Irish Tax Institute

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» 34TACD2021 dealt with an appeal against assessments to VAT and income tax relating to tax years of assessment 2008 to 2011.

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Direct Tax Cases: Decisions from the UK Courts

Stephen Ruane and **Patrick Lawless**

» In *Foundation Partners (GP) v HMRC* [2021] UKFTT 18 (TC) the First-tier Tribunal found that Foundation Partners GP had not been trading and upheld HMRC's decision to disallow a trading loss of c. £36m claimed in its partnership tax return. It also found that the expenditure incurred by the partnership was on capital account and should properly have been accounted for as an investment rather than as stock.

» In *Aozora GMAC Investments Ltd v HMRC* [2021] UKFTT 99 (TC) the First-tier Tribunal found that HMRC was incorrect in disallowing credit under s790 ICTA 1988 for US withholding tax suffered on interest paid to Aozora GMAC Investments Ltd, a UK-resident company, on loans that it had made to its US subsidiary.

» In *Gareth Phillips v HMRC* [2021] UKFTT 91 (TC) the issue of whether an individual was employed or self-employed was considered in some detail.

» In *Roger Preston Group Limited v HMRC* [2021] UKFTT 38 (TC) the First-tier Tribunal upheld an appeal challenging HMRC's decision to disallow corporation tax deductions claimed by the appellant in respect of amortisation of intangible assets acquired in 2008. The case focused primarily on whether a licence had been properly recognised as an intangible asset for accounting purposes.

» In *Mark Shaw (as nominated member of TAL CPT Land Development Partnership LLP) v HMRC* [2021] UKUT 100 (TCC) the Upper Tribunal considered whether the First-tier Tribunal had erred in disallowing claims made by the partnership for industrial building allowances in the years ended 31 March 2005 to 31 March 2007.

Compliance Deadlines

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

International Tax Update

Louise Kelly and **Geraldine McCann** summarise recent international developments.

» US tax developments:
  - A US Treasury Department report released on 7 April 2021 provides additional detail around changes – especially within the international tax space – that the White House would like to see made to the tax code as part of the "Made in America Tax Plan" recently unveiled by President Biden.ti

» Developments relating to the OECD/G20 BEPS project:
  - White House proposal re-energises global talks on corporate tax reallocation.
  - A leaked proposal on rethinking Pillar One, where the US pitches a new design that would use quantitative criteria to include no more than 100 of the largest and most profitable multinational groups "regardless of industry classification or business model".

» The US Treasury Department report released on 7 April provides support for a global minimum tax, which is Pillar Two of the OECD project.

» In the UK, the Chancellor of the Exchequer delivered the first Budget since Brexit. The UK Government also published a range of consultations and reviews as part of "Tax Day".

» HMRC in the UK published a manual providing guidance on the tax implications that can arise from transactions involving crypto-assets.

» On 21 April the Irish Department of Finance hosted an International Tax Seminar, taking stock of recent developments in international tax.

» The Italian tax authorities released official guidance on the digital service tax that is being implemented in Italy pending broader solutions from the OECD on the taxation of digital services.

» Barbados has been removed from the EU list of non-cooperative jurisdictions for tax purposes and added to a "state-of-play document" ("grey list").

» The OECD announced that the 12 "no or only nominal tax" jurisdictions have begun their first tax information exchanges under the Forum on Harmful Tax Practices global standard on substantial activities.

» The Supreme Court in India has ruled in favour of taxpayers that certain software payments are not taxable as a royalty under Article 12 of the Indian tax treaties.

» There have been some interesting recent Dutch developments around informal capital structures (e.g. interest-free/royalty-free licence structures and certain, not arm's-length, IP onshoring transactions) and Dutch reverse hybrids (e.g. a Dutch CV as a holding company).

» Update on Covid-19-related measures:
  - The European Commission proposes to exempt from VAT vital goods and services distributed by EU bodies in times of crisis.

VAT Cases & VAT News

Gabrielle Dillon gives us the latest VAT news and reviews the following recent CJEU VAT cases:

» *EQ v Administration de l'Enregistrement, des Domaines et de la TVA* C-846/19, which related to the interpretation of Articles 9(1) and 132(1)(g) of the EU VAT Directive;

» *The Commissioners for Her Majesty's Revenue & Customs v Wellcome Trust Ltd* C-459/19, which concerned the interpretation of Article 44 of the VAT Directive;

» *Danske Bank A/S, Danmark, Sverige Filial v Skatteverket* C 812/19, which dealt with the VAT group provisions (Article 11 of the EU VAT Directive); and

» *Frenetikexito - Unipessoal Lda v Autoridade Tributária e Aduaneira* C-581/19, which related to the interpretation of Articles 2(1)(c) and 132(1)(c) of the EU VAT Directive.

» 72TACD2021 related to the entitlement to input VAT recovery in relation to costs incurred on the acquisition of reversionary interests in property.

» 73TACD2021 concerns an appeal against an assessment to VAT and income tax.

» 95TACD2021 was published on 30 July 2021, where the TAC had to determine whether volume-based discounts granted/rebate payments made by the appellant to private health insurance companies (PHICs) constitute a reduction in the consideration received by it in respect of the supply of the product and whether the appellant is entitled to repayment of VAT.i

Accounting Developments of Interest

Aidan Clifford, ACCA Ireland, outlines the key developments of interest to Chartered Tax Advisers (CTA).

Revenue Commissioners' Update

This update from Revenue explains the new electronic Professional Services Withholding Tax (PSWT) system to be introduced on 1 July 2021.

President's Pages

Sandra Clarke
Irish Tax Institute President

Introduction

Tax has certainly been making the headlines in recent months, nationally and internationally, and the news has implications for our economy and for ourselves, as tax practitioners.

In early April the Biden administration threw its weight behind a global minimum tax rate, setting off a flurry of activity that has boosted the prospects of an agreement in the long-running OECD Inclusive Framework process not just on how to tax the largest and most profitable multinational companies but also on a global minimum corporation tax rate.

In mid-April the Minister for Finance announced the establishment of the Commission on Taxation and Welfare, as promised in the Programme for Government. The Commission is to be chaired by Professor Niamh Moloney of the London School of Economics and Political Science.

On 1 June the Government published its Economic Recovery Plan, which contains new measures to support businesses as they recover, as well as the extension of existing valuable supports such as the EWSS, the CRSS and the debt warehousing scheme.

On the following day the Minister for Finance outlined his plans for a much-needed overhaul of local property tax, which will end the injustice of homeowners who bought properties built since 2013 being exempt from the charge. The rate has been reduced and the bands widened, but property valuations are to be reviewed every four years. The overhaul will resuscitate a natural revenue source that was close to withering on the vine.

Each of these separate developments is important in its own right, but they are all part of the overall tax jigsaw and therefore interconnected in terms of their impact on our economy.

The Road to Recovery

The development of most immediate relevance is the Government's Economic Recovery Plan. With the vaccination programme progressing at pace and the economy beginning to reopen, the aim of the plan is to kick-start what it calls "a job rich recovery". It sets out new measures targeted at businesses in the sectors most affected by the lockdowns.

One such measure is the Business Resumption Support Scheme (BRSS), which is designed to help vulnerable but viable businesses that have been worst hit by the public health restrictions. The BRSS will be introduced in September and will be available to businesses whose turnover is reduced by 75% during the period from September 2020 to 31 August 2021 when compared to 2019. The scheme will be administered by Revenue and will operate in a similar way to the CRSS.

The Role of Revenue

The existing suite of Covid-19-related supports have been crucial to the survival of businesses over the 15 months since the pandemic began. The Institute welcomes their continuation as businesses and their employees start on what may be for many the bumpy road to recovery. However, we strongly believe that the attitude adopted by Revenue to recovering businesses will be critical to their future. In that respect, it was good to hear recent assurances about continued forbearance towards businesses with warehoused Covid tax debt being reiterated at the Institute's joint webinar with Revenue on 1 June. The best way for the Exchequer to recover this debt from previously viable businesses is to support them as they return to full trading.

Over 1,000 members tuned in to the webinar, which included a discussion of planned developments in the Compliance Intervention Framework, the tax treatment of and trends in share-based remuneration, and the digital transformation of tax administration. The latter presents challenges as well as opportunities for taxpayers and their advisers, and engagement with Revenue on behalf of businesses trying to recover from a very stressful year will be crucial in the months ahead.

Pre-Budget and Finance Bill Submissions

There are some issues, not covered by the recently published plan, that the Institute will raise in its Finance Bill and Pre-Budget submissions. For example, the plight of small business owners saddled with corporation tax liabilities from 2019 after a year of rolling lockdowns. As I said in my speech at the Annual Tax Summit, these are good businesses that made a profit before the pandemic but have been unable to trade because of the Covid restrictions. Now, just as the restrictions are being lifted, their owners are facing a significant interest charge of 8% per annum on a tax liability that they can't pay.

The Institute believes that corporation tax that was due for payment in 2020, and indeed the first quarter of 2021, should be included in the debt warehousing facility so that affected businesses can avail of the reduced 3% interest rate that applies under this scheme to other tax heads, such as income tax, VAT and payroll taxes.

Indeed, we strongly believe that this reduced rate, introduced as an alleviation measure in the early stages of the pandemic, should now be made a permanent feature of our tax system. The existing statutory interest rates of 8% and 10% are, frankly, penal given the low rates that prevail in the market. A 3% charge, which is still higher than the rate applied in the UK, would recompense the Exchequer and act as a disincentive to late payments. We have the chance now to reform this important component of our tax system – we should use it in the forthcoming Finance Bill.

We will also include in our submission the significant impact of denying a credit for PAYE withheld from remuneration paid to a director or employee within the remit of s997A TCA 1997. If an employer is availing of debt warehousing for PAYE (employer) liabilities, in accordance with this section, a director or employee with a material interest in the company cannot claim credit for PAYE deducted if it has been warehoused and not paid. If the director or employee is eligible for income tax warehousing (because they are also subject to self-assessment), she or he can warehouse all liabilities, including any Schedule E liabilities.

