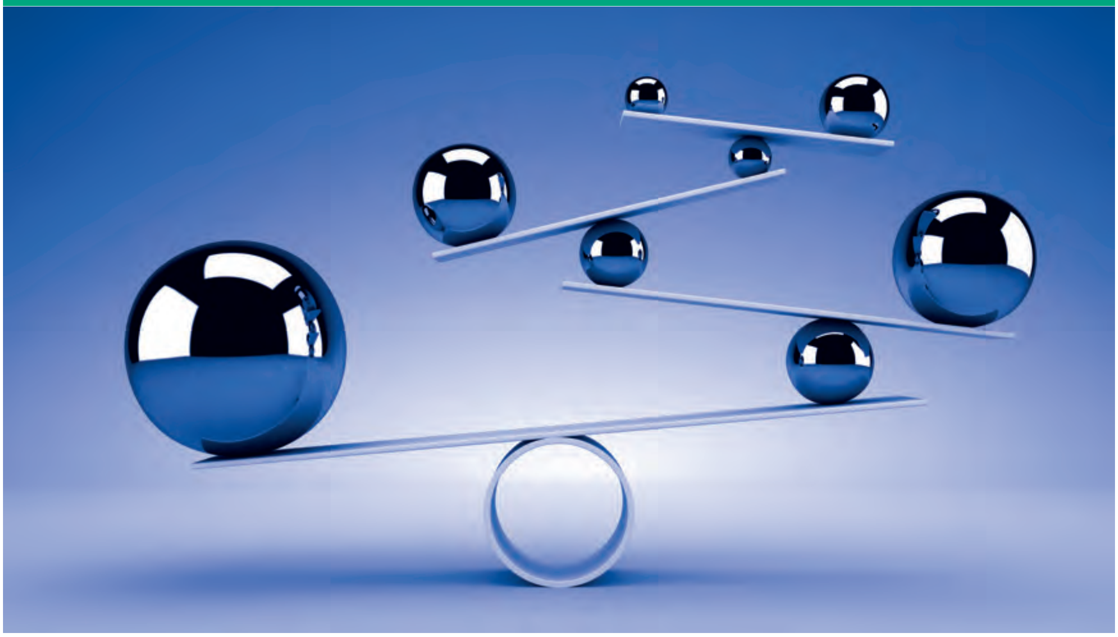
Finance Act 2020: Reduction of Rate of Revenue Interest on Underpayments/Overpayments - A Step too Far?



Introduction

The purpose of this article is ostensibly to provide an overview of the 2020 Finance Act updates to the tax appeals system. The updates themselves are brief and relatively simple and do not, to be frank, require much explanation. What they do provide, however, is an opportunity to take stock of the balance of power between the Revenue Commissioners and taxpayers when tax is underpaid or overpaid.

Underpayments and Overpayments of Tax

The basic principle is that if you overpay tax to the Revenue Commissioners you get interest on the amount overpaid but if you underpay tax you have to pay interest on the amount you underpaid. Sounds pretty straightforward.

Now, it is not surprising that the legislature would choose to introduce some nuance to this position because, of course, taxpayers are responsible for ensuring that their taxes are paid properly and in a timely fashion. Accordingly, it is not necessarily surprising that taxpayers are entitled to receive interest on amounts they have overpaid to the State only where the overpayment is as a result of a “mistaken assumption in the operation of the law” by the Revenue Commissioners. It is, however, noteworthy that this threshold is not reciprocated, with taxpayers having to pay interest to the State as a matter of course if there is an underpayment. This perhaps unsurprising imbalance is also inherent in the rate of interest payable. Accordingly, it is not necessarily surprising that taxpayers would have to pay more interest to the State when they underpay their taxes than the State has to repay when taxes are overpaid, but what is quite arresting, however, is the scale of this disparity.

A taxpayer who inadvertently overpays tax to the Revenue Commissioners is entitled to receive simple interest at an effective annual rate of 4%. By contrast, a taxpayer who underpays tax is required to pay two to three times that rate of interest to the State, namely 8% or 10% – but what is the justification for this disparity?

From 1963 to 1971 statutory interest on overdue tax ran at 6% per annum. During that period short-term commercial interest rates were running between 6% and 8%. The highest interest rate that has ever been imposed on underpaid tax was the 18% in force between May 1975 and July 1978, but at that time market interest rates were running at between 12% and 14%. The interest rate on underpaid tax has never been as wildly out of kilter with market interest rates as it is now.

In the UK statutory interest for late payment of tax is fixed at a rate 2.5% higher than the Bank of England rate. On that basis it is currently 2.6% (as the Bank of England base rate is 0.1%). The current European Central Bank (ECB) rates are –0.50% for deposits and 0.25% for marginal lending. In the last ten years the highest ECB deposit rate was 0.75% (in 2011) and the highest lending rate was 2.5% (again, in 2011). It seems entirely clear, then, that statutory interest rates of between 8% and 10% per annum cannot be justified by reference to the time value of money. The disparity between commercial interest rates and statutory rates implies that statutory rates are designed to punish people for underpaying tax and at the same time to disincentivise late payment or non-payment of tax.

Now, looked at in isolation, creating a disincentive to late payment or non-payment of tax is entirely sensible. The problem, however, is that we already have a system of penalties that are designed precisely for that purpose.

Anyone reading this article is undoubtedly already aware of the complexities of the circumstances in which penalties apply and the mind-boggling complexity of s1077E TCA 1997. The purpose of this article is not to delve into the intricacies of these provisions but merely to draw from them some basic principles. I hope, therefore, that I will be forgiven for some slight generalisations in my analysis of the issues below.

Every taxpayer who delivers an incorrect tax return of one type or the other is liable to a fixed penalty of €3,000 or €4,000. That penalty applies irrespective of the amount of the underpayment or the size of the return; it is exceptionally regressive.

Separately to these fixed penalties, the Act provides for tax-geared penalties. As readers will be acutely aware, these penalties start at 100% of the tax underpaid and can be mitigated downwards. Those who deliberately understate their tax – a group that in my experience are in the overwhelming minority of taxpayers – are rightly subject to the highest level of penalties. However, those who do not deliberately understate their tax liabilities are liable to a penalty where that person “carelessly” delivers an incorrect return.

Now, there is a wealth of case law in the UK to the effect that the equivalent provision in the

UK does not impose a penalty if (to simplify) the taxpayer has relied on professional advice in the preparation of their return and has not acted carelessly. Put simply, the UK courts recognise that a taxpayer may make an honest mistake – it may be a mistake that ought not to have been made, but it if is a mistake that did not result from a failure to take reasonable care, no penalty is payable.

However, despite the fact that s1077E defines "carelessly" as "a failure to take reasonable care", in practice the Revenue Commissioners have defined this requirement out of all meaning. The concept of a no fault honest mistake without consequences in tax penalties is very limited.

Paragraph 5.6.1(b) of the Code of Practice for Revenue Audit and Other Compliance Interventions sets out how "carelessly" is supposed to be approached in practice. It states:

> "The test of reasonable care is 'whether a taxpayer of ordinary skill and knowledge, properly advised, would have foreseen as a reasonable probability or likelihood the prospect that an act (or omission) would cause a tax underpayment, having regard to all the circumstances'. The taxpayer cannot devolve the responsibility of making a correct return to an agent."

Despite the fact that the Code places certain words in quotations, it is not clear to me what its source is and it is not cited. So far as I can ascertain, it is not a quotation from any case in the UK, Ireland or beyond. Whatever its source, this is not a test of reasonable care.

This is, in effect, a test of perfection. In my experience, it is the above test – and not the test of reasonable care – that the Revenue Commissioners apply in practice. In essence, the Revenue Commissioners will consider this test to have been met if a taxpayer brings a particular matter to his/her adviser's attention, receives advice on that issue, the advice is wrong but the Revenue Commissioners agree that the issue on which the advice was received was complex and open to the interpretation given to the taxpayer, so that it was reasonable of the taxpayer to conclude that there was no liability. In other words, there is no room for a genuine error and merely room for adopting a differing view to the Revenue Commissioners on certain tax technical issues.

A taxpayer who submits a return but makes an innocent miscalculation, innocently claims a credit that should not have been claimed or fails to apply a restriction that ought to have been applied is, according to the Revenue Commissioners' approach to s1077E, careless and, therefore, liable to a penalty. Other than in the context of complex tax matters where the correct interpretation of the legislation is open to debate, penalties are, in my experience, applied as a matter of course. The only question is how much the penalty will be?

Now, those not familiar with tax would undoubtedly ask whether one can appeal such a penalty – and, yes, of course, one can. The problem, however, is that one can do so only through the means of a public hearing in the District, Circuit or High Court, as determined by the amount of the penalty sought to be imposed. Accordingly, a diligent taxpayer who has made an innocent error will be faced with the choice of taking their 15% to 30% penalty on the chin but being able to do so without the glare of publicity or engaging in a public dispute with the Revenue Commissioners where their under-declaration of tax (and, by extension, the amount of their income etc.) will be fully within the public domain. Unsurprisingly, taxpayers invariably choose the former route.

The combined effect of all of the foregoing is as follows. Every underpayment of tax carries statutory interest at a simple interest rate of 8% to 10%. On top of this, with very few exceptions, any error of any nature is also punished by a penalty of 15% to 30% of the tax underpaid and, possibly, additional fixed penalties. In those circumstances there is no need, indeed there is no justification, for the application of a penal rate of interest. This is so, in particular, because the penalty regime, being tax-geared, can cater for the whole gamut of tax behaviour. Penalties of as much as 100% of the tax underpaid can be applied where that is appropriate. And, to be clear, sometimes it is appropriate.

But this is all, as it were, "old news", so why is it relevant to an article on Finance Act 2020? Well, I was asked to write an article about the 2020 Finance Act measures, and one of those measures is a section that further tips the scales of equity against those who make innocent errors, and it got me to thinking: is this the straw that breaks the camel's back?

The effect of s960GA TCA 1997,which was inserted by Finance Act 2020, is to tip the balance further against taxpayers. Its purpose was pithily summarised by the Explanatory Memorandum to the Finance Bill:

> "This section provides that where a taxpayer appeals an assessment, and in connection with that appeal, makes a payment to Revenue and subsequently wins the appeal, the taxpayer will not be entitled to interest on the amount repaid [under the relevant provisions of the relevant Acts]."

Despite some tortuous language, it appears that this is indeed the effect of the section. Quite why a taxpayer who pays over tax on foot of an assessment that is later proven to be misfounded is to be denied interest is, to be honest, a mystery. This incongruity is rendered all the more inexplicable by virtue of the fact that interest would be payable, in any event, only where the provisions of s865A TCA 1997 are met. As adverted to above, pursuant to s865A, taxpayers are entitled to receive interest at a rate of approximately 4% per annum on tax that has been overpaid only where the overpayment is as a result of a "mistaken assumption made by the Revenue Commissioners in the application of any provision of the Acts". It is quite common for no interest to be paid on repayments arising on foot of statutory appeals, on the basis that the dispute was one regarding the facts rather than the law.

The prohibition that s960GA introduces acts to disincentivise taxpayers from paying over tax that has been assessed pending the outcome of an appeal. Yes, by paying the sums in question, the taxpayer will avoid the prospect of additional interest if the appeal is lost, but if the appeal is won, no interest will be receivable. It must also be recalled that in the event of a successful appeal before the Appeal Commissioners the taxpayer does not receive any costs (nor, of course, would the Revenue Commissioners receive their costs if they were successful). Accordingly, the section envisages, on the one hand, that a taxpayer receives an assessment, appeals it, runs the appeal, wins, the Revenue Commissioners are shown to have operated on the basis of a "mistaken assumption" as to the law and the taxpayer receives no costs and no interest. On the other hand, if the tax is not paid and the appeal is lost, the taxpayer will have to pay interest of 8–10% irrespective of the reasons for the loss. One cannot help but wonder why this measure, which is conspicuous in its unfairness, was enacted.

If there was considered to be an unfairness in the State's having to pay significant sums of interest to successful litigants (notwithstanding that the State made a "mistaken assumption" as to the law), then the rates of interest ought to have been changed. In searching for a rationale for s960GA, a cynical observer might query whether it was easier to remove the right to interest for a discrete number of taxpayers than to change the overall rate of interest applicable to repayments, which would have put the rate of interest applicable to underpayments directly in the spotlight. It seems to me that the abolition of statutory interest in the case of appealed assessments may be the straw that has broken the camel's back in terms of the balance of fairness between taxpayers and the State.

In 2018 the German Supreme Court suspended the effect of Germany's annual statutory rate of interest of 6% on late payment of taxes, which had been in force for some 50 years, on constitutional grounds, on the basis that it was, in effect, disproportionate, given the long-established prevailing low rate of interest.[1] Whether the Irish statutory provisions could be said to be susceptible to a constitutional challenge on grounds of being disproportionate is beyond the scope of this article,[2] but it is certainly noteworthy that the German Supreme Court adopted such an approach.

Conclusion

The purpose of this article is not to suggest grounds for a legal challenge as much as to contribute in some small way to the precipitation of an earnest consideration of these provisions. The rate of interest applicable to late payments of tax, the disparity between that rate and the rate applicable to underpayments, the ever-decreasing circumstances in which taxpayers can obtain interest on overpayments and the application of penalties in the case of innocent errors may each appear justifiable when viewed in isolation, but collectively, in my view they do our tax system a great discredit.

1 Supreme Tax Court, resolution IX B 21/18 of 25 April 2018, published on 14 May 2018.

2 The implications of the Supreme Court judgment in *Brennan v AG* [1984] ILRM 355 and that of Mr Justice Murphy in *Browne v Attorney General* (unreported, 6 February 1991) would certainly have to be considered.