However, if the directors and employees do not qualify for income tax warehousing, they are faced with an income tax liability in respect of their Schedule E income. In some circumstances employees may not even be aware that their employer warehoused the PAYE deducted from their pay. We believe that a legislative amendment is required to ensure that the individuals within the remit of s997A who are ineligible for income tax warehousing can claim credit for the PAYE that their employer has warehoused. We raised this issue with Revenue at our Annual Tax Summit, and it stated that the legislation is very clear – Revenue is bound by the legislation, and a credit for PAYE cannot be given.

Other potential policy measures endorsed by members at our Annual Tax Summit will form part of our submissions. These include:

- accelerated capital allowances for expenditure on equipment for employees to facilitate home working and to encourage investment by businesses in plant, equipment and vehicles;
- accelerated loss relief for the self-employed and companies;
- employer payments of their employees' TWSS tax liabilities to be treated as a tax-deductible expense; and
- a reduced employer PRSI rate of 0.5% to apply for six months following the cessation of the EWSS.

Accelerating tax refunds and credits has been an effective way of getting cash to business owners over the last 15 months of lockdowns and restricted trading. This mechanism should continue to be used to help cash-strapped traders as they get back on their feet.

Global Tax Reform

On the international front, our corporate tax rate attracted a lot of attention in the wake of the Biden administration's support for a global minimum rate. As the larger countries lined up to welcome what they hailed as a breakthrough in the long-running OECD negotiations, some took aim at our 12.5% rate, which has long been a thorn in the side of many large economies.

The push from governments to find more sources of revenue is understandable, given the cost of the global public health crisis, but a return to a principles-based approach to the reform process would lead to more sustainable outcomes in the long term.

In a press statement issued by the Institute, we argued that any new international tax framework must have at its core the aim of fostering the economic activity and investment that would provide governments with the revenue they need to fund public services for citizens.

We said that businesses need certainty and clarity, and for that reason we hope that the return of the US to the negotiating table will give fresh impetus to the OECD negotiations. But we warned that smaller trading nations with few natural resources, such as Ireland, should not be the fall guys of any global agreement. A new system of international corporate tax must accommodate the legitimate aspirations of all countries for their citizens, irrespective of their size or level of economic development.

G7 Agreement

In March the Biden administration announced new corporate tax reform proposals that would see the GILTI rate increase to 21%. It also indicated that the US would seek global agreement on a minimum rate at the OECD. The latest instalment in the global reform process was the agreement reached at the recent G7 meeting in the UK, and reaffirmed at the subsequent meeting of G7 leaders, committing to a global minimum rate of 15% and a new way of taxing the largest and most profitable multinationals. The outcome has created quite a stir, but the process still has some distance to travel before the shape and detail of a new global tax order emerge. And as we heard during the International Tax Seminar hosted by the Department of Finance in late April, the most uncertain part of the journey may well be through the complex legislative environment in the Houses of Congress.

One of the speakers at the seminar was Barbara Angus, Global Tax Leader with EY and former Chief Tax Counsel to the Committee on Ways and Means of the House of Representatives. During a discussion moderated by our Director of Tax Policy, Anne Gunnell, she pointed out that the administration's proposal was a first offer and that Congress writes the legislation, and she said it was hard to predict the ultimate outcome of "a long and complicated path with a lot of moving pieces".

Wherever the rate lands, there is a growing consensus at international level that agreement will be reached later this year, with unknown implications for our corporate tax regime. Our economy may weather the storm – even if the Exchequer is set to lose at least €2bn, according to the Minister for Finance. But one thing is clear, and we've all known it for some time: our economy is too dependent on multinationals, and we really need to rebalance it by developing our indigenous SMEs and micro businesses.

The Commission on Taxation and Welfare

And that bring us to the Commission on Taxation and Welfare, which Minister Donohoe announced on 20 April. In his statement the Minister said: "The Commission's work will have regard to the principles of taxation and welfare policy outlined within the Programme for Government including the Government's commitment to a pro-enterprise policy framework, by providing a stable and sustainable regulatory and tax environment."

The commitment to building our SME sector is amplified in the Economic Recovery Plan, which says that the Government will take "a systemic approach to sustaining and growing the domestic SME sector".

We already know how our tax system has played a critical part in developing our FDI sector. More recently, we have seen how the tax system was used to keep businesses afloat during the Covid crisis. Taxation is an essential tool for the achievement of public policy aims, and it could be used to great effect to foster an innovative and sustainable domestic enterprise sector that will provide good-quality jobs for our citizens.

It has been my privilege to be asked to serve on the Commission on Taxation and Welfare as an independent member and in my personal capacity. It is an important mandate, and I look forward to bringing my experience as Chartered Tax Adviser to the work of the Commission.

Education

I had the honour of taking part in our virtual conferring for the CTA class of 2020, which was streamed on the evening of 6 May. It was wonderful to welcome such a diverse and impressive group into the Institute and the CTA profession. We had 231 graduates, all of them blazing a trail as the first CTAs to complete their training online and do their exams remotely. I also congratulated our prize winners, whose outstanding achievements gladdened all our hearts. It is both inspiring and reassuring that in the fast-changing world of tax the Institute continues to attract young people of such a high calibre into the profession. They have so much to offer, and I hope that many of them will play an active part in the work of the Institute.

Conclusion

These are my last "President's Pages" for *Irish Tax Review*. It has been a strange year in some respects. I certainly missed getting out to meet members at our various annual gatherings, but in many ways I feel that the intense workload on practitioners during the pandemic brought members together – united in a common cause.

I want to thank my colleagues on the Council and immediate Past President, Frank Mitchell for their friendship and advice throughout the year. I also wish to acknowledge the valuable contribution of the committee members and their chairs to the work of the Institute. A special word of congratulations must go to the editorial team of *ITR* for the seamless transition of our venerable quarterly publication to the online world. I also want to thank the ITI staff for all their help and support during my term and I want to wish the incoming president Karen Frawley every success and the rest of the executive in their roles for the year ahead.

Finally, I want to thank you, the members, for the resilience you have shown during this difficult year and for playing your part in keeping us in touch with the practical impact on your clients of the many tax measures introduced by the Government in response to the pandemic. Your input informed the tweaking and adjustment of the design of these measures to improve their effectiveness for businesses and their employees. I think we can be proud that we played our part in helping our SMEs and small business owners to get through this unprecedented crisis.

As we emerge from the pandemic, the economic indicators are encouraging. Ireland has a track record of bouncing back after a crisis, and let's hope we can do it again. But the pandemic is likely to have some lasting impacts on how we order our society. Governments all over the world are under pressure to pay for the enormous increase in social provision during the crisis. That will have repercussions for tax and for business. Interesting times are ahead for our profession!

I hope you all have a lovely summer and stay safe.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

As economic activity resumes around Ireland and the vaccine drive continues at pace, we dare to be optimistic for the second half of 2021. Across the world, more energy is shifting back to projects and proposals from before the pandemic – just think of the continued spotlight on global tax reform since the US rejoined the discussion earlier this year.

While that's going on, the teams in the Institute have been very busy – whether it's collecting your feedback to ensure that the concerns of you and your clients are addressed through submissions to and meetings with the relevant bodies, creating a summer CPD programme to allow you to gain tax technical CPD hours at a time that suits you, or looking at how our qualification courses can be enhanced to support our students. I thank you for your engagement so far and hope that it continues throughout the rest of the year.

Welcoming the Class of 2020

On the evening of 6 May the CTA class of 2020 gathered virtually to be welcomed as Associates. The Institute's President, Sandra Clarke, congratulated conferees on their fantastic achievement, sharing words of wisdom that will no doubt be useful as they progress through their careers.

On the same evening our 2020 placed students were presented with their awards by representatives of the 12 sponsoring firms. We are extremely proud of all of our prizewinners, who turned in a fantastic performance in a very difficult year – it is a real testament to them and their hard work. I would like to thank the sponsoring firms for their generosity and continued support of the CTA programme.

We look forward to working with the class of 2020 throughout their careers.

Education

April and May were busy months for our winter students, with online exams and assignments been completed. It all went smoothly, and the results will be released in the coming weeks and months. Before they finished, we checked in with our CTA students to see how they found online learning. The feedback was excellent across all Parts, with appreciation for the flexibility and the supports available to them. The Education team will use the feedback to enhance students' experience of achieving the CTA qualification – the gold standard in tax.

Our summer courses for the CTA and the Tax Technician qualifications started at the end of April, with strong numbers across the board. Students are due to sit exams in August.

The Institute is delighted to offer its Third-Level Scholarship to a Leaving Certificate student who is interested in pursuing a career in tax but needs financial support to progress through college. With the application period closed, the Education team is working through the applicants and will hold interviews in the autumn. We wish all applicants the best of luck.

Professional Services

As a CTA member of the Institute, you are part of an international CTA network that has more than 30,000 members. We value our connection with each of the CTA-awarding bodies – the Chartered Institute of Taxation (UK), The Tax Institute (Australia), the Taxation Institute of Hong Kong. I am delighted that we have decided to jointly launch a new initiative by hosting a series of Global CTA Tax Webinars. The first session, on International Corporate Tax, was a success, with great engagement between the panel and viewers. Over 1,550 people watched the session, which examined the road from the launch of the BEPS project to the current implications and state of play of the OECD's Pillar 1 and Pillar 2 proposals. Session 2 of the Global CTA Tax Webinar series is in the works, and a communication will be issued in due course.

As we pass the mid-year point the PD team has worked hard to provide you with a dynamic programme that will allow you to fulfil your CPD requirements. In that context, the new 15-part online Practical Income Tax programme is designed for CTAs who wish to refresh and catch up on key private client and income tax issues. Running from mid-May to early July, it offers great flexibility, with on-demand access to the webinars, and each participant also receives a digital copy of updated chapters of *Practical Income Tax – The Professional's Guide*. As part of the programme, there will be a session dedicated to Pay & File 2021 in September. The full programme is available on our website.

Thank you for your continued support of the Institute and its work. As a token of our gratitude, all members have access to the soft copy of *Taxation Summary* through TaxFind, and it can be downloaded as an ebook from your membership dashboard. A PDF of the tax rates and tables will also be made available on TaxFind. Shortly, we will start the delivery of *Taxation Summary: Finance Act 2020* to all members who paid their membership fees by 31 May 2021. Additional copies are available to order on taxinstitute.ie.

Tax Compliance in a Changing World

On 1 June the Institute and Revenue held a joint conference that gave members an insight into the perspectives of Revenue on planned developments in the Compliance Intervention Framework, the tax treatment of and trends in share-based remuneration, and the digital transformation of tax administration. Over 1,000 people logged on to hear the engaging discussions, and although it was not recorded, you can view the presentation slides on our website.

International Tax Framework

In April, at the Department of Finance's International Tax Seminar, the Institute's Director of Tax Policy and Representations, Anne Gunnell, moderated a panel discussion on US and Irish business perspectives on the international tax landscape, the dynamics in the US Congress and how it could influence the discussions at the OECD on both Pillar One and Pillar Two. Ahead of the seminar, the Institute released a statement on a new international tax framework. We believe that the OECD's Inclusive Framework offers the best opportunity for agreement on global tax reform, and it is vital that at the centre of any new framework is the aim to create economic activity and investment that would enable governments to fund services for their citizens. Additionally, to provide businesses with clarity and to control the costs of compliance, the new framework should be clear and easy to implement.

Giving a keynote address at the beginning of the International Tax Seminar, the Minister for Finance, Paschal Donohoe TD, referred to the considerable progress already made in reforming the international tax framework and highlighted the need for agreement on the political principles underlying the concept of a global minimum tax rate before moving forward. Mr Donohoe believes that tax policy needs to be a "legitimate lever" for small countries to offset advantages enjoyed by larger countries but also accepts that clear boundaries need to be established for competition to be "fair and sustainable".

Policy and Representations

The Branch Network has been busy, and most recently has been engaging with Revenue on the practical aspects of the Special Assignee Relief Programme (SARP). The meetings look at ways to streamline the claim process, including requests for supporting information. We will keep you up to date on these developments.

The ongoing engagement at TALC has enabled our representatives to gain clarity on matters that are important to you and your clients. In late May it was confirmed at Main TALC that the assessment of tax clearance status was recommencing – potentially affecting up to 3,200 businesses in receipt of the EWSS and/or CRSS – and that the debt warehousing scheme is still available to businesses that reopened in May as the public health restrictions slowly lifted. Revenue also provided an update on the TWSS reconciliation process. Our Policy and Representations team included important recent TALC developments in TaxFax on 21 May 2021.

Over the last few months we have been working closely with our sub-groups draft responses to various public consultations. In mid-April we made a submission, with input from the Transfer Pricing Sub-Group, to the Department of Finance on the application of the authorised OECD approach to the attribution of profits to branches of non-resident companies. Collaborating with our European colleagues in CFE Tax Advisers Europe, we responded to the European Commission's public consultation on a digital levy. The Institute also responded to the Department of Finance's consultation on tax treaty policy, with 12 recommendations based on feedback from you, our members. Most recently, we submitted a completed questionnaire in response to the European Commission's public consultation on EU taxpayers' rights which will help inform the recommendations to Member States due out in Q3 2021. A complete list of our submissions is available on our website here.

Tax Talk

Tax Talk is our podcast series that explores the current issues in the world of taxation. Our most recent episode examined the operation of the Employment Investment Incentive (EII) and how it can play a more effective role in Ireland's economic recovery. Our panel consisted of an investor, an SME and a tax adviser – Nick Corcoran, co-founder of Cardinal Capital; Brendan Sheppard, CEO of Smart Factory Solutions; and Institute Council member Laura Lynch. After a comprehensive discussion, they all agreed that, with some changes, the EII could be reformed to fulfil its intended purpose of fostering an entrepreneurial economy. You can listen to the podcast here.

Looking Forward

It's that time of year again, with preparation of our pre-Budget and Finance Bill 2021 submissions on the agenda. With this year's Budget promising to be just as important as last year's in our economic recovery from the pandemic, there are many things to consider. At the end of June, the Institute will participate in the National Economic Dialogue – an important part of the budgetary process – to advocate for the support of businesses as they emerge from the pandemic. The overarching theme is building sustainable businesses post-recovery, and we will bring forward issues raised by you and your clients, including the Employment Investment Incentive (EII), expanding the debt warehousing facility to the corporation tax of small businesses significantly affected by the restrictions that was due for payment in 2020, and accelerated loss relief for the self-employed and companies.

Finally, I would like to extend my congratulations to two senior members of the Institute – Sandra Clarke and Marie Bradley – who were selected to be on the Commission on Taxation and Welfare. Although they will be acting in their own capacity, I know that their talent and expertise will greatly benefit the Commission, as they have benefited the Institute throughout the years.

Legislation & Policy Monitor

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

News Alert

Commission on Taxation and Welfare established

On 19 April the Minister for Finance, Paschal Donohoe TD, announced the establishment of the Commission on Taxation and Welfare, chaired by Professor Niamh Moloney, Professor of Financial Markets Law and Head of the Department of Law at the London School of Economics and Political Science.

As set out in the Programme for Government, the Commission on Taxation and Welfare is being tasked with independently considering how the taxation and welfare systems can support economic activity and promote increased employment and prosperity, while ensuring that there are sufficient resources available to meet the costs of the public services and supports in the medium and longer term. The Commission will take account of issues such as the impact of the Covid-19 pandemic, ageing demographics, digital disruption and automation, and the long-term strategic commitments of Government regarding health, housing and climate. The Commission is due to report to the Minister for Finance by 1 July 2022.

Public consultation on application of "Authorised OECD Approach" launched

On 16 March the Department of Finance launched a public consultation on Ireland's corporation tax rules relating to the application of the "Authorised OECD Approach" to the attribution of profits to branches of non-resident companies. The Institute responded to this consultation on 16 April, and further information is included in the article "Institute Responds to Four Tax Policy Consultations" in this issue of *Irish Tax Review*.

Public consultation on Ireland's tax treaty policy launched

The January 2021 update to Ireland's Corporation Tax Roadmap committed to reviewing Ireland's tax treaty policy while taking account of international developments and publishing a tax treaty policy statement by the end of 2021. On 7 April 2021 the Department of Finance launched a public consultation on Ireland's tax treaty policy, with written submissions to be made by 7 May 2021.

The Department invited interested parties to contribute to this consultation with a view to informing Ireland's future tax treaty policy – specifically, in relation to how such a policy can continue to support economic growth and prosperity and having regard to Ireland's development commitments. At the time of writing, the Institute is drafting its response to this consultation.

Selected Statutory Instruments

Finance Act 2020 (Section 62) (Commencement) Order 2021

The Minister for Finance, Paschal Donohoe TD, signed the commencement order (SI 108 of 2021) for s62 of Finance Act 2020 on 10 March 2021. Section 62 deals with the migration of shares and securities in Irish registered companies from a central securities depository (CSD) in the UK to a CSD in Belgium (or transition from Crest to Euroclear) and the future settlement of trades in those shares and securities in the Belgian CSD arising from the withdrawal of the UK from the EU. The amendments aim to ensure tax-neutrality of the migration event, provide for the new CSD arrangements relating to dividend withholding tax, and maintain the status quo, before and after migration, in relation to certain tax treatments.

Policy News

President Biden announces US corporate tax reform proposals

On 31 March the US President, Joe Biden, announced, alongside The American Jobs Plan, new corporate tax proposals as part of The Made in America Tax Plan. The Tax Plan, which confirms that the US will seek global agreement on a minimum tax through multilateral negotiations, is intended to "bring an end to the race-to-the-bottom on corporate tax rates that allows countries to gain a competitive advantage by becoming tax havens".

Some of the key measures in the plan are:

- Increasing the corporate tax rate from 21% to 28%.
- Increasing the global minimum tax on US corporations to 21% and calculating it on a country-by-country basis. It also proposes to eliminate the rule that allows US companies to pay no tax on the first 10% of return when they locate investments in foreign countries.
- Seeking global agreement on a minimum tax through multilateral negotiations, in an effort to avoid the possibility of US corporations switching their headquarters to foreign countries. The plan also includes denying deductions to foreign corporations on payments that could allow them to reduce profits in the US if they are based in a country that does not adopt the minimum tax.
- Making it harder for US corporations to invert. This is intended as a backstop to other reforms that should address the incentive to do so in the first place.
- Denying companies expense deductions from offshoring jobs and providing a tax credit to support onshoring jobs.
- Repealing the Foreign Derived Intangible Income (FDII) rules introduced as part of the 2017 US tax reform package by President Trump and using the revenue generated to expand R&D investment incentives.
- Enacting a minimum tax that will apply to "book income" of the largest corporations. The 15% minimum tax rate would apply to the income that corporations use to report their profits to investors, known as "book income". This measure is intended to be a backstop to other proposed reforms and would apply only to the very largest corporations.
- Eliminating tax preferences for fossil fuels and making sure that polluting industries pay for the cost of environmental clean-ups.
- Ramping up enforcement against corporations by ensuring that the Internal Revenue Service has the resources it needs to enforce tax laws effectively.

UK Budget 2021[1]

The Chancellor of the Exchequer, Rishi Sunak MP, presented his Budget to the UK Parliament on 3 March 2021. Tax measures announced in the Budget included:

- The rate of corporation tax will increase to 25% with effect from April 2023. Businesses with profits of £50,000 or less will continue to be taxed at 19%. Tapering will apply where profits are above £50,000 so that only businesses with profits greater than £250,000 will be taxed at the full 25% rate.
- A 130% "super deduction" will be introduced for capital investments in qualifying new plant and machinery for two years from 1 April 2021.
- The corporation tax and income tax trading loss carry-back rules will be temporarily extended to allow relief to be carried back to the previous three years, rather than the usual one year.
- The VAT rate cut to 5% for hospitality, accommodation and attractions across the UK will be extended until the end of September, followed by a 12.5% rate for a further six months until 31 March 2022.
- The amount of SME payable R&D tax credit that a business can receive in any one year will be capped at £20,000 plus three times the company's total PAYE and National Insurance Contributions liability. A review of the R&D tax reliefs was also announced.
- The temporary cut in stamp duty land tax in England and Northern Ireland will be extended until September 2021.
- The income tax personal allowance and higher rate threshold will be frozen at the 2021–2022 levels until 5 April 2026.
- Inheritance tax thresholds will be maintained at their current levels until April 2026.
- The Coronavirus Job Retention Scheme and the UK-wide Self-Employment Income Support scheme will be extended to September 2021.