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Finance Act 2020: Encashment Tax, PSWT Modernisation and Share Reporting Requirements

Introduction

A Finance Act is published annually in Ireland and introduces into legislation the tax provisions announced as part of the annual Budget by the Minister for Finance and other relevant amendments. The Finance Act provides for the imposition, repeal, remission, alteration and regulation of taxation. Typically, there are a number of items that have been flagged well before Budget Day/the release of the Finance Act, but there are often some unexpected additions too.

As the Finance Act updates Irish tax legislation, it is important that taxpayers give due attention to all of the provisions included in same. Finance Act 2020 included a number of headline items that were widely discussed and reported on; however, taxpayers should also be aware of and consider the other items included in the Act. Although such provisions may not be widely applicable, they are relevant to certain specific sectors/taxpayers. The focus of this article is on a selection of such technical amendments.

Headline Items in Finance Act 2020

The backdrop to Finance Act 2020 was considerable economic uncertainty as a result of both Brexit and the Covid-19 pandemic. The Finance Act 2020 provisions do not contain detailed provisions in respect of Brexit. However, measures to deal with some of the uncertainty created by Brexit have been provided for separately under "Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020". Therefore, a significant focus of Finance Act

2020 is on provisions to support those impacted by Covid-19. Such measures include a reduction in the VAT rate applicable to the hospitality and tourism sector, a scheme to provide funding for businesses impacted by Covid-19 – the Covid Restrictions Support Scheme (CRSS) – and tax debt warehousing measures to assist taxpayers with cash-flow issues.

In addition, Finance Act 2020 contains a number of technical amendments to clarify the operation of provisions introduced in recent Finance Acts, to ensure that such provisions operate as intended. These include amendments to the anti-hybrid tax rules, Ireland's controlled foreign company regime, the legislation governing EU mandatory disclosure reporting (DAC 6) and Ireland's transfer pricing regime.

Other Items in Finance Act 2020

There are also a number of independent technical amendments in Finance Act 2020, which will be of interest to certain taxpayers/sectors:

- an increase in the rate of encashment tax and more clarity on its operation,
- the modernisation of Ireland's professional services withholding tax (PSWT) regime and
- wider share reporting requirements.

Further detail in respect of each of these items is provided below.

Encashment tax

A number of unexpected changes were included in Finance Bill 2020, and subsequently Finance Act 2020, with respect to encashment tax.

What is encashment tax?

Encashment tax is a withholding tax deducted from income from public revenue dividends and dividends of a non-resident body. The individual who is responsible for the payment of the income (typically, Irish banks or other paying agents) must deduct the tax.

Public revenue dividends include dividends, interest and annuities payable out of both the public revenue of any government and the revenue of any public authority or institution.

A number of exemptions are available relating to the payment of encashment tax, which include payments to Revenue-approved charities, Revenue-approved pension schemes, certain ARFs, AMRFs and PRSAs, Irish investment undertakings, banks, building societies, life assurance companies, credit unions and s110 companies.

What are the changes?

Firstly, the rate of encashment tax is increased from 20% to 25% from 1 January 2021. This brings encashment tax in line with the rate of dividend withholding tax, which was increased to 25% in Finance Act 2019.

Secondly, also bringing encashment tax in line with similar exemptions from withholding tax available to Irish companies, an exemption has been introduced from encashment tax for Irish-tax-resident companies that are beneficially entitled to the income they receive and are, or will be, within the charge to corporation tax in respect of such income. This change also has an effective date of 1 January 2021.

Finally, there are updates to the reporting and record-keeping requirements in respect of encashment tax. Details that must be included in the encashment tax return include the name and address of the person to whom the payment is made, the amount and type of the payment, the amount of income tax deducted in respect of the payment and a declaration to the effect that the return is complete and correct. In addition, certain details must be retained by the chargeable person. The reporting and record-keeping requirements are subject to a Ministerial Commencement Order. Although the section is subject to a commencement order, once that order is signed by the 23rd of the following month, an accountable person has to submit a return in relation to the period 1 Jan to the date of commencement of the provisions.

What is the impact of the changes?

These amendments, though unexpected, provide greater clarity, in particular in the context of certain financial institutions that may be moving to Ireland as a result of Brexit and may now be within the remit of encashment tax.

The impact of the increase in the rate of encashment tax to 25% should largely be on cash-flow rather than a real cost to taxpayers, as encashment tax is creditable against the Irish income tax/corporation tax of the recipient, with a refund available for any excess.

For companies that meet the exemption criteria, there will be a cash-flow benefit, in addition to the removal of administrative requirements.

The fact that the updates to the reporting and record-keeping requirements are subject to a Ministerial Commencement Order should allow time to update systems to report/record the correct information.

Modernisation of PSWT regime

What is PSWT?

Professional services withholding tax is a tax that applies to payments to accountable persons (e.g. government bodies and local authorities) for certain professional services (e.g. medical, architectural, accountancy, financial, marketing, legal, geological) provided to relevant entities. An accountable person must deduct PSWT at the standard rate of income tax (currently 20%) from payments made for certain professional services. An accountable person must submit PSWT returns to Revenue and pay over the PSWT deducted to Revenue. The person providing the service is known as the specified person.

What are the changes?

Finance Act 2020 provides for the modernisation of the PSWT regime by providing for the electronic transfer of information, data and returns. There are also a number of small technical amendments included in the Act.

The provisions refer to a "PSWT service" for the first time. This PSWT service is explained as an electronic system such as is made available by the Revenue Commissioners to allow accountable persons to fulfil their PSWT requirements and to facilitate electronic communication between the Revenue Commissioners, accountable persons and specified persons.

The provisions outline that accountable persons will have two different types of interactions/filing requirements with the PSWT service: submission of a notification when a payment is made and submission of an annual return in relation to PSWT.

Firstly, an accountable person will be required, on making a relevant payment, to submit a payment notification to Revenue using the PSWT service. The payment notification will need to include the following details:

- the name and address of the specified person,
- the specified person's tax reference number,
- the amount of the relevant payment,
- the amount of PSWT deducted from the payment,
- the date on which the payment was made and
- such other information as may be required by the Revenue Commissioners.

On submission of the payment notification, the accountable person shall be provided by the PSWT service with a reference number to acknowledge the notification.

The accountable person must then provide to the specified person the following details:

- the name and tax reference number of the accountable person,
- the gross amount of the relevant payment, including the tax deducted,
- the amount of tax deducted from the relevant payment,

- the date of the relevant payment and
- where requested, the payment notification reference number.

The due date for submission of the return and payment of the PSWT is the 23rd day of the following month.

The second category of interaction with the PSWT service is the annual PSWT return. An electronic return will be required to be filed on or before 23 February of the following year providing the following details to Revenue:

- all amounts of PSWT deducted from relevant payments during the year,
- all amounts of PSWT remitted to Revenue by the accountable person during the year and
- any amounts of PSWT owed by the accountable person in respect of relevant payments made during the year.

The provisions in respect of PSWT are subject to a Ministerial Commencement Order.

What is the impact of the changes?

Revenue has been increasing its digital capabilities over recent years, and the provision of a PSWT service is another step in this direction. The modernisation of Revenue's interactions with taxpayers should hopefully reduce the administrative burden currently placed on both taxpayers and Revenue in relation to PSWT reporting. Again, as with the changes to encashment tax, the fact that the PSWT provisions discussed above are subject to a Ministerial Commencement Order should allow time for accountable persons to update systems to report/record the correct information.

Share reporting requirements

What are the reporting requirements for share-based remuneration?

There are a number of annual reporting requirements that apply where employers provide certain share schemes for their employees. Employers must report certain details in respect of such share schemes to Revenue on or before 31 March following the end of the relevant tax year.

What are the changes?

Finance Act 2020 extended the scope of reporting requirements for employers in respect of share schemes. Mandatory electronic reporting by employers will now be required where:

- a discount on shares is provided to an employee/director or
- an award in the form of a cash equivalent of shares is provided to an employee/director.

In addition, Finance Act 2020 updated the existing reporting requirements for the award of convertible securities, restricted shares and forfeitable shares. Mandatory electronic reporting will now be required for such share awards. There is also a catch-all provision that applies mandatory electronic reporting to any share award to employees/directors that is not otherwise captured within the provisions.

What is the impact of the changes?

Employers have been subject to mandatory electronic reporting for share option awards for some time, and it is unsurprising that mandatory electronic reporting is being extended to other share-based remuneration. Effectively, all share awards and cash equivalents are now subject to mandatory electronic reporting.

As with the changes to encashment tax and PSWT reporting, the move to electronic reporting for share awards should ease the administrative burden for both taxpayers and Revenue.

Conclusion

There are constant changes to tax legislation for Irish taxpayers to keep abreast of. The annual Finance Act is a good starting point for taxpayers in considering whether there is updated Irish tax legislation that may be applicable to them. Although certain provisions have wide application to taxpayers, the Finance Acts typically also include a number of technical amendments that apply only to certain sectors/taxpayers. It is important that taxpayers consider each and every provision in the Finance Act and their applicability and implications.

This article discussed three such technical amendments in the areas of encashment tax, PSWT reporting and share reporting. The overarching theme of these amendments is a move to the digitisation and modernisation of reporting. This is unsurprising, as Revenue's "Statement of Strategy 2020–2022" stated that "we will build on our advanced digital platform and PAYE Modernisation by designing innovative and dynamic systems". This move to electronic reporting should ease the administrative burden on both Revenue and taxpayers and thereby increase the efficiency of the tax system. It is expected that this digitisation and modernisation of the tax system will be seen in other areas in future Finance Acts.

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Finance Act 2020: Key Changes to CAT, CGT and Stamp Duty

Introduction

Well before the opening statement of Budget 2021 on 13 October 2020, it was already clear that the chief focus for the Minister for Finance, Paschal Donohoe TD, would be the introduction and extension of unprecedented stimuli to mitigate the effect of the Covid-19 pandemic on the Irish economy. By comparison to these headline measures, the changes introduced across the capital gains tax (CGT), capital acquisitions tax (CAT) and stamp duty tax heads appeared almost cursory. As the dust settled, and after consultation and amendment at the Committee Stage, the Finance Act 2020 (FA 2020) was signed into law by President Michael D. Higgins on 19 December 2020. This article seeks to examine and comment on the key (and potentially overlooked) changes to the above areas.

Stamp Duty

In general, the changes made to stamp duty by FA 2020 were conservative. As expected, there was no increase (or, indeed, decrease) in the rate applicable to conveyances or sales of non-residential property, and this remains at 7.5%. In this regard, a contrast may be drawn with the "stamp duty holiday" introduced in the United Kingdom, which saw a ramp-up of transactions as the UK Government temporarily reduced the rate of stamp duty on residential and buy-to-let transfers until 31 March 2021.[1] Despite no such measures being introduced in this jurisdiction, transactional activity in the residential sector remained high, although there has been a noticeable drop-off in its commercial counterpart as arrangements were postponed due to uncertainty.[2] From the perspective of FA 2020, in lieu of adjusting the rates of stamp

1 The relevant UK legislation is the Stamp Duty Land Tax (Temporary Relief) Act 2020.

2 Fergus O'Farrell, Savills Ireland, Investment Market Outlook, December 2020

duty, several reliefs were extended both in time and in scope, as outlined below.

Additional charge on certain share transactions

Section 48 of the FA 2020 inserts sub-section 7A into s31C of the Stamp Duties Consolidation Act, 1999 (SDCA 1999). This sub-section clarifies that where an agreement would be treated as a conveyance or transfer of shares deriving their value from immoveable property but for s31D of SDCA 1999, the agreement shall be chargeable to stamp duty under s31C of SDCA 1999 instead (and, accordingly, subject to the 7.5% rate of duty). This provision appears to be concerned with removing the possibility of conflict between s31C and s31D SDCA 1999 and ensures that the 7.5% rate will apply to such conflicts.

Extension of the residential refund scheme

The residential refund scheme, as set out in s83D of SDCA 1999, is amended by FA 2020 as follows:

- The scheme has been extended by one year. Construction on the "relevant residential development" must now be commenced before 1 January 2023.
- The time limit for completion of the development to which the section applies has been extended from 24 months to 30 months from the date of commencement of construction works. This applies for both multi-unit developments and developments comprising a single dwelling unit.

Since its inception, and again following its extension, the scheme has featured in Dáil debates as it does not appear to be effectively serving its intended purpose of incentivising the growth of housing stock in the State.[3] The more onerous conditions of the scheme, such as the requirement to have 75% of the surface area of the development be occupied by single dwelling units, have been cited as being too restrictive. Recently released figures from Revenue show an increased uptake of the residential refund scheme from 2018 to 2019, with the vast number of applications being made for single dwelling units.[4] Engagement with the scheme fell in 2020, but this is not entirely unexpected, due to the effect on the construction industry of the Covid-19 pandemic. On balance, the relief appears to be of use, although it is hoped that a future loosening of the conditions will prompt even greater uptake.

Extension of time for farm consolidation relief and consanguinity relief

The time limit applicable to claims of the farm consolidation relief from stamp duty has been extended for two years, to 31 December 2022. This will bring the relief in line with its CGT counterpart and allow both to be reviewed at the end of 2022. Originally introduced to facilitate farmers seeking to consolidate their various holdings, the farm consolidation relief provides a reduced stamp duty rate of 1% (as opposed to the standard rate for non-residential property of 7.5%). Over the years, the relief, contained in s81C SDCA 1999, has seen modest but consistent uptake, and it has been recognised as an effective tax-based support for the agri-food industry in Ireland, facilitating greater output as parcels of land are amalgamated.[5] It is unsurprising, therefore, that the relief is extended, particularly in the context of Brexit, which is likely to lead to disruption in the agri-food sector in the short to medium term.

Similarly, the time limit to claim consanguinity relief has been extended to 31 December 2023. The relief currently operates to reduce the rate of stamp duty from 7.5% to 1% where the owner of agricultural land transfers the land to a relative, provided the relative either farms or leases the land for six years following the disposal and certain other conditions are met.

3 See https://www.oireachtas.ie/en/debates/debate/dail/2020-11-04/17/.

4 See http://www.budget.gov.ie/Budgets/2021/Documents/Budget/121020%20Tax%20Expenditures%20Report%202020%20for%20Publication.pdf#page=80.

5 See http://www.budget.gov.ie/Budgets/2021/Documents/Budget/121020%20Tax%20Expenditures%20Report%202020%20for%20Publication.pdf#page=89.

While a review of the relief in 2020 examined the possibility of re-introducing an age limit as part of the qualifying conditions, this ultimately was not included in the legislation.[6] The imposition of such an age limit is likely to encourage farmers to transfer land at a younger age but, conversely, may also cause a chilling effect in such transfers by those already past the age threshold. It is a real possibility that such a condition may be included in future Budgets and advisors should be cognisant of this when consulted by clients who are engaged in agricultural activities.

Capital Acquisitions Tax

As with the amendments to stamp duty, FA 2020 did not introduce any major policy changes to CAT. Although upward increases to the group thresholds had become the norm in recent years, there are no such inclusions in either the Budget speech given by the Minister or the Act as passed. Instead, the changes to CAT focus on the area of compliance, with two amendments conceivably providing Revenue with greater ability to scrutinise CAT returns.

Obligation to file a CAT return

The first change introduced by FA 2020 is the expansion of the obligation to file a return where either business relief or agricultural relief is claimed by a beneficiary or donee. The previous position required an individual to file a return where the aggregate taxable value of the total benefits received exceeded 80% of the applicable group threshold or where Revenue directed the individual in writing that a return be made. The amendment brought by FA 2020 now requires a return to be filed where either business relief or agricultural relief is claimed, regardless of the value of the benefit. This extension of filing obligations may in the author's view signal that business and agricultural reliefs are now areas of particular focus for Revenue, as the amendments provide greater oversight on all claims. Along similar lines, it should also be noted that the move of the Inland Revenue Affidavit (Form CA.24) to an online format in 2020 will naturally result in Revenue's being provided with more immediate access to electronic data. This, in turn, will allow for faster and more comprehensive analysis of returns.[7] The changes to s46 of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) came into effect from the date of passing of FA 2020.

Adjustment of time limits for enquiries, assessments and repayments

Additionally, the time limit for Revenue to make enquiries, assessments or repayments in respect of certain returns has been extended to four years after the end of the year in which that return is made. There is a carve-out in the amendment in respect of discretionary trusts, which will remain subject to the four-year limit from the actual date that the return is made. The relevant legislation is contained in ss46, 49 and 57 CATCA 2003, as amended by s56 FA 2020.

Capital Gains Tax

Although hopes among investors for a reduction in the overall CGT rate to stimulate capital transactions were quickly dashed by the announcement of Budget 2021, other amendments were introduced that merit comment. FA 2020 provides a technical amendment to provisions governing the transfer of non-Euro currencies between accounts, and the slight loosening of the criteria to avail of revised entrepreneur relief is also a welcome development.

Amendment to s541 TCA 1997

A new s6A is inserted in s541 of the Taxes Consolidation Act 1997 (TCA 1997). Sub-section (a) of this provision states that where a non-Euro sum is owed by the bank to an individual, and this debt is transferred by the individual from one account to another account, either with the same bank or with another bank in the same currency, there is deemed to be a disposal of the debt on a no-gain, no-loss basis. At face value, the provision appears to prevent losses being

6 See https://www.gov.ie/pdf/?file=https://assets.gov.ie/90876/a4fe66fd-6ea0-4cc3-83f6-512299fd6eee.pdf#page=45

7 See https://taxfind.ie/document/ITR_Issue_2_2020_XML_07072020-C18-3045910141.

realised from the movement of funds from one currency to another, by moving the currency between different accounts without a disposal to a third party. Sub-section (b) provides that where such a disposal to a third party is ultimately made, the no-gain, no-loss provisions in (a) are ignored for the purposes of calculating any taxable gain or allowable loss. These provisions commenced with the passing of FA 2020.

Expansion of revised entrepreneur relief

As it became clear that there would be no reduction in the rate of CGT, speculation before the Budget announcement focussed on whether adjustments would instead be made to the various CGT reliefs, as many of these (entrepreneur relief, retirement relief etc.) reduce the effective rate of CGT payable on a transaction where certain conditions are met. Although the introduced measures do broaden the accessibility of revised entrepreneur relief,[8] it may well in the author's view be considered a missed opportunity to make a more meaningful change.

Under the previous iteration of the relief, the "relevant individual" was required to hold shares in a trading company for three of the five years immediately preceding the disposal. This definition of a "relevant individual" has now been extended by FA 2020 to include an individual who has held shares, being not less than 5% of the ordinary shares in a trading company, for a continuous period of three years at any time before the disposal of those shares. The extension applies to a disposal of shares only, and the requirement for the individual making the disposal to have been a director or employee of the company for a continuous period of three years out of the five years immediately preceding the disposal and spent a minimum of 50% of their working time in service to the company in a managerial or technical capacity is unchanged.

As passed, the new definition should extend the relief to those individuals who may not have held the beneficial interest in the shares in the five years immediately before their disposal but, nevertheless, held the shares for three continuous years at some point in their ownership. Additionally, it should further allow for an individual to dispose of part of a 5% shareholding and avail of the relief on both that disposal and the disposal of the balance of the shareholding, even where the balance is less than 5%. This may be of relevance to practitioners and individuals where an individual's shareholding was greater than 5% historically but has since been diluted. The change is applicable only to claims for revised entrepreneur relief made from 1 January 2021.

An Eye on the Horizon

A final point to note is the announcement by the Minister for Finance of a public consultation on the Employment Investment Incentive (EII).[9] In its current format, the scheme allows certain investors to claim relief of up to 40% on their investment in SMEs and start-ups. The consultation aims to improve the effectiveness of the scheme, encouraging suggestions that would take account of the prevailing economic climate. This is a positive first step, as such schemes may well prove critical to ensuring the stimulating investment crucial to the survival of the SME sector as the stimulus packages are wound down by the Government. With a deadline for submissions of 12 February, it is hoped that the results of the consultation will be made available later this year.

Conclusion

With the Irish economy's having undergone a seismic upheaval due to the impact of the Covid-19 pandemic, FA 2020 is primarily concerned with introducing and refining financial support packages for employers and employees, alike. Although the various amendments introduced across the tax heads of stamp duty, CAT and CGT are sensible, those businesses and individuals hoping for more widespread change in policy will be disappointed.

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8 Section 597AA, TCA 1997.

9 See https://www.gov.ie/en/consultation/25dd7-public-consultation-on-the-employment-investment-incentive-eii/.

As 2021 progresses, both businesses and advisers will be hopeful of further reviews of other tax reliefs, and the launch of the consultation scheme for the EII is to be welcomed as a positive first step. Finally, notwithstanding historically low interest rates, with an anticipated Budget deficit of €19bn in 2021, the Budget this year will need to strike a balance between shoring up the public finances and ensuring adequate support for businesses as the long-term economic effects of the pandemic become more apparent. As a result, the changes made to stamp duty, CAT and CGT in FA 2020 may be "as good as it gets".

Read more on taxfind From Irish Tax Institute *Law of Capital Acquisitions Tax, Stamp Duty and LPT, Finance Act 2020; Direct Tax Acts, Finance Act 2020*

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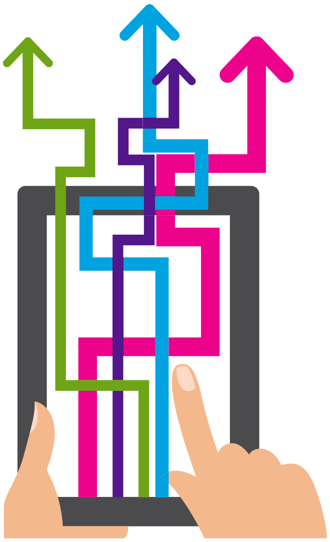
Expansion of UK's "Making Tax Digital" Regime



Introduction

The final element of the UK's Making Tax Digital for VAT rules takes effect for VAT periods commencing on or after 1 April 2021. From this date, it will be necessary to maintain a digital audit trail to support the UK VAT return. However, this is the end of the beginning, rather than the beginning of the end, of HMRC's Making Tax Digital journey.

What is Making Tax Digital?

The UK MTD regime came into effect from 1 April 2019 for UK VAT registered entities that had a taxable turnover in excess of the UK VAT registration threshold (£85,000). However, with effect from April 2022, MTD will apply to all UK VAT registered entities and not just those whose taxable turnover is in excess of the VAT registration threshold. The introduction of MTD for VAT as part of HMRC's ambition to become one of the most digitally advanced tax authorities in the world. A key objective of MTD is to modernise the collection of tax, with a view to reducing the number of errors in tax compliance and thereby helping to close the "tax gap", i.e. the difference between the tax revenue that should be collected and the amount actually collected by HMRC. This will result in fundamental changes to how HMRC conducts UK VAT (and other tax) audits in the future for UK VAT registered entities that had a taxable turnover in excess of the UK VAT registration threshold (£85,000). However, with effect from April 2022, MTD will apply to all UK VAT registered entities and not just those whose taxable turnover is in excess of the VAT registration threshold.

The introduction of MTD is part of a global trend that has seen the introduction of various measures to allow tax authorities to utilise technology to facilitate the filing of tax returns and the gathering of transaction data. Other examples are the introduction of real-time reporting (SII) in Spain; the SAF-T (standard audit file for tax) in France, Portugal, Poland and others; and e-invoicing regimes in Italy and Greece, as well as the introduction of PAYE Modernisation in Ireland.

The UK regime differs from the indirect tax regimes in other countries in that source data is not collected by HMRC. Instead, there is an onus on the taxpayer to maintain a digital audit trail to support all data relevant to the tax return filing. Although MTD was initially introduced for VAT, it has been envisaged from the outset that MTD would ultimately apply for direct tax compliance purposes, with MTD for income tax set to be introduced next.

Recap on Making Tax Digital for VAT

There are three principal requirements in relation to MTD for UK VAT: digital records, digital links and digital submission.

Digital records

VAT return figures due for periodic submission to HMRC must be maintained in digital form within "functional compatible software". HMRC has clarified that functional compatible software includes Microsoft Excel and that it is permitted to maintain records in multiple systems.

For all accounts payable/purchases transactions, the following must be recorded digitally:

- the time of the supply,
- the value of the supply and
- the amount of input tax to be claimed.

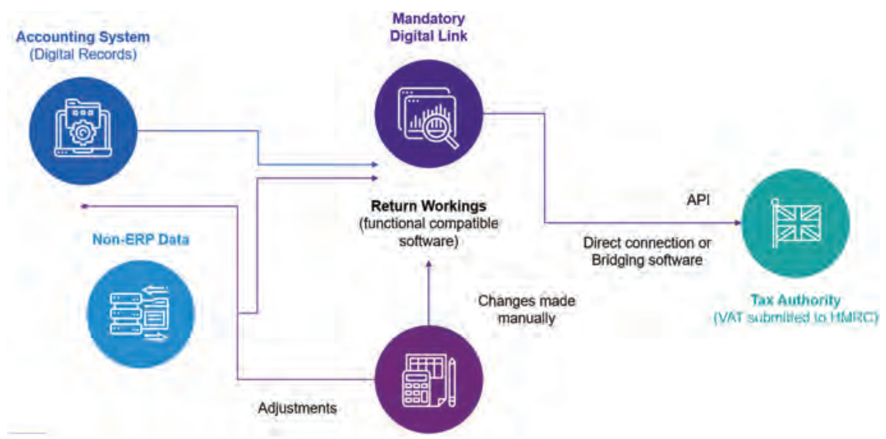
For accounts receivable/sales transactions, it is necessary to record:

- the time of the sale,
- the value of the sale and
- the applicable VAT rate.

Digital links

A taxpayer must be able to demonstrate that "digital links" are used throughout the end-to-end process for preparing the UK VAT return to transpose data between the various systems that may be used, before the data ultimately reaches the VAT return. Although there was a deferral for the mandatory introduction of digital links, this no longer applies for VAT return periods starting on or after 1 April 2021.

Fig. 1: Making Tax Digital – Digital Links.



Therefore, digital links must be in place from this date.

Rekeying data and the use of "cut and paste" are specifically prohibited, thereby allowing information flows between systems to be automated. As set out in Fig. 1, this requires there to be an electronic audit trail between the source invoice data and the nine boxes in the UK VAT return.

It should be noted that links between various Excel documents are permitted. However, the digital links requirement has presented a significant challenge for businesses when it comes to the manual adjustments and various journal entries that often form part of the VAT reporting process.

Digital submission of VAT returns

With effect from 1 April 2019, VAT return information can now be submitted to HMRC only via an application programme interface (API). It is no longer permitted to complete the nine-box UK VAT return manually via HMRC's portal.

Key Challenges under MTD for VAT

The MTD for VAT regime presented a number of challenges for businesses, and indeed also facilitated some valuable learnings that can be used by businesses to manage the further expansion of MTD or the roll-out of similar measures in other jurisdictions. MTD may also be a trigger for businesses to transform how they manage tax compliance and maintain tax data.

Data quality

Although the UK regime differs significantly from the various measures introduced across Europe, the need for high-quality data to help businesses to meet the MTD "digital records" requirement is the same. The impact of MTD has been minimal for those that already had good data in their systems in relation to purchases, sales, vendors, products etc. Although the "digital links" requirement may have presented the greatest challenge from a systems/IT perspective, the changes required to enhance the quality of the data being captured have proved much more arduous. Those businesses that have high-quality "digital records" and data have found it much easier to build the necessary digital links to be MTD compliant.