Mandate approved on proposed Directive on public country-by-country reporting (CbCR)

The Portuguese Presidency of the Council of the European Union was mandated by Member States' ambassadors on 3 March to engage in negotiations with the European Parliament for the swift adoption of the proposed Directive on public CbCR. The proposed Directive would require multinational enterprises or stand-alone undertakings with a total consolidated revenue of more than €750m in each of the last two consecutive financial years, whether headquartered in the EU or outside, to disclose publicly the income tax that they paid in each Member State, together with other relevant tax-related information. If the Directive is adopted, Member States will have two years to transpose the Directive into national law.

After the agreement of the negotiating mandate by the Committee of Permanent Representatives (Coreper), the Portuguese Presidency will now work with the Parliament to potentially agree to rapidly adopt the Directive at second reading ("early second reading agreement").

EU adopts tax transparency rules for digital platforms (DAC7)

The Council of the European Union has adopted new rules to revise the Directive on Administrative Cooperation in the Field of Taxation (DAC) – Council Directive 2011/16/EU. The amendments to the Directive (DAC7) create an obligation for digital platform operators to report the income earned by sellers on their platforms and for Member States to automatically exchange this information. The new rules cover digital platforms located both inside and outside of the EU and will apply from 1 January 2023. These amendments to the DAC will allow national tax authorities to detect income earned through digital platforms and determine the relevant tax obligations.

Other amendments to the DAC will enhance the exchange of information and cooperation between Member States' tax authorities, and

1 See also article "International Tax Update", in this issue.

the new rules provide a framework for the competent authorities of two or more Member States to conduct joint audits. This framework will be operational in all Member States from 2024 at the latest.

European Council updates EU list of non-cooperative jurisdictions

The European Council adopted conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes on 22 February, adding Dominica to the list and removing Barbados.

Following commitments made to reform tax policies, the following nine jurisdictions are now listed in the Annex II under the state of play for non-compliant countries that have undertaken to reform their tax policy ("the grey list"): Australia, Barbados, Botswana, Eswatini, Jamaica, Jordan, Maldives, Thailand and Turkey. Turkey has been asked to resolve exchange-of-information issues with EU Member States to avoid being moved to the non-cooperative list of jurisdictions ("the blacklist").

Following the February 2021 update, there are 12 jurisdictions on the list of non-cooperative jurisdictions (Annex I): American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

European Commission prolongs and expands State Aid Temporary Framework

The European Commission has decided to prolong the State Aid Temporary Framework until the end of 2021 in light of the Covid-19 pandemic. The framework was adopted on 19 March 2020 and set to expire on 30 June 2021 (except for recapitalisation measures that could be granted until 30 September 2021). The Commission has also decided to expand the scope of the Temporary Framework by increasing the ceilings set out in it and by allowing the conversion of certain repayable instruments into direct grants until the end of 2022.

European Commission launches direct tax and VAT initiatives

The European Commission launched a number of roadmaps and public consultations relating to direct tax and VAT matters in the first quarter of the year, including:

- Alcohol & Tobacco Bought Abroad – Review of Tax Rules;
- Business Taxation in the 21st Century;
- EU Taxpayers' Rights – Simplified Procedures for Better Tax Compliance (Recommendation);
- Tax Fraud & Evasion – Strengthening Rules on Administrative Cooperation and Expanding the Exchange of Information;
- Communication on the VAT Gap: "Mind the VAT Gap";
- VAT Rules for Financial and Insurance Services – Review; and
- Detailed Implementing Rules for the VAT e-Commerce Trade.

OECD consultation on proposed changes to Commentaries in Article 9 of Model Tax Convention

Article 9 of the OECD Model Tax Convention deals with the taxation of transactions between associated enterprises. The OECD has recently undertaken work on the Commentary on Article 9 to clarify its application, especially as it relates to domestic laws on interest deductibility. This work is closely linked to the report titled *Transfer Pricing Guidance on Financial Transactions*, published on 11 February 2020. A public consultation document was published on 29 March that includes proposals for changes to the Commentary on Article 9 and other, related articles. The changes put forward in the consultation document are expected to be included in the next update to the OECD Model Tax Convention.

OECD updates on its international tax work programme

The 11th plenary meeting of the 137 members of the OECD/G20 Inclusive Framework on

BEPS took place virtually on 27 and 28 of January and outlined the various international tax-related work streams undertaken by the Inclusive Framework to date. Regarding the tax challenges arising from digitalisation, the OECD noted that simplification was a key message from the submissions received in response to the public consultation on the reports on the Pillar One and Pillar Two Blueprints.

During a webcast on 4 March the OECD confirmed that the US Secretary of the Treasury, Janet Yellen, outlined in a letter to the G20 in February that the US is withdrawing its "safe harbour" proposal for Pillar One. Secretary Yellen stated that "[t]he United States is committed to the multilateral discussions on both pillars within the OECD/G20 Inclusive Framework, overcoming existing disagreements, and finding workable solutions in a fair and judicious manner".

The OECD also confirmed that work on reviewing the scope and quantum of the pillars was continuing at the various dedicated Working Groups. Pascal Saint-Amans, Director of the Centre for Tax Policy and Administration at the OECD, mapped out a likely timeframe for agreement of the two pillars. He noted that the goal is for the members of the Inclusive Framework to meet at the end of June or early July to try to reach a consensus on the proposals; if agreed, it will then go to the G20 Finance Ministers for approval at their meeting on 9–10 July. On 21 April, at a virtual seminar on international tax hosted by the Department of Finance, he stated that July is key but that "before the end of October there will be a deal with a timeline of implementation".

During the webcast on 4 March the OECD also outlined progress on the implementation of the BEPS minimum standards under Action 5: Combating Harmful Tax Practices, Action 6: Countering Tax Abuse, Action 13: Country-by-Country Reporting and Action 14: Improving Dispute Resolution.

Revenue eBriefs Issued from 23 January to 23 April 2021

No. 009 Accounting for Mineral Oil

Revenue's "Accounting for Mineral Oil Tax" manual has been updated to include information on deferment of Mineral Oil Tax and the security guarantee required to avail of the deferred payment. Guidance has also been provided on the making of an assessment of Excise Duty by authorised officers. In addition, an appendix has been included detailing historical Mineral Oil Tax rates from 2008 to 2020.

NO. 010Temporary VAT measures relating to Covid-19

Revenue has updated the "Guidance Note on Temporary VAT Measures Relating to Covid-19" to include information on the concessional VAT zero rating of the supply of Covid-19 vaccines and testing kits.

No. 011 Relief for Contributions to Permanent Health Benefit Schemes and Tax Treatment of Benefits Received under Permanent Health Benefit Schemes

Revenue has updated the manual "Relief for Contributions to Permanent Health Benefit Schemes and Tax Treatment of Benefits Received under Permanent Health Benefit Schemes" to clarify the difference between permanent health benefit schemes and employee protection insurance.

No. 012 Queries regarding Restricted Shares held under other arrangements

Revenue has updated chapter 8 of the "Share Schemes Manual" dealing with restricted shares. S128D TCA 1997 provides that restricted shares must be held in a trust established by the employer or held under such other arrangements as Revenue may allow. The manual titled "Chapter 8 – Restricted Shares" has been updated to confirm that queries regarding other arrangements should be sent to the Employee Share Scheme Section of Revenue via MyEnquiries or shareschemesection@revenue.ie. The examples in the manual have also been updated.

No. 013 SAYE Schemes

Revenue has updated chapter 12 of the "Share Schemes Manual" dealing with Save As You Earn Schemes (SAYE). The manual titled "Chapter 12 – Save As You Earn Schemes (SAYE)" has been updated to confirm that a "qualifying savings institution" for SAYE schemes includes a financial institution prescribed by the Minister for Finance. After the withdrawal of the UK from the European Union, SI 357 of 2020 prescribed Barclays Bank UK PLC and Yorkshire Building Society as qualifying savings institutions.

No. 014 EU Mandatory Disclosure of Reportable Cross-Border Arrangements (DAC 6)

Revenue has updated the manual "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" to set out filing instructions where certain specified information in a disclosure is subject to legal professional privilege (LPP). In such cases, a Form DAC 6 (LPP) should be filed using MyEnquiries, setting out the identity of the relevant taxpayer and other intermediaries involved in the reportable cross-border arrangement. A copy of the Form DAC 6 (LPP) is available on the Revenue website.

No. 015 Tax Treatment of Foster Care Related Payments

Revenue's manual titled "Tax Treatment of Foster Care Related Payments" now includes Finance Act 2020 amendments that provide for an exemption from income tax for payments made by or on behalf of the Health Service Executive to a carer in respect of Home Sharing Host Allowance.

No. 016 Guidelines for conducting Compliance Interventions remotely during COVID-19

Revenue has published a manual titled "Guidelines for conducting Revenue Interventions remotely during Covid-19". This guidance for caseworkers covers matters such as initiating notifications via MyEnquiries, conducting virtual interviews and engaging with taxpayers and practitioners.

No. 017 Universal Social Charge

Revenue's "Universal Social Charge" manual has been updated to reflect Finance Act 2020 changes, in particular, the extension of the reduced rate of USC for medical card holders to 2021 and the increase in the USC rate threshold in line with increases to the national minimum wage in 2020 and 2021.

No. 018 Valuation System for New and Used Vehicles

Section 8 of the VRT manual, which relates to the valuation system for new and used vehicles, has been updated to reflect changes introduced in Finance Act 2020, as follows:

- Section 3.7.1 – Calculate the CO_2 element,
- Section 3.7.2 – Calculate the NOx element,
- Section 4 – Example of a VRT Calculation,
- Appendix 2 – Calculations for Recently Registered Category A Vehicles and
- Appendix 3 – Minimum VRT amounts – VRT Category A (M1/N1).