Stakeholder interaction

The submission of VAT and other tax returns is typically the responsibility of tax advisers or accountants within the business; however, MTD has illustrated for many the reliance that is placed on other teams or business divisions. Accounts payable and accounting teams are often responsible for the preparation of the data that is typically relied on by those preparing tax returns, and the changes required under MTD also called for significant interaction with IT and project personnel. The ability to communicate and effectively interact with a growing range of stakeholders is becoming an increasingly important element of the job for in-house tax advisers, as well being a critical element of the support provided by tax advisers in practice.

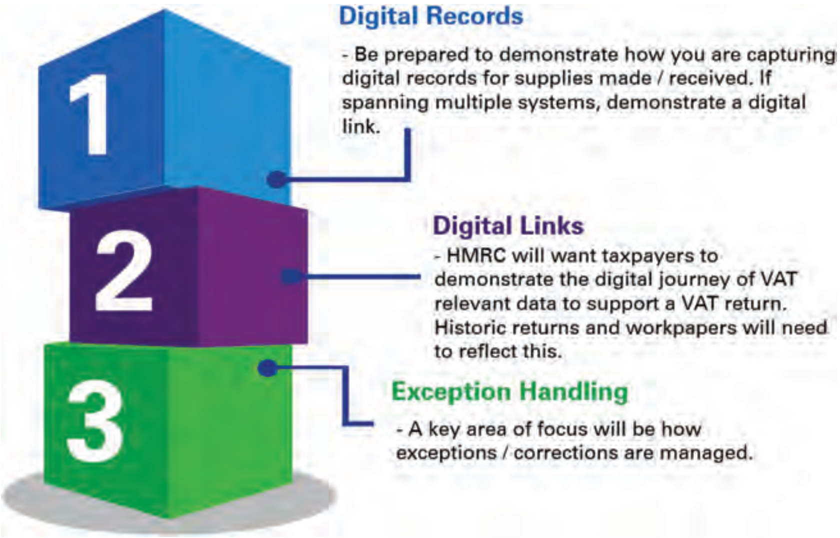
Opportunity to improve processes

MTD has prompted many businesses to take the opportunity to automate and streamline their VAT (and wider tax) processes such that not only are they compliant with the new regime but also time and operational cost savings are achieved. In many instances the burden on those responsible for tax compliance, particularly among large multinational businesses, has grown significantly in recent years. New compliance regimes, combined with the challenges that the Covid-19 pandemic has presented, have forced many businesses to reconsider how they manage VAT and other taxes.

Existing IT may be the answer

Although most businesses would have needed to acquire bridging software to facilitate the "digital filing" of VAT returns under the MTD regime, minor amendments to existing technology/IT systems have helped many to meet the "digital records" and "digital links" requirements of MTD. Subtle changes to the master data set-up (e.g. supplier, customer,

Fig. 2: Key building blocks for HMRC audits/interventions under MTD regime.



product data) and tax logic in ERP systems can make a significant impact on the downstream reporting processes and mitigate the need for journal entries and manual adjustments, which are typically time consuming for those preparing tax returns.

Looking Ahead: VAT Audits in the UK

The manner in which tax audits are conducted in the UK is likely to change significantly on the back of the MTD regime. The MTD requirements will potentially pass a significant element of the audit work from HMRC back to the taxpayer. However, businesses that have put a robust process in place to meet the MTD requirements are likely to be "audit ready" on an ongoing basis.

Some key changes that we may see in relation to how VAT audits are conducted are:

- In the first instance, there will be an onus on the taxpayer to demonstrate that there is a digital audit trail in place to support the numbers included in the VAT return.
- In addition to demonstrating that the correct amount of VAT has been filed, it will be necessary to show that there are digital records in place to support each purchase and sale transaction.
- HMRC auditors will be able to assess easily whether data has been manually transposed by rekeying or copying and pasting.

A key challenge presented under MTD has been in relation to journal entries and manual adjustments. Many businesses have thought about this in the context of the "digital links" requirement but have failed to recognise that it is necessary for a digital record to be in place for all purchases and sales. As a general rule, manual adjustments that amend an existing digital record are permitted under MTD. However, where a manual adjustment results in the creation of a new transaction, it must meet the "digital records" requirement.

Expansion of MTD to Income Tax, Corporation Tax and All VAT-Registered Entities

HMRC announced a roadmap in July 2020 that set out plans in respect of the future of

MTD and, in particular, for MTD for income tax. As outlined above, with effect from April 2022, MTD will apply to all UK VAT-registered entities and not just those whose taxable turnover is in excess of the UK VAT registration threshold (currently £85,000), which has been the position since its introduction. April 2023 is then set to bring the introduction of Making Tax Digital for income tax, which will apply to sole traders and landlords. Although legislation has yet to be published in this regard, details of the key measures to be introduced under MTD for income tax have been provided.

Key Measures Pertaining to MTD for Income Tax

- It will apply to sole traders and landlords with income above £10,000.
- Subject to any further deferrals, it is set to apply to the first accounting period starting on or after 6 April 2023.
- For each of their businesses, individuals will be required to submit details of income and expenditure on a quarterly basis.
- At the end of the year, an EOPS (End of Period Statement) must be submitted for each business.
- The quarterly submissions will be collated by HMRC's system to compute an individual's income tax liability for the year. Taxpayers will be required to complete a final declaration each year to confirm that they are in agreement with HMRC's assessment. Therefore, it will no longer be necessary to complete a year-end tax return.
- All of the relevant data and information must be submitted using "functional compatible software".

Some planning will be required to ensure that the correct data can be captured and maintained in functional compatible software, particularly for smaller businesses that are currently reliant on a year-end process. Tax advisers working in practice will need to adapt to a new way of supporting their clients, with the emphasis set to shift from a busy year-end process to the provision of quarterly filings, potentially with information to be shared with HMRC in a tight timeframe.

A detailed roadmap for the roll-out of MTD for UK corporation tax is yet to be published. A public consultation process is currently under way, following which it is expected that a voluntary pilot will be launched from April 2024. The mandatory introduction of MTD for corporation tax may not come into force until 2026, at the earliest. The corporation tax measures can be expected to be in line with those introduced for income tax, perhaps with more detailed financial data to be provided as part of the quarterly updates.

Preparing for Change

The UK Making Tax Digital journey is just beginning, and significant changes can be expected in Ireland in coming years, with the introduction of real-time reporting said to be "inevitable". The digitisation of tax is a daunting prospect for many tax professionals. Although it is not necessary for tax professionals to become IT experts, consideration should be given to whether operating practices are robust and digitally enabled. It may be beneficial for tax advisers, particular those working in in-house teams, to carry out periodic reviews of existing processes and the quality of tax data. It is critical for tax teams to understand upstream business processes that produce the data to support tax compliance, planning or reporting. Carrying out such an exercise means that tax teams not only will be ready for future regulatory changes (such as the MTD changes discussed in this article) but also may find efficiencies in existing practices and be in a better position to deal with tax authority audits and interventions.

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The Mysterious World of Valuations

Introduction

Never underestimate the importance of a valuation. It is often the key to unlocking a tax issue but, conversely, it can be a Pandora's box. The problem with valuations is that they can be subjective and can also change frequently, depending on both external environmental factors and internal factors based on the asset itself. The year 2020 was a particularly challenging one on the valuation purposes, given the level of uncertainty caused by the Covid-19 pandemic and Brexit, the buoyant recovery and continued growth of the stock markets, the high level of transactional activity, and the disparity caused by unprecedented growth in certain sectors and unprecedented decline in others. 2021 has started in a similar vein, but with hope on the horizon in terms of the Covid-19 vaccines. One thing that we can be certain of is that this year will bring more twists, turns and surprises feeding into an ever-changing economic picture and making the valuation process equally hard to conclude.

This article considers share valuations in a private company context, the impact of valuations on tax and why they are important. Share valuations are relevant for multiple tax heads – stamp duty, CGT, CAT, income tax etc. – and at times the valuation can be different for the various tax heads.

Back to Basics: What Is the Basis for a Tax Valuation?

Section 548 TCA 1997 is the capital gains tax (CGT) legislation dealing with the valuation of assets, and it defines "market value" in relation to any assets as "the price that those assets may reasonably be expected to fetch on a sale in the open market". This definition is typically used for other tax heads as well, e.g. stamp duty, and is cross-referenced in other sections of the legislation, for example, income tax sections 128D, 128E and 128F TCA 1997, which relate to share incentives.

In s548(4) TCA 1997 it states:

> *"Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length."*

In addition to the legislation, there is a wealth of case law that is also relevant and has helped to establish some of the key principles underpinning the definition of "market value".

A valuation is not necessarily an exact science as it requires the valuer to assess all of the information that would be available from a hypothetical vendor to a hypothetical purchaser and determine an appropriate value based on this information using an appropriate methodology. The information that would typically be reviewed is:

- historical financial information, e.g. last three years' (audited) accounts,
- management accounts to date of valuation,
- projections/business plans for next number of years,
- prior transactions of shares in the company being valued,
- review of competitors and recent transactions,
- multiples of earnings/revenue of comparable listed companies,
- market value of assets (for investment or property companies),
- Memorandum and Articles of Association/ shareholder's agreement and
- capitalisation table (list of shareholders and their interests).

The most important part of undertaking any valuation is being able to demonstrate that a review of all of the relevant information has been undertaken and that a contemporaneous note of the facts and circumstances influencing the valuation is prepared to justify any approach taken. This is especially important at the current time, when the financial climate is constantly evolving and there may be temporary changes to a business's financial status or significant risk factors that may affect the current value.

The Process of Valuing Private Company Shares

The valuation of a private company's shares typically involves the following steps:

- review of all relevant financial information,
- valuation of the whole company using an appropriate method,
- review of shares being valued and evaluation of rights attaching to those shares and
- application of appropriate discounts for minority, lack of voting rights, marketability etc.

Whole company valuation

In valuing a private company, it is important first to establish whether the business being valued is an investment/property company or a trading company. Valuation of the former is usually based on its net asset value, whereas that of the latter is typically based on earnings/ revenues.

Investment/property company valuations

In valuing an investment/property company, the process involves looking at each of the assets held by the company and valuing each individually to calculate the total value. For example, if the company holds shares in a listed company, the value will be based on the publicly traded price of those shares. If the company holds real estate, a professional valuation should be obtained to determine the value of that property, albeit that the valuation of the property itself could be based on rental yields. To the extent that any assets are held jointly with another person, e.g. real estate, it may be necessary to discount the value of that asset.

If any of the assets held by the investment company are shares in a private trading company, the valuation of this asset will follow the same approach as detailed below for a private trading company, which may then include a discount if the company being valued owns a minority interest.

The total value of the assets may then be reduced by any liabilities of the company, such as debts, running costs, upcoming/latent tax liabilities, liquidation expenses (if relevant) etc.

Private trading company

To value a private trading company, it is typical to look at "maintainable" earnings or revenues, which are then multiplied by the appropriate "multiple" to determine the "enterprise value" (EV). The equity value is then typically determined by deducting debt and adding back surplus cash and the value of other, non-business assets, e.g. investment assets.

To determine "maintainable" earnings/revenues, you will need to look at the company's historical performance, as well as projections for future years, and make adjustments for extraordinary items of income/expenditure, for example, excess directors' remuneration, redundancy payments, income from once-off contracts, notional adjustments for rent (if the business premises is owned by the company). For companies with fluctuating profit levels, it may be more appropriate to look at the average earnings over a number of years. The most common "earnings" measure seen in practice, especially for highly geared companies, is EBITDA (earnings before interest, tax, depreciation and amortisation) or EBIT. After-tax profits may also be used, in which case the equity value of the company is obtained without the need to adjust for net debt.

The multiple can be determined by looking at other transactions that have taken place in the market for similar businesses or considering listed company multiples. Listed company multiples are usually much easier to obtain as they are derived from public information, whereas private company multiples may be based on speculative or imprecise information. To the extent that listed multiples are used, it is important that they are considered in terms of the business activities of the companies selected, the size of the businesses and the liquidity of their shares, as these factors are likely to make such multiples higher than those of a smaller private company. In addition, there are significantly higher risks associated with smaller private companies than with larger quoted (or unquoted) companies.

Example 1

Company A sells a variety of seasonal products, including Christmas decorations and trees, barbecues and homewares. The maintainable EBITDA for the business has been calculated as €2.6m per annum. It has surplus cash of €4m and debt of €7m. A typical EBITDA multiple for a business of this size and type has been determined as 3–4 times.

The EV of the company is €9.1m (assuming a 3.5 multiple).

The equity value of the company is €6.1m (€2.6m x 3.5 plus cash of €4m and less debt of €7m).

In some circumstances using an earnings method to value a company may not be appropriate, for example, in early-stage or start-up businesses that are not yet generating revenues. For this type of business, other methods may be considered, such as the "cost approach", i.e. looking at the costs incurred in developing the assets of the business, or the "discounted cashflow (DCF) approach", i.e. considering the present value of projected future cash-flows. Although it is an accepted valuation method – particularly for M&A transactions, funding rounds and larger private companies – the DCF approach can be difficult to estimate for small private companies, as it relies on detailed future projections and related assumptions. However, it can be useful where no other methods are suitable or as a comparison.

The "dividend yield approach" warrants mention here, as it is another method for valuing shares in a private company and is referenced in the Revenue CAT guidance on valuing unquoted shares in relation to minority interests (see below). This method of valuation is typically suitable for a shareholding where the main benefit of holding the shares is the right to receive dividends. It is usually used for minority shareholders of mature businesses. It looks at the company's past dividends, dividend growth patterns, fluctuations and the likely dividend policy going forward. However, it is seldom seen in practice as many smaller private companies or growing companies either do not pay dividends or do not pay them regularly.

It should be noted that one of the most important measures of a company's value is any relevant third-party arm's-length transactions that have taken place in the last 12 months, or potentially a longer period if there have been limited changes to the company's performance/market sentiment in that timeframe. Any transactions should be reviewed to assess their importance and suitability for application to any current transaction and either taken into account or disregarded in the valuation of the business, as appropriate. It is important not to simply disregard any third-party transactions without good reason, as they are likely to provide key information that is looked at in a due diligence process or Revenue audit. A third-party transaction is clear evidence of "market value" and therefore should always be considered in any valuation process. However, be mindful that a transaction can also be readily discounted if it can be shown that either the company's performance has improved/declined or external factors have changed since the transaction, or if there are special circumstances relating to a transaction that might mean the price paid was not market value. Also, be wary of using "indicative offers" as a basis for valuing a company, as these may be set at a high level to entice an owner to sell or, conversely, may be at a level that will never be acceptable to a vendor, and it is never wholly relevant to take them into account until they become binding.

The Covid-19 impact

It is fair to say that every business must have been affected in some way by Covid-19, whether positively, negatively or even in terms of a change in the way that the business operates. The pandemic has clearly created a level of uncertainty in the market that has made valuations more difficult. But what does this mean for valuations? Covid-19 should not alter the way that a business is valued, but it may require some of the inputs to the valuation to be modified. For example, maintainable earnings may need to be measured over a longer period, or 2020/2021 may need to be adjusted up or down to ignore the effects of Covid-19. Current and future working capital requirements may need to be revisited and factored in, as companies may need to take on debt to "plug the gaps" for periods of non-trading/inactivity. Multiples may need to be scrutinised closely, especially those relating to transactions, to determine whether they were based on distressed businesses or they are genuinely comparable.

We have also yet to see whether Covid-19 has had a permanent effect on some businesses – e.g. in the retail and hospitality sectors – or the trajectory will reverse once some level of normality has been restored. Overall, it may mean that valuation ranges need to be wider and more flexible to take account of temporary circumstances as well as longer-term potential.

Share valuation

Once the company's value has been established, it is important to value the shares in question. Note that this may not be simply a case of dividing the value of the company by the number of shares in issue, as often there are multiple classes of shares that have different rights. For example, for a company with preference shares, it may be necessary to reduce the value of the company by the amount of preference share capital/accrued dividends, depending on the terms of those shares, as the ordinary shareholders may have no entitlement to those "preferential" amounts. Also, if there are various classes of shares in issue, it will be important to review the rights of the different share classes to determine the voting rights, dividend rights, other special restrictions/ entitlements (for example, whether certain classes have to achieve hurdles to become valuable), as these may affect not only that share class but also the value of the ordinary shares.

In practice, one of the common scenarios seen is the existence of preference shares with a fixed annual dividend entitlement. For valuation purposes, the preference shares may be treated similarly to debt, as both the capital and the accrued dividends would need to be deducted from the equity value of the company in determining the value of the ordinary equity.

Growth and hurdle shares also present complex valuation issues, as there is no prescribed methodology in Irish tax legislation or guidance for valuing this type of instrument. However, in determining the "market value", it may be necessary to calculate the hope value so that the market value is adequately captured. There are various methods that can be used to calculate the value of these types of shares, for example, the "expected returns model" (ERM) (which is the methodology typically favoured by HMRC in the UK for growth/hurdle shares) and the "Monte Carlo simulation method" (which tends to be more readily accepted in the US for growth/hurdle shares).

Discounts (for Minority Shareholders, Marketability, Non-Voting etc.)

As mentioned above, discounts play an important role when considering how to determine market value and whether discounts should be applied. The discount is applied to the value that has been derived for the whole company valuation to determine the price per share of the company or for a class of shares. Where market value does not include an appropriate level of discount to reflect the factors listed below, it may trigger adverse tax consequences if Revenue concludes in an audit that the valuation is incorrect.

Minority shareholders generally expect that their shareholding has a lower value per share due to their lack of control over the company. However, the discount applicable can vary greatly depending on the facts and circumstances of the case. Many factors contribute to the level of discount to be used when determining the fair market value, and below is a list of common factors, based on our experience, that may be relevant in determining the appropriate level of discount (note that the list is not exhaustive and there may be additional factors to be considered).

- other, comparable transactions in the same company,
- size of holding,
- level of influence – e.g. single-digit shareholder,
- voting entitlements,
- dividend entitlements,
- size of other shareholders' holdings, e.g. whether there is a small group of shareholders who have control or many different shareholders who do not have control,
- number of shareholders,
- likelihood of an exit event soon,
- whether the shares have a lock-in period,
- what the articles say in terms of transfers,
- whether there are exit mechanisms in place,
- whether the company is profitable,
- nature of the company's activities and
- level of dividends being paid.

For example, a small non-voting minority shareholding that has no entitlement to dividends where there is a single majority shareholder with no prospect of an exit in the foreseeable future might warrant a discount as high as 80–90%.

From an Irish tax perspective, there is limited guidance on the appropriate levels of discount that might be considered acceptable for minority holdings and marketability in an income tax/CGT context. There is some guidance issued by Revenue in its Tax and Duty Manual that is relevant for CAT purposes ("Valuation of Unquoted Shares – Capital Acquisitions Tax Part 21"). This can be used as a guide to indicate the potential levels of discount that may be acceptable from a Revenue perspective. An extract from this document is given below:

> "**21.13 Majority Shareholding/Influential Minority Shareholding**
>
> **21.13.1 Holdings of 50% and above**
>
> Value by reference to the value of the whole company less a suitable discount, e.g.
>
> | | |
> |---|---|
> | 75%+ | nil discount or perhaps 5% at most |
> | 50%+1 | 10–15% |
> | 50% | 20–30% |
> | 25%+1 | 35–40% |
>
> **21.12.2 Minority Shareholding**
>
> Up to 25% – value by reference to dividends if a realistic level of dividend is being paid. If no dividend, look at discounted earnings with a discount range of 50%–70%, as these are influential minority holdings."

However, this guidance does not provide suggested discounts for non-influential minority interests, e.g. single-digit holdings or non-voting interests, and also does not include any commentary on discounts for lack of marketability. Previously, Revenue had a discount table for CGT purposes, but this has been removed and is no longer in circulation. This old CGT discount table included discounts of 80% for single-digit holdings.

Nonetheless, there has been practice established over recent years that has seen discounts for minority interests as high as 80–90%. Des Peelo's *The Valuation of Businesses and Shares* (Dublin: Chartered Accountants Ireland, 2nd ed., 2016) suggests that "[s]ingle percentage shareholdings, without influence, may be discounted by up to 90%".

There may be differences between the CAT and CGT discounts that may be applicable to the transaction; please see the "Pitfalls" section below for further details. It is also important to remember that the discounts may fall outside of the suggested ranges if certain fact patterns permit this, and all facts/circumstances should be reviewed when considering the appropriate discounts to be used.

Impact of Valuations

As mentioned, the impact of valuations can be seen every day through a variety of transactions that tax advisers and taxpayers come across in practice. The most common types are as follows.

Transfer of family businesses

A valuation will be vitally important on the transfer of a family business as market value will likely be imposed on a transaction between connected persons. It is required to ensure that the correct amount of CGT/CAT is paid where a business or another asset is transferred to a son/daughter/other family member. Even if no tax arises as a result of the transaction's falling within certain thresholds or qualifying for certain reliefs, the value will likely need to be established for other reasons, for example, to calculate stamp duty liabilities, establish the base cost of the acquiring party or ensure that reliefs claimed have not breached thresholds.

Connected-party transactions

Where the seller and the purchaser are connected (i.e. for the purposes of s10 TCA 1997), s549 TCA 1997 would become relevant as the transaction must be executed at market value. If market value is not used, additional CGT may arise for the seller. CAT implications may arise for the purchaser if market value is not used.

Management incentive plans

Where a company decides to implement a management incentive plan for the purpose of retaining and rewarding key employees or management individuals within the business, the valuation of the equity is important. If the fair market value is not determined by way of a "best estimate" under s985A(3) TCA 1997, the company will be responsible for operating payroll taxes on the difference between the market value and the price paid by the employee to acquire the equity and paying this over to Revenue. In addition, it is worth noting that there are certain provisions, such as s128D and s128E, that may require shares to be valued without reference to certain restrictions, i.e. the freedom to sell/dispose of shares, forfeiture provisions.

Exiting shareholders

Often when a shareholder decides to exit a business, this could be done by way of a share buyback, and the legislation is contained in ss176–186 TCA 1997. Where a share buyback qualifies for CGT treatment but the amount paid for the shares is in excess of the market value, income tax could arise for the individual on the excess if this is regarded as either a distribution or remuneration. If the share buyback is undertaken at below market value, the exiting shareholder could be caught by the value-shift provisions in s543 TCA 1997 or, indeed, could be deemed to make a gift to the remaining shareholders. Therefore, it is important to ensure that the buyback is executed for market value to avoid any negative consequences for the exiting or remaining shareholders.

Corporate restructuring

A valuation will most likely be required where shareholdings are being restructured or assets are being moved within a group or to another connected entity. This is to ensure that there are no value-shifting issues under s543 TCA 1997 or CAT implications if a gift is deemed to have been made; or, indeed, it may be required to calculate a stamp duty liability, for accounting purposes or to determine the tax basis for the recipient.

Pitfalls

As with all transactions, there can be pitfalls that need to be considered. One pitfall for valuations is the differential that often arises for CGT and CAT purposes. As mentioned earlier, for CGT purposes, the definition of market value is set out in s548 TCA 1997, which states that it is "the price which those assets might reasonably be expected to fetch on a sale on the open market". A similar definition exists for CAT purposes in s26 CATCA 2003; however, this definition is expanded in s27 CATCA 2003. The latter section states that where a company is controlled by a "donee or successor", the shares are valued by reference to the total control by the individual and any "relatives". This could mean that no discount for a minority shareholding in such a situation.

Example 2

Adam (70%), Betty (20%) and Conor (10%) hold shares in a company. Adam and Betty are husband and wife, and Conor is an unconnected party. Betty decides to transfer her shares to their son, Daniel. The company is currently valued at €1m. On the gift by Betty to Daniel, CAT was payable as the CAT group thresholds were previously used up and the shares do not qualify for business relief. The value of Betty's shareholding from a CGT perspective would include a discount for a minority interest, as it would be the price that the shareholding being disposed of would fetch on an open market, i.e. a 20% share. However, from a CAT perspective no discount for a minority interest would be applicable, as Daniel is deemed to control the company for CAT purposes because the interest he acquires would give him "control" of the company when combining his interest with that of his relatives. Any reliefs applicable for CGT and CAT purposes have been ignored in this example.

In practice, this means that the value for CGT purposes might be €100K (assuming a 50% discount), whereas the value for CAT purposes may be €200K (assuming no discount). It would also mean that Daniel would pay CAT of 33% on the value of the gift of €200K, whereas his base cost for CGT purposes would be only €100K, meaning that on a future disposal he would pay CGT on any gain over €100K. This point can often be overlooked.

Other pitfalls that can arise with valuations and that may trigger adverse tax implications are:

- assuming that book values are equal to market values – this can lead to an undervaluation (or, indeed, overvaluation) of a company,
- ignoring non-trading assets such as property and surplus cash – as these should be added to any value of the trade, this could lead to an undervaluation of a company – and
- use of **hindsight**. Case law on hindsight (*Re Holt* [1953] 1 WLR 1488 – "firmly reject the wisdom which might be provided by the knowledge of subsequent events") supports that hindsight cannot be used to measure value but, conversely, too much reliance should not be placed on historical data/valuations where these are shown to be no longer relevant. Both of these points are crucial to remember in the current environment, where changes may be temporary or permanent but neither approach is likely to be fully supportable. Hindsight could be used either positively or negatively, for example, a valuation carried out post-Covid-19 relating to a pre-Covid-19 period should be based on the facts and circumstances at the time, ignoring the subsequent impact of Covid-19; but, likewise, a valuation relating to late 2020 should undoubtedly take any impact into account, even if the valuation is being done in a period post-Covid-19.

It is worth noting that all of the above commentary relates solely to Irish taxes; however, there may be an international dimension to a tax valuation for the person disposing of the shares, the person receiving the shares or the company itself, which would need consideration to ensure that the valuation is suitable in the foreign location. Other jurisdictions may have guidance or legislation that requires assets to be valued in a particular manner either for tax purposes generally or for specific tax heads, and therefore it is prudent where a valuation is being used for a foreign tax purpose to seek local advice to ensure that the valuation is fit for purpose.

Revenue Audits

Valuations are increasingly moving up the agenda in terms of importance in the context of Revenue audits. Some of the key areas where Revenue may focus its attention are transactions between connected parties (especially where valuable reliefs such as retirement relief, entrepreneur relief, s626B relief have been claimed), share buybacks, share awards to employees and gifts. The most robust way to defend any challenge from Revenue is to demonstrate that a third-party valuation has been obtained at the time of the transaction and that this sets out the contemporaneous evidence to support the valuation. This should significantly reduce the risk of a Revenue challenge but will not eliminate it completely. Revenue may still choose to challenge a third-party valuation, but having a complete record of the facts and circumstances at the time will make any challenge easier to defend, as the information relied on will already be readily available.

Final Thoughts

2020 has probably been one of the most challenging years in history on many fronts and it has brought about significant changes, some of which may be temporary and others permanent. Valuation is all about balance and requires an approach that considers historical data, projections and market information to determine the likely value of a shareholding.

Now, more than ever, it is important to ensure that you have detailed contemporaneous evidence to support any transactions that have taken place. Judgement calls will, of course, be needed, and often it is not possible to put off a transaction simply because the valuation exercise is too hard. Minimise your risk by considering all of the angles and justifying any approaches that are disregarded. Do not forget that hindsight is not an acceptable measure for a valuation, and therefore any valuation can legitimately factor in risk but also needs to be realistic in order to stand up.