No. 019 Irish Whiskey and Irish Poteen Geographical Indications(GI) Verification Scheme

Revenue's "Geographical Indication for Irish Whiskey & Irish Poteen Verification Procedures Manual" has been revised to include the new guidelines that relate to the change of responsibility for the approval of labels, as part of the bottling and labelling production stage of Irish whiskey and Irish poteen. Since 1 January 2021, responsibility for the approval of labels has moved from the Environmental

Health Officer to the Department of Agriculture, Food and the Marine.

No. 020 Company Residence – End of Transition Period

Section 23A TCA 1997 sets out rules for determining company residence in the State. This section was amended by Finance Act 2014, but the application of the amended s23A was subject to a transition period for companies incorporated before 1 January 2015. This transition period ceased on 31 December 2020, and Revenue's manual titled "Company Residence in the State" has been updated to reflect this.

No. 021 PAYE Modernisation Procedural Changes

Revenue's manual "PAYE Modernisation Procedural Changes" was created to highlight changes to existing Revenue manuals that were brought about by PAYE Modernisation. The information in this manual is no longer relevant, and it has been archived.

No. 022 Encashment Tax – Increase in rate and withdrawal of an exemption

Revenue's "Encashment Tax" manual has been updated to reflect that as and from 1 January 2021:

- The rate of encashment tax has increased to 25%.
- Encashment tax does not apply to certain payments to companies.
- The exemption from the obligation to deduct encashment tax previously given in respect of British commercial dividends has been withdrawn.

No. 023 Distributions

Revenue has updated the "Distributions" manual to clarify that UK companies will continue to be within the ambit of ss130(2(d)(iv) and 130(3) TCA 1997 after the withdrawal of the UK from the EU, by virtue of the amendment made by s51 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

No. 024 Close companies and loans to participators – update in accordance with the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020

The introduction to Revenue's manual "Company Charge to Income Tax on Loans to Participators" has been updated to include a reference to non-UK-resident companies. This amendment was made to reflect measures introduced by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

No. 025 Customs Manual on Import VAT

Revenue's "Customs Manual on Import VAT – A Guide for Staff on Value Added Tax payable on goods imported from outside the European Union" has been updated with regard to:

- the withdrawal of a concession that has become redundant due to the introduction of "postponed accounting",
- an updated link to the AIS Trader Guide and
- updated AIS codes.

No. 026 Migration of Irish securities and application of close company provisions

Revenue's manual "Close Companies: Interpretation and General" has been updated to clarify that a company will not be considered to come within the scope of the close company provisions solely as a result of the migration of Irish securities from the CREST system to Euroclear Bank in March 2021.

No. 027 Controlled Foreign Company Rules – Finance Act 2020 amendments

Revenue has updated the "Controlled Foreign Company Rules" manual to reflect amendments to CFC rules that were introduced by Finance Act 2020. A new s835YA TCA 1997, which takes effect in respect of accounting periods of CFCs beginning on or after 1 January 2021, provides that where the territory in which the CFC is resident is a listed territory, ss835T, 835U and 835V TCA 1997 shall not apply in respect of that accounting period. A "listed territory" is a jurisdiction that is listed in Annex 1 of the EU list of non-cooperative jurisdictions for tax purposes.

No. 028 Tax relief for new companies, UK companies

Revenue has updated the "Tax Relief for New Start-up Companies" manual to include a reference to the UK in respect of the definition of a new company. As a result of the provisions of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, which amended s486C(1)(a) TCA 1997, the definition of a new company includes a company incorporated in the UK.

No. 029 Update of Tax and Duty Manual 02-02-06 – What constitutes a trade?

Revenue's manual titled "What Constitutes a Trade?" has been updated to include additional material in relation to the case of *Noddy Subsidiary Rights Company Ltd v CIR* [1966] 43 TC 458. The summary of opinions in Appendix B has also been updated.

No. 030 Capital Gains Tax (CGT) Revised Entrepreneur Relief

Revenue's manual "Revised entrepreneur relief (S.597AA)" has been updated to reflect an amendment made to the relief by s24 Finance Act 2020. The requirement for an individual to have owned a holding of at least 5% of the ordinary share capital is amended, so that the shares can qualify for relief if they were held for a continuous period of three years at any time before their disposal. The amendment applies to disposals of chargeable business assets made on or after 1 January 2021.

No. 031 Partial Recovery of VAT on Qualifying Passenger Motor Vehicles

Revenue has updated the manual "Partial Recovery of VAT on Qualifying Passenger Motor Vehicles" to reflect the definition of a "qualifying vehicle" effective from 1 January 2021.

No. 032 Vehicle Registration Tax Manual – Section 1

The following VRT manuals have been updated to reflect changes in Finance Act 2020:

- "Vehicle Registration Tax Manual 1 – Procedures and Processes in Revenue" has been updated at section 3.4.2 on the verification of CO_2 emissions.
- "Vehicle Registration Tax Manual 1A – Vehicle Classification and Tax Categories" has been updated at section 4.2 to provide more detail on the VRT categories, EU categories and the tax applicable in each case.
- "Vehicle Registration Tax Manual 1C – Conversions" has been updated at section 8 regarding calculating the VRT due on conversion.

No. 033 Capital Gains Tax (CGT) – Deduction from consideration on disposal of certain assets (S.980)

Revenue's CGT manual titled "Deduction from consideration on disposal of certain assets (S.980)" has been updated to reflect the online "eCG50" process and provide guidance on the processing of paper-based applications. Revenue will continue to support paper-based applications to facilitate the transition to the online eCG50 process and taxpayers who are not e-enabled . However, the timeframe for processing paper-based applications will move from five to ten working days from 1 July 2021. Paragraph 1.8 includes advice on submitting paper-based applications to assist in expediting applications.

The manual has also been updated to provide clarity on the application to disposals by way of gift, to include additional guidance for applications in specific circumstances and to provide clarity on the interaction of ss615, 617 and 980 TCA 1997.

No. 034 PAYE Services: Review your tax

Revenue has updated the manual "PAYE Services: Review your tax" to include information on the supports introduced by the Government in response to the Covid-19 pandemic. Other changes to the manual reflect:

- guidance that payments under the Employer Refund Scheme (ERS), Temporary Wage Subsidy Scheme (TWSS) and Pandemic Unemployment Payment (PUP) are displayed on the Preliminary End of Year Statement, Statement of Liability and Employment Detail Summary;
- notification that 2017–2020 are the available review years in PAYE Services;
- details of how to make a claim for the Stay and Spend Tax Credit and Remote Working Relief;
- revised system screen shots reflecting the changes detailed above; and
- confirmation of the services available in myAccount for 2019 and future years.

As the PUP is a new Department of Social Protection (DSP) payment, it is now included in the income tax return on myAccount, and it will be shown under the DSP heading in the Non-PAYE income section. If an individual was in receipt of the PUP in 2020 but this income is not displayed in the Non-PAYE income section, it can be added manually by selecting it from the list of DSP incomes.

No. 035 Income from scholarships

Revenue has amended the "Income from scholarships" manual to include updates on fellowships (in section 3), student declaration forms (in section 4) and students from overseas (in section 6). The manual also includes a new section 5, dealing with students on extended leave.

No. 036 Film Tax Credit (Section 481) – Finance Act 2020 amendments

Revenue has updated the manual "Section 481 Film Corporation Tax Credit" to take account of Finance Act 2020 amendments. The amendments reflect the extended availability of the highest (5%) rate of Regional Film Development Uplift for claims made on or before 31 December 2021 and the tapered uplift rates of 3% and 2% now being available in 2022 and 2023, respectively. The manual also includes a clarification on the accounting periods in respect of which a claim can be made, with updated examples (in section 2.3.3).

No. 037 Guidance on Part 35A Transfer Pricing

Revenue has published an updated "Transfer Pricing" manual to provide guidance on the operation of Ireland's transfer pricing rules that were substantially amended by Finance Act 2019. Part 35A TCA 1997, as substituted by Finance Act 2019, applies for chargeable periods starting on or after 1 January 2020; and, in relation to the computation of certain capital allowances, where the related capital expenditure is incurred on or after 1 January 2020; and for the computation of balancing allowances/charges, where the event giving rise to the allowance/charge occurs on or after 1 January 2020, irrespective of when the related capital expenditure was incurred.

Revenue has also updated the "Transfer Pricing Documentation Obligations" manual to confirm that this guidance does not apply for chargeable periods starting on or after 1 January 2020. For chargeable periods starting on or after that date, the documentation requirements are instead set out in the updated "Transfer Pricing" manual.

No. 038 Film Withholding Tax – Brexit update

Revenue's "Film Withholding Tax" manual has been updated to reflect that Film Withholding Tax (FWT) now applies to UK-resident artistes after the end of the Brexit transition period. FWT is a withholding tax on certain payments made by companies that qualify for the s481 TCA 1997 Film Tax Credit. The withholding tax should be operated by any film or television producer company (including the qualifying company through which it makes the film) that engages and makes relevant payments to non-resident artistes from outside the EU or EEA on a qualifying film for the Film Tax Credit.

No. 039 Capital acquisitions tax returns: agricultural and business reliefs

Revenue has updated the "Capital Acquisitions Tax" manual to include the requirement introduced by Finance Act 2020 to file a CAT return in all cases where a gift or inheritance comprises agricultural property or relevant business property and agricultural relief or business relief applies. This is an exception to the usual requirement for returns to be filed only where the aggregated value of benefits received exceeds 80% of the particular tax-free group threshold. The following parts have been updated:

- Part 1 (para. 1.2.5),
- Part 3 (para. 3.1),
- Part 11 (para. 11.3.1) and
- Part 12 (para. 12.2).

Revenue has also updated Part 11 of the "Capital Acquisitions Tax" manual at para. 11.7.5 to provide clarity in the context of a clawback of agricultural relief where agricultural land is exchanged for other agricultural land and Teagasc has issued a Farm Restructuring Certificate in connection with the stamp duty and CGT reliefs for farm consolidation and restructuring.

No. 040 EU Mandatory Disclosure of Reportable Cross-Border Arrangements (DAC6)

Revenue has updated the manual "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" to include updated guidance on the specified information reporting requirements, as follows:

- The practice of allowing intermediaries not to disclose information about a person to whom they made a reportable cross-border arrangement available, where the person indicated that he or she would not be proceeding with it, has been removed.
- Further detail has been included on the required disclosure standard in respect of the following specified information: the summary of the content of the cross-border arrangement, the national provisions forming the basis of the cross-border arrangement and the Member State(s) likely to be concerned by an arrangement.

The guidance has been updated further to include the meaning of "may reasonably expect" in the application of the Main-Benefit Test (2.5.3) and the meaning of "knows or could be reasonably expected to know" in the context of a whether a secondary intermediary has a reporting obligation (para. 4.3.1). Appendix V to the guidance contains a detailed summary of the other material updates, which include:

- guidance on Hallmark A3 reflecting the introduction of s817RI TCA 1997 by Finance Act 2020 (para. 2.6);
- additional examples to demonstrate the application of the exemption (para. 4.6);
- a footnote clarifying that waivers of legal professional privilege are accepted for the purpose of DAC6 filings only (para. 4.10);
- additional guidance to cover situations where the relevant taxpayers have reporting obligations in different Member States (para. 5.5); and
- additional guidance to deal with situations where an intermediary was responsible for reporting but neither filed a return nor provided the taxpayer with an Arrangement ID (para. 5.6).

No. 041 Section 1001 Fixed charge on Book Debts

Revenue has updated the manual "Section 1001 – Fixed charge on Book Debts" to reflect the changes introduced by Finance Act 2019 in relation to the transfer of a charge from one charge-holder to another and the responsibilities attached to such a transfer (para. 3(ii)(b)). It also contains updated information regarding legal ownership and beneficial ownership (para. 3(iii)(g)).

No. 042 Health and Safety Guidelines for Revenue Officers involved in sampling mineral oil contained in road tankers

Revenue's manual titled "Health and Safety Guidelines for Revenue Officers involved in sampling mineral oil contained in road tankers" has been updated, primarily to include additional safety measures for Revenue Officers who are conducting such activities.

No. 043 State Aid Transparency Requirements

Revenue has updated the manual titled "State Aid Transparency Requirements: Publication of information regarding State aid granted to Individual taxpayers" to reflect the changes to the publication deadlines for aid awards granted through the film relief and the Employment Investment Incentive (para. 3).

No. 044 Hard copy returns

Revenue has published a new manual titled "Hard copy returns" setting out the requirements that must be met in making and authenticating the hard copy of the electronic return as submitted to Revenue. The manual also reflects a change introduced in Finance Act 2019, such that Revenue is no longer approving the format, or technical detail, of the hard copy returns of third-party software providers. The relevant schema and notes for third-party software providers are available on the Revenue website.

No. 045 Vehicle Registration Tax Manual Section 3

Revenue has updated the manual "Vehicle Registration Tax: Section 3 – Repayment schemes and procedures for processing repayment claims" to remove a section on "Leasing/Hire/School of Motoring", as claims for the relief described are no longer accepted. The manual was also updated to reflect Finance Act 2020 changes to section 3.4, "Electric vehicles including motorcycles". In addition, a new section 5.6.3 titled "Removal to Great Britain or Northern Ireland" has been inserted to reflect changes after the end of the Brexit transition period.

No. 046 Annual average exchange rates and Lloyds sterling conversion rates

Revenue's manual "Annual average exchange rates and Lloyds sterling conversion rates" now includes annual average exchange rates for the 2020 calendar year.

No. 047 Charges on income for corporation tax purposes

Revenue's "Charges on income for corporation tax purposes" manual has been updated to include a reference to the UK in circumstances where interest is paid to a bank (including a building society), stockbroker or discount house carrying on a business in the UK (para. 2.1). This amendment reflects the changes made to s243(4)(b) TCA 1997 by s52 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

No. 048 Control and Examination of Baggage

Revenue's "Manual on the Control and Examination of Baggage" has been updated to reflect the withdrawal of a Revenue concession in relation to the payment of and the accounting for VAT (para. 11.6.3). From 1 January 2021, postponed accounting is the only method of postponing the payment of import VAT.

No. 049 Accelerated capital allowances for energy efficient equipment

Finance Act 2020 extended the scheme of accelerated capital allowances for certain energy-efficient equipment to 31 December 2023. Revenue has updated the manual "Accelerated Capital Allowances for Energy-Efficient Equipment [Section 285A TCA 1997]" to reflect this development. Finance Act 2019 revised downwards the emissions thresholds on which capital allowances and leasing expenses are based. Accordingly, the updated emissions threshold is now reflected in the paragraph concerning electric and alternative-fuel vehicles.

No. 050 VAT – Postponed Accounting – Entries on VAT3 Return and VAT Return of Trading Details (RTD)

Revenue's manual titled "VAT – Postponed Accounting" has been updated to include information on Postponed Accounting entries on the VAT3 Return and the VAT Return of Trading Details (RTD).

No. 051 Tax and Duty Manuals relating to the scheme of manufacturing relief

The contents of two Revenue manuals relating to the scheme of manufacturing relief have been removed, as the scheme expired on 31 December 2010. The manuals were "Credit for foreign tax not otherwise credited" and "Manufacturing Relief – Kiln Drying of Timber".

No. 052 Tax treatment of certain benefits payable under the Social Welfare Acts

Revenue has updated the manual "Tax treatment of certain benefits payable under the Social Welfare Acts" to include changes made by Finance Act 2020.

No. 053 Tax Avoidance area on Revenue website

Revenue has a dedicated Tax Avoidance area on its website. Revenue notes that the manual that dealt with the launch of this area is no longer relevant.

No. 054 Payment and Receipt of Interest without Deduction of Income Tax

Revenue has updated the manual "Payment and receipt of interest and royalties without deduction of income tax" to provide for the introduction of a Self-Certification system, under which withholding tax on certain payments of interest and royalties is at the applicable double taxation agreement rate, and to confirm that the Central Bank of Ireland is, for the purposes of s246 TCA 1997, a bank carrying on a bona fide banking business.

The guidance has also been updated to set out how one should interpret the reference to "interest paid in the State" when assessing eligibility for the relevant exemptions in s246(3) TCA 1997. The guidance states that "paid in the State" means the payment of any yearly interest amount where:

- the source of the interest payment is in the State and
- the payment of the interest is, without regard to the exemptions contained in s246(3), within the scope of Irish interest withholding tax under s246(2).

No. 055 Stamp duty: Finance Act 2020 changes

Revenue has updated the following parts of the Stamp Duty Manual to reflect Finance Act 2020 amendments to the Stamp Duty Consolidation Act 1999 (SDCA 1999):

- "Section 31C: Shares deriving value from immovable property situated in the state" clarifies at para. 6.3 that although s31C SDCA 1999 does not specifically disapply ss79 or 80 SDCA 1999, it is Revenue's view that the anti-avoidance provisions in s31C take precedence over these sections. However, Revenue is prepared administratively to allow the s79 exemption in relation to conveyances and transfers of shares deriving value from non-residential property between group companies that are very closely associated. Revenue is not prepared to commit administratively to allowing the s80 exemption in all cases, and therefore cases where both sections might apply will be decided by Revenue on the particular facts and circumstances on a case by case basis.
- "Section 31D: Cancellation schemes of arrangement" reflects in para. 4 the provision in s31C SDCA 1999 that, where both sections can apply to an arrangement, s31C takes priority over s31D.
- "Section 81C: Farm consolidation relief" has been amended at para. 1 to reflect the extension of farm consolidation relief by a further two years to 31 December 2022 (subject to a commencement order).
- "Section 83D: Residential development refund scheme" has been updated at paras 2.3, 2.4,

2.7, 3.4 and 3.7 to reflect an extension from two years to 30 months in the time allowed to complete a development and an extension by a further year to 31 December 2022 in the time allowed to commence a development under the scheme.

- "Section 126AA: Bank Levy" now reflects in para. 3 an increase in the rate of the bank levy for the year 2021 to maintain the fixed annual yield of €150m.
- "Schedule 1 to SDCA 1999: Stamp duties on instruments" has been updated at para. 2.5 to reflect the extension of "consanguinity relief" for a further three years to 31 December 2023.

No. 056 Electronic Tax Clearance

Revenue has updated the manual "Electronic Tax Clearance (eTC) – Guidelines & Procedures" to remove duplication of information regarding non-resident (para. 12) and Standards in Public Office (para. 15) applications. Links to the relevant Tax and Duty Manuals have been inserted in those paragraphs and in the introduction (para. 1). In addition, para. 21, dealing with the application for renewal of a tax clearance certificate, has been updated to confirm that the Employment Wage Subsidy Scheme (EWSS), Covid Restrictions Support Scheme (CRSS) and Stay and Spend applications remain valid for one year where tax affairs are kept up to date.

No. 057 Dependent Relative Tax Credit

Revenue's "Dependent Relative Tax Credit" manual has been updated to reflect the changes made by Finance Act 2020. The tax credit available has increased from €70 to €245 in respect of the year of assessment 2021 and subsequent years. The guidance has also been updated to clarify who is or is not a dependent relative and to provide details on how to apply for the credit.

No. 058 Temporary Wage Subsidy Scheme (TWSS) Reconciliation

On 22 March Revenue made the Temporary Wage Subsidy Scheme (TWSS) reconciliation files available on ROS to most employers who availed of the scheme last year. This information shows any balance of over- or underpayments of TWSS and the detailed TWSS reconciliation file, based on the information supplied by the employer. Employers have until 30 June 2021 to review the information, provide any outstanding information regarding subsidies paid to employees, make any necessary corrections to the data supplied and accept the reconciliation balance.

Revenue notes that a small number of employers have not yet been provided with their reconciliation information. These are employers with whom Revenue has open queries relating to their participation in the scheme or Revenue is otherwise engaging with the employer to finalise details of their subsidy amounts. Revenue advised employers in these categories to monitor their MyEnquiries correspondence to identify and respond to any outstanding issues.