Read more on taxfind From Irish Tax Institute *Direct Tax Acts, Finance Act 2020*

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Where is Statutory Interpretation of Tax Legislation after *Bookfinders*?

Introduction

In the recent Supreme Court decision in *Bookfinders Ltd v The Revenue Commissioners*[1] the court revisited the issue of statutory interpretation of tax statutes and in particular the principles set out in the majority judgment of O'Donnell J in *O'Flynn Construction v The Revenue Commissioners*.[2]

The court also clarified the question of whether s5 of the Interpretation Act 2005 applies to tax statutes.

O'Flynn: The Purposive Approach

It should be recalled that in *O'Flynn*[3] the majority judgment of O'Donnell J took the view that the court should adopt a purposive

1 [2020] IESC 60.

2 [2011] IESC 47.

3 See Emer Hunt and Turlough Galvin, "Impact of the Supreme Court in *O'Flynn Construction* on Statutory Interpretation", *Irish Tax Review*, 15/1 (2012).

approach to the interpretation of s86 Finance Act 1989 (now s811 TCA 1997) on the basis that s86 was incorporated as an immediate response to the Supreme Court's decision in *McGrath v McDermott*,[4] where the court had rejected the idea of judicial interference in the development of tax law by the development of a concept of fiscal nullity which had been developed in the UK courts. In response to the determination of the Appeal Commissioners that *McGrath* precluded a purposive approach, O'Donnell J stated:

> "The suggestion that the principles in *McGrath* preclude a 'purposive approach' is also perplexing. In the first place the express words of s.86 require the Commissioners to have regard to the 'purposes for which it [the relief] was provided'. **Furthermore, the decision in *McGrath* itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive**. In that decision Finlay, CJ restated the orthodox approach to statutory interpretation at the time when he adverted to the obligation of the courts in cases of doubt or ambiguity to resort to a 'consideration of the purpose and intention of the legislature' at p. 276. **Indeed, if *McGrath* stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters** [emphasis added]."

Dissenting Judgment of McKechnie J

It should be recalled that in *O'Flynn* McKechnie J in the minority judgement took the view that it was impermissible to allow the interpretation of s86 to be influenced by the background to its incorporation. McKechnie J also set out the principles of interpretation of tax statutes, as follows:

"(i) the duty of the court is to establish the intention of the Oireachtas **by reference to the language used**,

(ii) in so doing, as such provisions are directed to the public at large (at least generally), the normal rules of interpretation apply which mean that, the words used should be given their ordinary and natural meaning, having regard where appropriate, to the context in which they are employed,

(iii) to create a tax charge the same must be founded within the clear, unambiguous and express terms of the provision relied upon: if the liability comes within the 'wording' of the provision, that's an end to the matter: the tax payer must be taxed,

(iv) the principle last mentioned equally applies, where an exemption to tax is asserted: such exemption and its scope must likewise be so founded, as otherwise the basis of liability may be impermissibly enlarged,

(v) if the suggested charge is not within the 'wording' of the provision as so understood, the tapayer is not liable: Principles of construction based on or derived from equity or approaches based on inferences or analogy or fairness have no part to play in this exercise,

(vi) if there is any doubt or ambiguity attaching to the language used, the same should be construed strictly so as to prevent the imposition of fresh liability or the extension of existing liability,

(vii) in essence, legal effect has primacy [emphasis added]."

4 [1988] 2 IR 258.

However, he went on to state:

> "Having established in my view what the correct interpretive approach is, I now turn to consider the relevant parts of s. 86. **I do so whilst expressly rejecting any suggestion that such interpretation should be influenced by background, as so described by the Revenue**. They say that it must be assumed that s. 86 is a direct response to *McGrath*'s rejection of their invitation to the court in that case, to develop a doctrine of fiscal nullity by judicial means. Further, in effect it is also said that one should proceed on the basis that the section achieved what was intended, namely disowning *McGrath*. **Such a proposition, if I have correctly summarised it, is in my view alarming** [emphasis added]."

In determining that it was not permissible to take into account the purpose or background of a statute, McKechnie J was following a long line of authority from *Cape Brandy Syndicate v IRC*,[5] as evidenced a few years before *O'Flynn* by the High Court in *McGarry v Revenue Commissioners*,[6] where O'Neill J had said that "there was no place for the purposive approach". Furthermore, McKechnie J also considered two Supreme Court decisions[7] that were determined after *McGrath* and that had not departed from such authorities by introducing a purposive approach.

However, since *O'Flynn*, the courts have followed the purposive approach to the interpretation of tax statutes as determined by O'Donnell J on a number of occasions.[8]

The Interpretation Act 2005

Before *O'Flynn*, it had been considered that the introduction of the Interpretation Act 2005 would have little impact on the interpretation of tax statutes.[9] However, in *O'Flynn* O'Donnell J determined that the provisions of the Interpretation Act 2005 embodied a purposive approach to the interpretation of statutes other that criminal legislation and made no concession to more narrow or literal interpretation of taxation statutes:

> "In *Barclays Mercantile v Mawson* [2004] 3 WLR 1383 the House of Lords emphatically reaffirmed that the same principles of statutory interpretation applied to taxation statutes as to other non criminal statutes. Indeed, it was the realisation in Lord Steyn's words in *IRC v. McGuckian* [1997] 1 WLR 991 at p. 999, that 'those two features – literal interpretation of tax statutes and the formalistic insistence of examining steps in a composite scheme separately – … [which] allowed tax avoidance schemes to flourish' which led the UK Courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation. In Ireland, however, this was something that was acknowledged at least implicitly in *McGrath*, **and explicitly in the provisions of the Interpretation Act 2005 which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes**. Accordingly, the Appeal Commissioners' conclusion that the principles set out in *McGrath* prohibited the adoption of a purposive approach is incorrect on a number of levels [emphasis added]."

The Interpretation Act 2005 reference was to s5(1) of that Act, which provides:

5 [1921] 1 KB 64.

6 [2009] IEHC 427.

7 *Texaco (Ireland) Ltd v Murphy (Inspector of Taxes)* [1991] 2 IR 449 and *Saatchi & Saatchi Advertising Ltd v McGarry* [1998] 2 IR 562.

8 See *Sarlingford v Appeal Commissioners* [2017] IEHC 416, *Hughes v Revenue Commissioners* [2019] IEHC 807 and *Used Car Importers of Ireland v Minister for Finance* [2017] IECA 327.

9 See Patrick Hunt, "The Interpretation Act 2005 and the Construction of Tax Statutes", *Irish Tax Review*, 19/1 (2006).

"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –

(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole [emphasis added]."

Bookfinders

The issue of statutory interpretation of tax provisions in *Bookfinders* came before the High Court,[10] the Court of Appeal[11] and, ultimately, the Supreme Court. The case concerned the VAT rate that applied to the sale of food and drink and was brought by a franchisee of Subway. The taxpayer, having lost before the Appeal Commissioner and the High Court, appealed to the Court of Appeal. One issue that arose was whether, as the taxpayer argued, a different approach applied to the statutory interpretation of tax statutes and a purposive approach was prohibited. In the Court of Appeal Donnelly J referred to the O'Donnell J majority judgment in *O'Flynn* and rejected the contention that a purposive approach was prohibited.

In the Supreme Court O'Donnell J revisited the views he had set out in *O'Flynn* on the question of statutory interpretation. He first referred to his observation that s86 was enacted to reverse the effect of the decision in *McGrath* and stated:

"It would have been sufficient in that case, and might have been preferable, if I had limited myself to that observation, since that case did not raise any more general issue of the correct approach to interpretation. However, I also observed that the decision in *McGrath* 'itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive'. I also stated that *McGrath* implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters, and that it was acknowledged, at least implicitly, in *McGrath* that the same principles of statutory interpretation apply to tax statutes as to other legislation, and that this same principle was acknowledged explicitly in the provisions of the Interpretation Act 'which embodies a purposive approach to the interpretation of statutes other than criminal legislation and made no concession to a more narrow or literalist interpretation of taxation statutes'.

It is clear that my observations on the issue of statutory interpretation in the *O'Flynn* case were *obiter*. On reflection, they were, I think, unnecessary, incautiously expressed, and made without the benefit of opposing arguments. In particular, I think it was wrong to use the loaded word 'purposive' and to further suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. There has been a tendency to set the debate as one

10 [2016] IEHC 569.

11 [2019] IECA 100.

between two rather extreme positions: one, a purposive or teleological approach akin to that employed in the field of European law, and in which words and text are of lesser importance than the apparent objective of the legislation; and, at the other extreme, an approach where the only focus of the inquiry, and the question of interpretation, is conducted almost by microscopic analysis of words set upon a transparent slide and stripped of all their context and where, if any ambiguity can be detected, the provision must be given an interpretation favourable to the taxpayer, however unrealistic that interpretation may be [emphasis added]."

He went on to refer to s5 of the Interpretation Act and, by referring to *Inspector of Taxes v Kiernan*,[12] revised the view that he had set out in *O'Flynn* that s5 applied to taxation statutes:

> "It might have appeared, therefore, that the reference in s. 5 to the 'imposition of penal or other sanction', without any express reference to revenue or taxation law, implied that a deliberate distinction was being drawn and that revenue legislation did not come within the scope of the exception from s. 5. On reflection, however, I think that such a significant departure from the pre-existing approach, as exemplified by the judgment of Henchy J. in *Kiernan*, should not depend upon implication. Furthermore, as has been pointed out. taxation statutes invariably create offences, and it would be anomalous if the language were to be construed differently depending on the nature of the proceedings.
>
> **It follows that I should not have suggested that s. 5 of the Interpretation Act 2005 allowed a 'purposive interpretation' of taxation statutes.** Rather, such statutes must be taken to be within the exception of provisions relating to 'the imposition of a penal or other sanction' unless the legislature otherwise provides [emphasis added]."

He went on to approve of and quote extensively from a recent judgment of McKechnie J[13] in *Dunnes Stores v The Revenue Commissioners*[14][15] and referred to the following passages from that judgment:

> "**As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. 'The words themselves alone do in such cases best declare the intention of the law maker'** (*Craies on Statutory Interpretation* (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach '...it is natural to inquire what is the subject matter with respect to which they are used and the object in view' *Direct United States Cable Company v. Anglo-American Telegraph Company* [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. *McCann Limited v. O'Culachain (Inspector of Taxes)* [1986] 1 I.R. 196, per McCarthy J. at 201. **Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.**
>
> Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their

12 [1982] ILRM 13.

13 In referring to McKechnie J, O'Donnell J observed that he was the dissenting judge in *O'Flynn*.

14 [2019] IESC 50. In this case McKechnie J had to interpret the provisions of the legislation that imposed a levy on plastic bags.

15 See article by Martin Phelan and Trish McGrath "*Dunnes Stores* Appeal Case on Plastic Bag Levy", Irish Tax Review, 32/4 (2019).

application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.

Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (*Cork County Council v. Whillock* [1993] 1 I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. **However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate: therefore if, on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail.**..........

.........Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected. An example is *Kellystown Company v. H. Hogan, Inspector of Taxes*, [1985] I.L.R.M. 200, a case involving potential liability for corporation profit tax: Henchy J. speaking for this Court at p. 202 of the report, said:

> 'The interpretation contended for by *Kellystown*, whilst it may have the merit of literalness, is at variance with the purposive essence of the *proviso.* Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company.
> I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail.' [emphasis added]."

O'Donnell J noted that the McKechnie J judgment in *Dunnes Stores* "provides valuable guidance" and means in his view that "it is a mistake to come to a statute – even a taxation statute – seeking ambiguity". However, he cautioned against an overly strict adherence to the literary approach by stating that "a literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision".

Conclusion

It might be said that both O'Donnell J and McKechnie J have narrowed the differences between them on the issue of statutory interpretation as set out in their conflicting judgments in *O'Flynn*. It seems clear to this author that, whilst the purposive approach in the interpretation of tax statutes is not prohibited, it is likely that resorting to such approach will be the exception rather than the rule. It seems that the Supreme Court has now reconfirmed that the primary tool that should be brought to bear on the interpretation of a tax statute is analysing the words of such statute. If the courts move to a more literal interpretation of tax statutes than a purposive one, this will provide greater certainty for tax professionals, as the search for the purpose of legislation can be fraught with difficulty.

On a separate note, it also might be argued that McKechnie J's objections to the interpretation of s86 Finance Act 1989 as set out in his minority judgment in *O'Flynn* have now found favour with the Supreme Court, which may well impact on the next occasion when the Superior Courts are asked to interpret the provisions of s811 or s811A TCA 1997.