No. 059 VAT & Employees' Pension Fund

Revenue's manual titled "Employer's entitlement to deductibility of VAT incurred in the setting ip and management of a pension fund for his or her employees" has been updated to clarify the circumstances in which an employer can claim deductibility for costs incurred in relation to an employee pension fund.

No. 060 Section 1001 Fixed Charge on Book Debts

Revenue has updated the manual "Section 1001 – Fixed Charges on Book Debts" to reflect that s1001 TCA 1997 was amended by Finance Act 2020. The amendment reordered the provisions of the section, and the legislation is included in Appendix 1.

No. 061 Charitable Donations Scheme

Revenue's manual "Charitable Donations Scheme Tax relief for donations to approved bodies Section 848A TCA" has been updated to reflect Finance Act 2020 amendments to Schedule 26A TCA 1997. After the amendments, an "approved body" can retain its authorisation to operate the Charitable Donations Scheme without having to serve the two-year waiting period in circumstances where the approved body has changed its legal form (and has therefore had to make a new application for the charitable tax exemption). The guidance has also been updated to:

- remove references to a donation by a self-employed person after a charity has lost its authorisation, as these are no longer relevant;
- clarify that applications for the charitable tax exemption are now made through ROS; and
- provide links to further information and updated contact details for Revenue's Charities and Sports Exemption Unit.

No. 062 Schedule of Revenue Powers

Revenue's "Schedule of Revenue Powers" manual has been updated to remove obsolete references.

No. 063 Revenue Receipts Tracker App and the Receipts Tracker in myAccount and ROS

Revenue's manual titled "Revenue Receipts Tracker App and Receipts Tracker in myAccount and ROS" has been updated to include further instructions for taxpayers on using the Revenue Receipts Tracker App (RRTA). The update also includes instructions on:

- the inclusion of the Stay and Spend and Remote Working Relief categories,
- uploading receipt images and amending details entered and
- updated screen shots for RRTA and Receipts Tracker in myAccount.

No. 064 Accounting for Mineral Oil Tax Manual

Revenue has updated the "Accounting for Mineral Oil Tax" manual to amend the wording relating to Guarantee for Deferred Payment of Mineral Oil (Appendix IV) and to remove the information relating to the temporary reduced rate of interest as provided for under s6 of the Financial Provisions (Covid-19) (No. 2) Act 2020 (para. 15.5.2).

No. 065 Surcharge for late filing and restrictions on loss relief

Revenue has suspended the application of a surcharge for late corporation tax returns for accounting periods ending in June 2019 onwards (i.e. Form CT1 returns due by 23 March 2020 onwards) until 1 July 2021 and has updated the relevant manuals to reflect the expiry date for the concessions in relation to the Form CT1.

The manuals reflect that the surcharge for late submission of a Form CT1 and iXBRL financial statements and the restrictions on loss relief for late filing of returns are suspended between 23 March 2020 and 1 July 2021 where:

- the late submission of Form CT1 returns is for accounting periods ending from June 2019 to September 2020 and
- the late submission of iXBRL financial statements is for accounting periods ending from March 2019 to June 2020.

No. 066 The VAT Treatment of the procurement of certain Goods and Services by a Public Body

Revenue's manual titled "The VAT treatment of the procurement of certain Goods and Services by a Public Body" has been updated to reflect the implications of the requirement to apply the reverse-charge mechanism to received construction services.

No. 067 Sale of Live Animals by Auction (Mart)

Revenue has published a new manual titled "Sale of Live Animals by Auction (Mart)", detailing the application of VAT to sales of live animals by auction. The "Flat-rate Farmers Settlement Vouchers – Sales to Marts" manual has been archived.

No. 068 Anti-hybrid guidance

Revenue's "Guidance on the anti-hybrid rules" has been updated to include amendments made by Finance Act 2020 to how the anti-hybrid rules apply to worldwide systems of taxation. The guidance has also been updated to include the following new paragraphs:

- Interpretation: setting out some key terms (para. 3);
- Foreign exchange movements: setting out an example of how foreign exchange movements might be treated when testing for a corresponding amount (para. 4.1.1);
- Associated enterprises: setting out the definition, including how and when to test whether two enterprises are associated (para. 7);
- Payee: providing guidance on the meaning of the term, including how to identify payees, how to test for inclusion where there is more than one payee and how to establish the payee territory (para. 8);
- Imported mismatches: what is the policy intent behind the rule and how to trace payments and identify payees (para. 9);
- State of knowledge/awareness test: what is meant by "reasonable to consider" and "reasonably be expected to be aware" (para. 10); and
- Included and tax consolidation: setting out an example to illustrate how the anti-hybrid rules might interact in a tax consolidation scenario (para. 11).

No. 069 Deposit Interest retention Tax (D.I.R.T.) Tax Treatment for Individuals

Revenue's manual "Deposit Interest Retention Tax (D.I.R.T.) Tax Treatment for Individuals" has been updated to remove reference to Finance Act 1993 changes and to reflect the rate band and tax credits for 2019 in the worked examples.

No. 070 VAT eCommerce – Registration for the One Stop Shop (OSS) and Import One Stop Shop (IOSS) from 1 April 2021

Revenue has published a new manual titled "VAT eCommerce – Registration for the One Stop Shop (OSS) and Import One Stop Shop (IOSS) from 1 April 2021". The manual provides an overview of registration requirements for pre-registrations in respect of the OSS and IOSS from 1 April 2021, before the go-live date of 1 July 2021. More detailed guidance will be provided in due course.

No. 071 Tax and Duty Manual Part 09-02-05 – Capital allowances for intangible assets – updated

Revenue's manual "Capital allowances for intangible assets" has been updated to reflect the Finance Act 2020 amendment that provided that all specified intangible assets acquired on or after 14 October 2020 will be subject to a balancing charge on a subsequent disposal, regardless of when the balancing event may occur. Before this change, no balancing charge (clawback of capital allowances) arose if the intangible asset was held for more than five years.

Two new sections have also been added to the manual:

- Section 3.14: Where s400 TCA 1997 applies to a company reconstruction, are allowances available to the successor under section 291A?
- Section 3.15: How does s291A TCA 1997 interact with the transfer pricing rules in Part 35A TCA 1997?

No. 072 Charities VAT Compensation Scheme

Revenue has updated the "Charities VAT Compensation Scheme Guidelines" at section 4 to include information on the treatment of Covid-19 wage subsidy scheme payments (i.e. TWSS and EWSS). Subsidy payments received under the TWSS and the EWSS are not treated as income and should be excluded from calculations in respect of both Total Income and Qualifying Income amounts for the purposes of calculating a VAT Compensation Scheme claim. Further clarification on the calculation of Total Income and Qualifying Income has also been provided in sections 5 and 6.

No. 073 Freelance Actors: Flat Rate Expense Deduction

The content of Revenue's manual "Freelance Actors: Flat Rate Expense Deduction" is no longer available. A full list of the flat-rate expenses is available on the Revenue website.

No. 074 Relief for Investment in Corporate Trades

Revenue's manual titled "Relief for Investment in Corporate Trades" now includes a temporary measure available to companies that have availed of Start-Up Refunds for Entrepreneurs (SURE) but whose ability to meet the employment conditions necessary to qualify for the relief may be impacted as a result of Covid-19 (see para. 16.9).

No. 075 Customs Export Procedures

Revenue has updated the "Customs Export Procedures" manual to provide further information in light of Brexit and to make minor amendments to the text where necessary. The significant changes include amending the list of special fiscal territories, the introduction of a new office of export for goods travelling to Great Britain (GB) via Northern Ireland, information on preferential origin for trade with the UK, information on voisinage arrangements and fishing procedures for trade with GB and Northern Ireland, and changes to the entitlement to the Retail Export Scheme.

No. 076 Diesel Rebate Scheme Compliance Procedures Manual

Revenue has updated the "Diesel Rebate Scheme (DRS) Compliance Procedures" manual at para. 2.1.2 to reflect the impact of Brexit. Road haulage and passenger transport operators who are established in Northern Ireland and hold a relevant UK transport licence will continue to be eligible for the scheme.

No. 077 Local Property Direct Debit Guidelines

Revenue's "Local Property Tax Direct Debit Guidelines" have been amended to include the UK in the list of SEPA Member States (in chapter 4). In addition, the LPT Helpline phone number has been updated.

No. 078 Opticians in Employment

The content of Revenue's "Opticians in Employment" manual is no longer available. A full list of the flat-rate expenses that are available to opticians is available on the Revenue website.

No. 079 Credit in respect of tax deducted from emoluments of certain directors and employees

Revenue has updated the manual titled "Credit in respect of tax deducted from emoluments of certain directors and employees", as follows:

- Paragraph 5, relating to the allocation of payments between tax, USC, PRSI and LPT, has been updated to remove the guidance on tax years before 2012.
- Paragraph 6 has been added in relation to the debt warehousing scheme to note that, if an employer is availing of debt warehousing for PAYE (employer) liabilities, a director or employee with a material interest in the company cannot claim credit for PAYE deducted if it has been warehoused and not paid. However, if the director or employee is eligible for income tax warehousing (because they are also subject to self-assessment), they can warehouse all liabilities, including any Schedule E liabilities.

No. 080 Recoupment of Overpayments of Salary by an Employer from an Employee

Revenue has amended the manual "Recoupment of Overpayments of Salary by an Employer from an Employee" to provide updated examples for recoupment of "in-year" and "out of year" salary overpayments and incorporate updates effective from 1 January 2019.

No. 081 Customs Import Procedures Manual update

Revenue has updated the "Customs Import Procedures" manual to provide additional information in light of Brexit. Some minor amendments have also been made to improve the text. The following significant changes have been made:

- information on the preferential rules of origin as agreed under the UK–EU Trade and Cooperation Agreement,

- guidance on the voisinage arrangement with Northern Ireland and the customs formalities with the UK for fisheries,
- information on customs formalities required for the importation of vehicles from Great Britain and Northern Ireland,
- update of the list of countries considered the special fiscal territories of the EU,
- further information on the procedure for oral declarations and
- further information on the procedure for Returned Goods Relief.