Read more on taxfind From Irish Tax Institute *Bookfinders Ltd v The Revenue Commissioners* [2020] IESC 60

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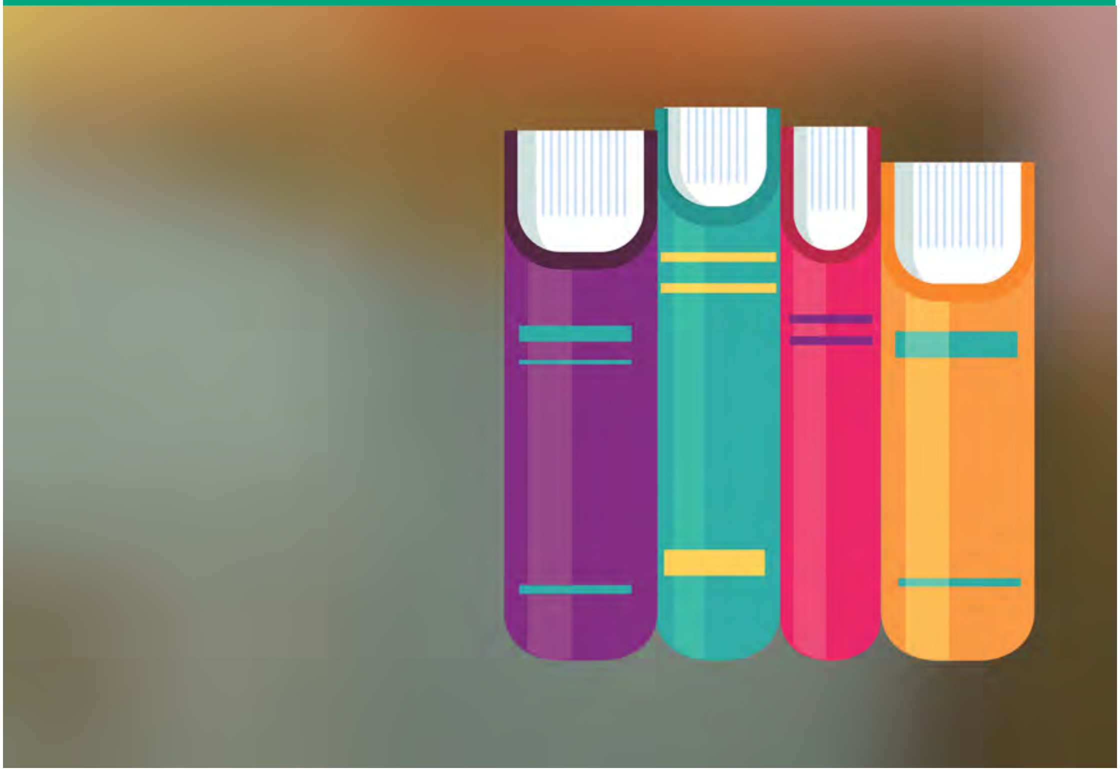
Employment Termination Payment Agreements: Recent TAC Decisions



Introduction

An employment contract can be terminated for a variety of reasons. If an employment is terminated with a payment to an employee for a breach of their rights or entitlements, then such a payment may be exempt from income tax, pursuant to s192A TCA 1997. To avail of this exemption it is important that any settlement agreement adequately reflects this relief. This article examines recent Tax Appeals Commission (TAC) decisions on termination agreements and elicits some of the relevant principles derived from them.

Payment on Termination of an Office or Employment

Any payment made in connection with the termination of the holding of an office or employment or any change in its functions or emoluments is subject to tax pursuant to s123 TCA 1997.

The Relief

Section 192A TCA 1997 provides for an exemption from income tax for certain awards made for infringement of an employee's rights or entitlements or an employer's obligations under employment legislation, for example: bullying, discrimination, harassment or victimisation. The exemption applies:

- to payments arising from claims made under a "relevant Act" (generally, employment legislation) after a formal hearing before a "relevant authority" on foot of a recommendation, decision or determination by that relevant authority and
- subject to certain conditions, to payments made under an out-of-court settlement, in place of a formal hearing before a relevant authority, which has been agreed between an employee and his or her employer.

"Relevant authority" means, the Rights Commissioner, the Director of the Equality Tribunal, an adjudication officer of the Workplace Relations Commission, the Workplace Relations Commission, the Labour Court, the Employment Appeals Tribunal, the District Court, the Circuit Court or the High Court.

Many employee-related disputes are settled by agreement (under a mediation process provided for in a relevant Act) without referral to a relevant authority. For such out-of-court settlements to qualify for the exemption, the following conditions must be met:

- The settlement is evidenced in writing.
- The agreement is not between connected persons.
- The claim would have been a *bona fide* claim under a relevant Act had it been made to a relevant authority: there must be sufficient grounds for the claim, it must be within the scope of one of the relevant Acts, it must be made within the specified time limit etc.
- The claim is likely to have been the subject of a recommendation, decision or determination by a relevant authority that a payment be made to the person making the claim.
- The payment does not exceed the maximum amount that could have been awarded under the relevant legislation (e.g. in a claim for discrimination, the maximum amount is 104 weeks' pay).

There is an important exclusion in s192A. The exemption does not apply to a payment in respect of:

- remuneration or arrears of remuneration, e.g. a claim for holiday pay under the Organisation of Working Time Act 1997 or for equal pay under the Employment Equality Act 1998;
- the termination of an office or employment, e.g. a claim under the Unfair Dismissals Act; separate exemptions may apply to such payments (i.e. basic exemption, increased exemption and standard capital superannuation benefit); or
- compensation for a reduction or possible reduction in future remuneration arising from a reorganisation or a change in work practices.

Recent Decisions from the TAC

There have been a number of recent decisions from the TAC dealing with claims for repayment of tax deducted in circumstances where an employee's employment was terminated pursuant to the terms of a settlement agreement. It is apparent from these decisions that it is essential that the terms of any settlement or compromise agreement accurately reflect the payment being made in respect of the injury suffered. It is necessary that the agreement embodies the damages complained of. The failure to reflect accurately the terms may not allow the taxpayer to qualify for the potential reliefs available.

Settlement agreement

In case 153TACD2020 the taxpayer appealed against the refusal of Revenue to repay PAYE, PRSI and USC that had been deducted by his former employer. The taxpayer received a termination payment of €180,000, which was made pursuant to a compromise agreement. Revenue refused the repayment of PAYE, PRSI and USC. The respondent contended that the payment was taxable in accordance with s123 TCA 1997 as it was made "in consequence of, or otherwise in connection with, the termination of the holding of an office or employment". The appellant maintained that a portion of the €180,000 represented damages for defamation, victimisation and injury to his professional reputation and was exempt from income tax in accordance with the provisions of s192A. The appellant also placed reliance on s613 TCA 1997.

The appellant reached a compromise agreement with his employer, which was set down in writing. The agreement reflected a gross sum in full and final settlement of all disputes between the parties without any admission of liability. Importantly, the agreement did not reflect any breakdown of the damages into separate constituent parts to reflect a sum paid for remuneration and a sum paid for damages. The appellant asserted that he had intended to institute proceedings against his employer for defamation, victimisation and injury to reputation but the necessity was obviated by the compromise agreement. The appellant submitted that, on the basis of (i) the background of the claims, (ii) the written evidence tracing the evolution of the claims and (iii) the negotiations of settlement between the employer and the appellant, the payment largely represented damages for defamation and was not a payment in accordance with s123 TCA 1997. Additionally, it was contended that the defamation claim pre-dated any claim relating to the termination of employment.

The Tax Appeals Commissioner, in assessing the nature of the payment, examined the terms of the compromise agreement on foot of which the payment was made. Interestingly, the Commissioner noted that no statement of claim had issued. In light of this, the Commissioner held that no claim was made to the relevant authority. The author would respectfully disagree with this interpretation of s192A.

The Commissioner held that:

> "pursuant to the express terms of the Compromise Agreement, the payment was not made in relation to a series of allegations nor does it seek to apportion the payment between different heads of claim".

She went on to note that:

> "[b]ased on the terms of the Compromise Agreement, it is not possible to conclude that the payment or part thereof comprised damages for defamation or injury to reputation as alleged by the Appellant. It follows that it is not possible nor is it necessary to identify a basis for apportionment of the monies as contended by the Appellant."

The Commissioner was satisfied that the payment was made either directly or indirectly in connection with the termination of the appellant's employment. The Commissioner also noted that the appellant was not assessed pursuant to a chargeable gain and so s613 did not apply.

It is evident from this decision that it is essential to accurately reflect and apportion any payments to each individual head of claim. Failure to do this will result in a person's falling at the first hurdle and failing to qualify for the relief. Furthermore, it seems that the TAC gives much weight to whether a statement of claim has been issued. It should be noted that a request to state and sign a case for the opinion of the High Court was received by TAC in respect of this determination.

Rebuttal of settlement agreement

In TAC decision 12TACD2020 the appellant, again, sought to claim relief pursuant to s192A TCA 1997. The appellant and their employer agreed to terminate the employment relationship on the payment of €65,000 plus a contribution to legal costs. The agreement was described as a severance agreement. The appellant maintained that the payment received was in compensation for a complaint of bullying. The appellant provided two letters supporting their contention that the matter was in respect of a bullying claim.

Revenue, however, while acknowledging that a dispute resolution process had taken place, submitted that the payment was not made under a mediation process provided for in a relevant Act. Revenue also contended that the payment did not come within s192A(4) as an "out of court" settlement, as the matter had not been advanced to the point where there was a real prospect that it would be presented to a court for a decision.

Again, it can be noted that the Tax Appeal Commissioner's starting point was the agreement. The Commissioner noted that:

> "[a]s the terms agreed by the parties are embodied in the agreement, the meaning of the agreement is determined from a consideration of the agreement as a whole, and without recourse to previous declarations of subjective intent by either party. The agreement conveys the matters agreed upon by the parties and due regard should be given to the words chosen by the parties."

The Commissioner went on to find that the payment was described as a termination payment and further noted that the payment was accepted without any admission of a breach of statute or law and that it was in full and final settlement.

It is important to highlight that the Commissioner held that, even though the appellant provided letters referring to allegations of bullying, there was no evidence to rebut the express terms of the severance agreement. The Commissioner also held that the agreement was not arrived at under a mediation process as provided for in a relevant Act. Again, the Commissioner in this case noted that s192A(4) specifically refers to a statement of claim and eschewed the broader interpretation afforded by Revenue's Notes for Guidance, which allows for "out of court" settlements, but instead considered the wording of the Act. The Commissioner noted that, in light of the fact that there was no statement of claim, there was no evidence that a claim was made by the appellant to a relevant authority.

It is noteworthy from this decision, again, that the starting point is the settlement agreement. In addition, the decision demonstrates that in order to supplant the settlement agreement, it is necessary to provide adequate evidence that would "rebut" the terms of the agreement. In this instance a number of letters referring to a claim were deemed inadequate. To demonstrate that a payment related to a claim for a breach of a person's rights and to satisfy s192A(4), it would be necessary to provide more cogent evidence of such a claim. Cogent evidence may include a medical report outlining the effect of the bullying or harassment of the person, an opinion on the value of the claim, whether the person availed of the grievance procedure in their employment, evidence from co-workers etc. In essence, it is necessary to demonstrate that the claim was a *bona fide* claim and not simply a means to make a tax-free payment to an employee.

The decision is also noteworthy because the Commissioner concluded that the payment did not arise from the mediation process. It appears that the parties engaged in mediation; however, the payment did not arise from this process. Sub-section (3) requires that the payment be made "in accordance with a settlement arrived at under a mediation process..."; thus, it is necessary for the settlement to be reached at the mediation process. It would appear from this TAC determination that it cannot arise from the process indirectly. In this case the taxpayer realised at the mediation that he saw no further relationship with his employer, and it appears that the matter was subsequently settled. It should be noted that it is not known if a request to state and sign a case for the opinion of the High Court was received by TAC in respect of this determination.

High Court proceedings

In TAC determination 13TACD2020 the appellant was an employee who instituted High Court proceedings against their employer. A settlement agreement was reached between the appellant, the employer and a third party.

The agreement was broken down into separate constituent parts, and the issue related to a payment entitled "special damages" in the agreement. The appellant maintained that the special payment was compensation payment quantified by reference to salary rather than in respect of remuneration. It was maintained that the payment arose out of the stress, bullying and harassment portion of the High Court claim and represented the appellant's inability to work full-time as a result of the personal injuries sustained. The appellant sought to rely on extract [7.1.27] from the Revenue Operational Manual, which distinguished between salary/wages and compensation for a wrong done quantified by reference to salary/wages.

Again, the Commissioner noted that:

> "[i]n considering if a payment made under an agreement has tax consequences, and as the terms agreed by the parties are embodied in the agreement, the agreement is considered as a whole with due regard for the words expressed in the agreement which are words chosen by the parties".

The Commissioner examined the schedule of damages submitted to the High Court in support of the appellant's claim. It was noteworthy that the special damages being sought were separate to the damages for personal injury. The Commissioner noted that the settlement agreement accorded with the categorisation of the damages as "damages for personal injury" and "special damages", whereby general damages relate to non-pecuniary loss and special damages relate to pecuniary loss. The Commissioner found it significant that the settlement agreement provided descriptions and amounts for these categories of damages. The Commissioner considered the schedule of damages and concluded that the schedule sought to quantify the pecuniary loss to the appellant and held that the inclusion of medical expenses and miscellaneous expenses supported this view.

The Commissioner noted that the language of s192A(5)(a) had been broadly drawn, which could be seen from the words "however described" and "in respect of". In effect, the TAC decided that the special damages were in respect of remuneration from the appellant's employment.

Again, the Commissioner, in determining whether a payment received came within the exemption in s192A TCA 1997, started with the settlement agreement. In addition to looking at the settlement agreement, the Commissioner considered the objective of an award of damages and that of general and special damages in determining whether the payment related to loss of earnings or remuneration. Thus, the Tax Appeals Commissioner, having used the settlement agreement as the starting point, went on to consider how awards are claimed in a court case in arriving at this determination.

It should be remarked, as noted by the Commissioner, that s192A(5)(a) is broadly defined so that it is open to a Commissioner or a court to give broad breadth to a "payment" received relating to remuneration. The requirements for specificity relating to the payment in the agreement are essential. It should be noted that it is not known if a request to state and sign a case for the opinion of the High Court was received by TAC in respect of this determination.

Comments Arising out of the TAC determinations

It would appear from the above determinations that there are certain requirements, which must be satisfied in any settlement agreement. This is the starting point. If this requirement has been satisfied, it is then necessary to consider whether the sum in question was a *bona fide* claim made under the provisions of a relevant Act. In considering this, it is essential that a taxpayer be able to demonstrate that the claim is *bona fide*, i.e. that the money paid was reflective of the right infringed.

Secondly, the section requires that the payment be an award that a relevant authority would have awarded. Thus, even though the sum may be *bona fide,* it cannot be a sum that no relevant authority would have awarded, and so it may be the case that evidence is required to address such an award. The section further requires that if the claim had not been settled, then such an award would have been made by a recommendation, decision or determination pursuant to the relevant Act, i.e. that the person would have had received such an award from a recommendation, decision or determination pursuant to the relevant Act. Moreover, such an award could not be in excess of any such award given by a relevant authority. In effect, any settlement figure would have to been within the remit of the relevant authority unless it was made by a court.

Thirdly, consideration may also be given to instituting proceedings in order to be able to avail of the tax exemption, in light of the Commissioner's finding in decision 153TACD2020 that the failure to issue a statement of claim seemed to be a determinative factor.

Conclusion

When seeking to avail of relief pursuant to s192A, the terms of the settlement agreement must clearly state that the payment being made is by way of compensation for breach of specified legal rights. Once that is satisfied, the taxpayer will need to demonstrate that there was a *bona fide* claim. This can be done by either referring to a decision from a relevant authority, a payment is made in accordance with a mediation process provided for by a relevant Act or by presenting such cogent evidence that would demonstrate a *bona fide* claim.

Read more on taxfind From Irish Tax Institute *Direct Tax Acts, Finance Act 2020*; 153TACD2020; 12TACD2020; 13TACD2020

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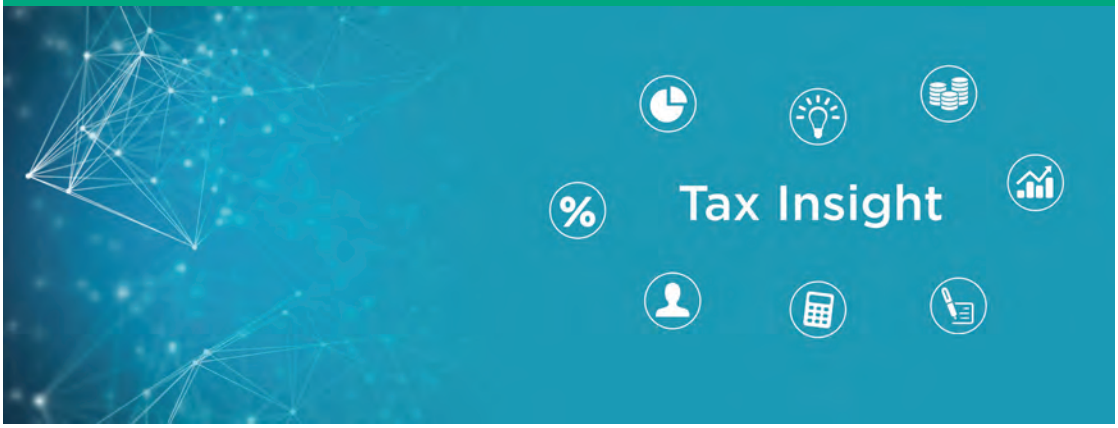
Institute Responds to OECD Consultation on Pillar One and Pillar Two Blueprints



Introduction

On 12 October 2020 the OECD launched a public consultation on the Reports on the Pillar One and Pillar Two Blueprints. Both reports were agreed, together with a Cover Statement, at a meeting of the OECD/G20 Inclusive Framework on BEPS on 8–9 October 2020.

The Blueprints reflect the progress that has been made by the 137 members of the Inclusive Framework on BEPS to progress technical solutions to agree new allocations of taxing rights between jurisdictions to reflect the digitalised economy (Pillar One) and to agree global anti-base erosion rules for a minimum effective tax rate to address remaining BEPS challenges (Pillar Two – GloBE Proposal).

Further information on the technical details included in the Reports on the Pillar One and Pillar Two Blueprints is provided in "Legislation & Policy Monitor", *Irish Tax Review*, 33/4 (2020).

Institute Responds to OECD Consultation

On 14 December 2020 the Institute responded to the OECD public consultation on the Reports on Pillar One and Pillar Two Blueprints. The Tax Policy and Representations team would like to thank members who provided feedback on the two Blueprints, which helped to inform the Institute's response to the consultation. In our submission we made the following key comments and observations.

Pillar One Blueprint

- Clarity is urgently needed on the range of business models that fall within the scope of the new taxing right under Amount A.[1]
- Consider implementing the new taxing right on a phased basis, starting with automated digital services (ADS), to address the uncertainty and layers of complexity that exist when applying the rules more broadly to consumer-facing businesses (CFB).
- Consider imposing a much higher threshold for global revenue than ¤750m, even for several years, to ensure that the compliance burden would be imposed only on the largest multinational enterprises while, at the same time, helping to build the capacity of tax administrations to operate the new rules.
- More consultation is needed on the practical challenges of how businesses will be able to track the data and determine the information required to compute Amount A, as the cost to perform these administrative exercises could be immense.
- In our view, it would be unfair to impose a time limit on pre-regime losses, otherwise countries in which multinational enterprises have invested either during their start-up phase or in the development of a new product may have to absorb losses, while such multinational enterprises are paying taxes on profits elsewhere.
- The level of complexity of the technical solutions proposed to calculate the new taxing right under Amount A is a major concern as the disruption, additional administration costs and increased uncertainty for taxpayers and tax administrations seem to far outweigh the limited revenues that the proposals are anticipated to generate.
- Regarding Amount B,[2] it would be overly simplistic to assume that a standardised benchmark will work for marketing and distribution across the board as each market is different.
- All areas of the new rules should be subject to legally binding and effective dispute resolution mechanisms. We would urge that where a country signs up to the new taxing right, it must also sign up to mandatory multilateral binding dispute resolution for all aspects of the new rules.

Pillar Two Blueprint

- More time is needed to evaluate fully recently implemented tax reforms (including the BEPS package, ATAD measures and US tax reform) to assess whether they have achieved the desired behavioural impact, before moving to implement very complex new rules that would increase tax uncertainty for business, create additional compliance burdens and risk double taxation.
- Any solution reached under Pillar Two must be compatible with the EU fundamental freedoms and the principles expressed in EU law.
- Providing for a substance-based carve-out from the GloBE proposal could serve as an opportunity to build upon and align with the existing work that is currently undertaken by the Forum on Harmful Tax Practices, as part of Action 5 of the BEPS project, to identify preferential tax regimes that unfairly impact the tax base of other jurisdictions.
- When estimating the Effective Tax Rate (ETR) on a jurisdiction-by-jurisdiction basis, the adjustments agreed to measure the tax base using accounting principles must recognise the diverse design elements of tax regimes in different jurisdictions, to ensure that a multinational group's ETR in a relevant jurisdiction could be estimated as closely as possible. Failure to recognise such differences in an individual country's tax regime could result in an inaccurate approximation of the multinational's ETR.
- Deferred tax accounting should be explored where accounting standards are applied in measuring the tax base for the period

1 No agreement has been reached on the scope and quantum of Amount A, refer to "Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint", OECD, October 2020.

2 No agreement has been reached on the scope and quantum of Amount B, refer to "Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint", OECD, October 2020.

to address the problem of temporary differences.

- It would be important to ensure that companies that are incentivised to carry out research and development (R&D) or spend on green initiatives to tackle climate change through tax incentives would not be penalised under the proposal, even if such incentives result in a low ETR.
- To reduce complexity and help business to manage the substantial compliance burdens that will be caused by the interaction of the four interlocking rules under the GloBE, we would urge that the same size of threshold of ¤750m considered for the Income Inclusion[3] Rule would be similarly applied to the Subject to Tax Rule.[4]
- In our view, an Income Inclusion Rule should operate, in the first instance, as the primary rule applying before any Subject to Tax Rule.

Conclusion

The Institute believes that an internationally agreed tax framework is an essential tool that facilitates cross-border trade and investment. However, adequate time must be afforded to the reform process to ensure that a fully considered and practical solution can be reached that will stand the test of time.

Accordingly, the Institute recommended that the ongoing work at the OECD must focus on ensuring tax certainty and minimising the enormous administrative burdens that will accompany any agreed solution. This will require continuous consultation with all stakeholders, in particular with businesses, to comprehend fully the practical challenges and the vast complexities involved for tax administrations and taxpayers to implement what is proposed under both Pillars.

As part of the OECD consultation process, a public consultation virtual meeting was held on 14 and 15 January 2021. Further details on the key themes and comments received from stakeholders in response to the public consultation on the Reports on the Pillar One and Pillar Two Blueprints are outlined in "Legislation & Policy Monitor" in this issue.

At the end of January, the Institute released Episode 3 of its podcast series Tax Talk, in which our host, Samantha McCaughren, discusses the future of the global tax reform process and its implications for business and the Irish economy with Pascal Saint-Amans, Director of Tax Policy and Administration at the OECD; Feargal O'Rourke, Managing Partner at PwC; and Tom Reynolds, Vice President of Global Tax at Schneider Electric. A link to Tax Talk, Episode 3: Global Tax Reform, and a copy of the Institute's full submission to the OECD on the two Blueprints can be found at www.taxinstitute.ie.

Read more on taxfind From Irish Tax Institute All submissions from the Institute are available on TaxFind

3 No agreement has been reached on the definition and operation of the Income Inclusion Rule, refer to "Tax Challenges Arising From Digitalisation – Report on Pillar Two Blueprint", OECD, October 2020.

4 No agreement has been reached on the definition and operation of the Subject to Tax Rule, refer to "Tax Challenges Arising From Digitalisation – Report on Pillar Two Blueprint", OECD, October 2020.

Liz Hughes *(not pictured)*
CEO Charities Institute Ireland

Charities VAT Compensation Scheme

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The VAT compensation scheme was introduced in 2018 by the government with the aim of reducing the VAT burden on charities. Charities are entitled to claim a refund of a proportion of their VAT costs based on their level of non-public funding. Claims can be submitted between 1 January and 30 June each year for VAT paid on expenditure in the previous calendar year. The scheme is due for review after an initial three years in operation.

Charity representative group Charities Institute Ireland (Cii) is encouraging charities to engage with the scheme once more to demonstrate the importance of this financial support to the sector. The scheme has been significantly oversubscribed since it began. In 2019, Revenue reported that 1,100 claims amounting to almost €40m were made under the scheme, which is capped at €5m and pays out claims on a pro rata basis, while 2020 saw 900 claims amounting to €49m.

There is clearly substantial demand for the scheme, and Cii, together with our sector partners, will campaign to have the scheme renewed as well as call for a significant raising of the €5m cap. The 2020 return is accordingly more important than ever.

Financial advisers to the sector are urged to take care not to include public funding in applications to the scheme

Qualifying income

While the majority of charities have no difficulty with the operation of the scheme, there still seems to be an issue for some about qualifying income, with Revenue continuing to see charities including public funding in their applications. Cii is urging financial advisers to the sector to take care not to include public funding in applications to the scheme, as doing so creates a backlog of work for Revenue and can delay the payment process.

Revenue has developed a very helpful guidance document, which is regularly updated, to help in the application process. The part that is most relevant to ensuring a claim is right first time is section 5.1, which comprehensively covers qualifying income.

Another point to highlight is the importance of submitting claims on time. Revenue would like charities to submit their VAT compensation claims well in advance of the 30 June deadline. In 2020 the claim deadline was extended to 31 August, but there will be no extension this year. Claims can be submitted only between 1 January and 30 June each year.

The 30 June date is a cut-off point, not a target. The tendency of many charities to leave their submission to the last minute may be a factor in the high incidence of errors reported by Revenue. Revenue has also stressed that if a charity has an issue with ROS or its staff are busy during that last week, claims may not be successfully uploaded in time, adding urgency to the need to submit claims well ahead of the deadline.

More information

You can find out more about the VAT compensation scheme on the Revenue website and on the Cii website

News and Moves

Martin Phelan joins Simmons & Simmons as Head of Tax, Ireland

Martin Phelan (CTA) joined Simmons & Simmons as Head of Tax, Ireland on 4th January. Martin has a tremendous reputation as a leading international tax expert and is the only qualified tax lawyer in Ireland who is also a qualified arbitrator. Martin is a Fellow and Past President of the Irish Tax Institute.

Emer Joyce appointed Tax Partner at Laura Lynch & Associates

Emer Joyce (CTA), has joined Laura Lynch & Associates as a Tax Partner. Emer brings a wealth of experience in advising Irish businesses and their families on all taxation matters. She has extensive experience in tax efficient structuring of acquisitions, re-organisations and disposals. Emer has worked in tax for over 20 years and has held senior roles in a number of large firms.

Mark O'Sullivan appointed Tax Partner at BDO

BDO is very pleased to announce the appointment of **Mark O'Sullivan** as a Tax Partner, Research & Development Incentives, within the firm.

Mark joins the partnership having previously held the position of Director and Head of Research & Development ("R&D") Technical Services with the BDO Tax team. Mark joined the firm in 2013 and specialises in securing R&D funding for companies through government grants and tax incentives, including RD&I grants, R&D tax credits, and the Knowledge Development Box ("KDB") regime.

Tara Doyle appointed Chairperson of Matheson

Tara Doyle has been appointed Chairperson of Irish law firm, Matheson. Tara is the first woman to be appointed Chairperson of the firm.

Tara will continue her day-to-day practice as Head of Matheson's Asset Management and Investment Funds Department, alongside her new role.

Tara Doyle joined Matheson in 1994 as a trainee solicitor, and has been a partner since 2002. She has served on the firm's management committee for a number of years, and also chairs Matheson's Graduate Talent and Development Committee.

New Managing Partner elected at Eversheds Sutherland Ireland

Leading global law firm Eversheds Sutherland is pleased to announce the appointment of **Alan Connell** as the new Managing Partner of its Irish offices, following his election by the firm's partners.

Alan, who is also Head of the firm's Tax Group, has been elected to serve a four-year term as Managing Partner based at the firm's Dublin office from 1st January 2021. Alan joined Eversheds Sutherland in 2017 as a Partner and Head of the firm's Tax practice.