No. 082 Stamp duty: associated companies relief

Revenue has updated the "Stamp Duty: Associated Companies Relief" manual to clarify the operation of certain Revenue practices in relation to the conditions governing the relief:

- Section 5 clarifies that where a transferee or transferor is a partnership but is not a body corporate, the relief does not apply.
- Section 9.4.2 clarifies the ways in which property comprising loans can cease to exist in order to be treated as ceasing to exist over time because of its nature.
- Section 9.4.2 also clarifies that the disapplication of the clawback of relief in situations where transferred property is retained in a corporate group for a period of two years post-transfer extends to situations where a property is transferred on a number of occasions through a number of group companies.

No. 083 Cessation of a trade or profession or change in accounting date – review of preceding year

Revenue's manual "Cessation of a Trade or Profession or Change in Accounting Date – Review of Preceding Year" has been updated to include examples demonstrating the approach to be adopted when a revision of a preceding year is required due to a permanent cessation of a trade or profession.

No. 084 Tax and Duty Manual Part 06-08A-01: Dividend Withholding Tax

Revenue has updated the "Dividend Withholding Tax (DWT) – Details of Scheme" manual after amendments were made by s62 Finance Act 2020 in respect of recognised qualifying intermediaries and market claims.

No. 085 Deduction for statutory registration fees paid to the Health and Social Care Professionals Council (CORU)

Revenue has updated the manual titled "Deduction for Statutory Registration Fees Paid to the Health and Social Care Professionals Council (CORU)" to clarify the three professions where the CORU annual registration fee is not incorporated into a flat-rate expense deduction. These are Occupational Therapists, Physiotherapists and Radiographers/Radiation Therapists. The manual also notes that for these three professions only, a claim under s114 TCA 1997 can be made for the €100 annual CORU registration fee.

No. 086 Stamp Duty: Farm Consolidation Relief

Revenue has updated the "Stamp Duty: Farm Consolidation Relief" manual to reflect the commencement of s49 Finance Act 2020 by Ministerial Order (SI 136 of 2021). This section extended the relief for a further two years to the end of December 2022. The manual has also been amended to replace references to the previous rate of 6% with the current rate of 7.5% in respect of transfers of non-residential land and to delete section 4.2, which is no longer relevant.

No. 87 Non-Statutory consolidation of Excise Law

Revenue's manuals "Non-Statutory Consolidations of Excise Law" and "Excise Duty Rates" are no longer relevant and have been withdrawn. Current excise duty rates can be found in the manual "Excise Duty Rates Budget 2021."

Selected Bills Presented from 1 November 2020 to 22 January 2021

Selected Acts Passed from 23 January to 23 April 2021

No. 2 Criminal Justice (Theft and Fraud Offences) (Amendment) Act 2021

No. 3 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021

Selected Bills Presented from 23 January to 23 April 2021

No. 15 Industrial Relations (Provisions in Respect of Pension Entitlements of Retired Workers) Bill 2021

No. 19 Principles of Social Welfare Bill 2021

Selected Statutory Instruments Made from 23 January to 23 April 2021

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

No. 32 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 1) (Covid-19 Pandemic Unemployment Payment – Self-Employment Income Limits) Regulations 2021

No. 50 Emergency Measures in the Public Interest (Covid-19) Act 2020 (Covid-19: employment wage subsidy scheme) (Date Adjustment) Order 2021

No. 56 Finance Act 2004 (Section 91) (Deferred Surrender to Central Fund) Order 2021

No. 72 Stamp Duty (Designation of Exchanges and Markets) (No. 1) Regulations 2021

No. 88 National Treasury Management Agency (Amendment) Act 2014 (Designated Bodies) Order 2021

No. 98 Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 4) (Commencement) Order 2021

No, 99 Migration of Participating Securities Act 2019 (Appointed Date) (Section 10) Order 2021.

No. 104 Taxes Consolidation Act 1997 (Covid Restrictions Support Scheme) (Percentage Adjustment) Order 2021

No. 108 Finance Act 2020 (Section 62) (Commencement) Order 2021

No. 110 European Union (Central Securities Depositories) (CSD Nominee) Regulations 2021

No. 111 Migration of Participating Securities Act 2019 (Appointment of Live Date) (Section 12(5)) Order 2021

No. 117 Financial Services and Pensions Ombudsman Act 2017 [Financial Services and Pensions Ombudsman Council] Financial Services Industry Levy Regulations 2021

No. 119 European Union (Central Securities Depositories) (CSD Nominee) (Amendment) Regulations 2021

No. 136 Finance Act 2020 (Section 49(1)) (Commencement) Order 2021

No. 146 European Union (Sustainability-related Disclosures in the Financial Services Sector) Regulations 2021

No. 160 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Covid-19 Pandemic Unemployment Payment – Entitlement to Increase for Qualified Adult) Regulations 2021

No. 186 European Union (Bank Recovery and Resolution) Resolution Fund Levy Regulations 2021

Determinations of the Tax Appeals Commission Published from 23 January to 23 April 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
15TACD2021	Capital Acquisitions Tax	Appeal against assessments to CAT on the basis that sums lodged to the Appellants' bank accounts did not constitute gifts but rather had been settled on trust by way of an oral declaration Sections 2, 3 and 5 CATCA 2003	Unknown
16TACD2021	Income Tax	Appeal against a determination that the provision of living accommodation by an employer is chargeable to income tax as a benefit-in-kind Sections 116, 118 and 120 TCA 1997	Unknown
17TACD2021	Corporation Tax – Sporting Tax Exemption	Appeal against a refusal of sporting tax exemption by virtue of not being established for the sole purpose of promoting an athletic game or sport and whose income has not been or will not be applied for the sole purpose of promoting an athletic or amateur game or sport Section 235 TCA 1997	Yes
18TACD2021	Income Tax	Appeal against the denial of a credit for income tax deducted from emoluments but not remitted by a company in which the appellant held a material interest Sections 997A,432,955 and 956 TCA 1997	Unknown
19TACD2021	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) Sections 145 and 146 FA 2001	Unknown
20TACD2021	CAT	Whether an inheritance from a child to parents is exempt from CAT because a non-exempt gift was received by the child from the parents within the period of five years before the date of the child's death Section 79 CATCA 2003	Unknown

21TACD2021	**IT – Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption" Section 195 TCA 1997	Unknown
22TACD2021	**Income Tax**	Appeal against the assessment of an estimated liability to income tax on a partner in a partnership Sections 922, 949AK, 949AL,954 and 1094 TCA 1997	Unknown
23TACD2021	**Income Tax**	Appeal against the assessment of an estimated liability to income tax Sections 949AK, 949AL, 959C,959Z and 1094 TCA 1997	Unknown
24TACD2021	**Income Tax**	Appeal against the assessment of an estimated liability to income tax on a partner in a partnership Sections 922. 949AK, 949AL, 954 and 1094TCA 1997	Unknown
25TACD2021	**VAT**	Appeal against the assessment of an estimated liability to VAT on a partner in a partnership Section 111 VATCA 2010	Unknown
26TACD2021	**Income Tax**	Appeal against a Balancing Statement (P21) removing the benefit of a tax credit for maintenance payments, which was applied in error by the Revenue Commissioners	Unknown
27TACD2021[2]	**Stamp Duty**	Appeal against an assessment to stamp duty in respect of the exercise of a Put-and-Call Agreement Sections 31 and 31A SDCA 1999	Yes
28TACD2021	**Capital Gains Tax**	Preliminary question of whether an issue in respect of a time limit, which was not included as a ground of appeal in the Form AH1, could be raised at appeal. Appeal relates to the pre-Finance (Tax Appeals) Act 2015 changes. Sections 949I and 957 TCA 1997 Section 27 Finance (Tax Appeals) Act 2015	Unknown

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

29TACD2021[3]	**Employment Investment Incentive (EII)**	Appeal against a refusal to grant EII relief for an investment in new shares by virtue of the investee company's not satisfying the conditions for a "qualifying company" Section 494 TCA 1997	Unknown
30TACD2021[4]	**CGT**	Appeal against an assessment to CGT in respect of disposals made by to a company of which the appellant was the sole shareholder and, in particular, the disallowance of deductions for enhancement expenditure incurred. Appeal also grounded on the assessment's having been raised by the Revenue Commissioners out of time. Sections 552, 886, 955 and 956TCA 1997	Yes
31TACD2021	**Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption" Section 195 TCA 1997	Unknown
32TACD2021[5]	**PAYE**	Appeal against estimated assessments raised in respect of payments made by the company appellant to its directors for travel and subsistence expenses on the basis that such payments were not incurred "wholly and exclusively laid out or expended for the purpose of the trade or profession" Sections 81, 112, 114, 117 and 118 TCA 1997	Unknown
33TACD2021	**Binding Tariff Classification**	Appeal against a Binding Tariff Classification issued in relation to a product manufactured by the appellant company Article 3(1) Harmonised Commodity Description and Coding System Council Regulation (EEC) No. 2658/87 of 23 July 1987 Commission implementing Regulation EU 2016/1821 amending Annex I to Council Regulation (EEC) No. 2568/87	No

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

34TACD2021[6]	**VAT & Income Tax**	Appeal against assessments to VAT and income tax in relation to payments received by the Appellant. Dispute regarding the nature and classification of the payments for VAT purposes, whether the trade was the same for determining whether losses could be offset, and the sale of machinery on which VAT had not been returned. Sections 382 and 924 TCA 1997 Sections 111 and 113 VATCA 2010	No
35TACD2021	**VAT**	Appeal against the imposition of VAT on the purchase of a newly manufactured yacht from a UK supplier by virtue of the acquisition not being an Intra-Community acquisition for which the appellant would be required to self-account for the VAT on purchase Section 24 VATCA 2010	Unknown
36TACD2021	**VRT**	Appeal relating to the method of calculation of the CO^2 emissions of a vehicle for VRT purposes Section 130 FA 1992 (as amended)	Unknown
37TACD2021	**Income Tax**	Appeal against the denial of a credit for income tax deducted from emoluments but not remitted by a company in which the appellant held a material interest Section 997A TCA 1997	Unknown
38TACD2021	**VRT**	Appeal against the imposition of VRT on the basis of the vehicle's being reclassified on the registration date from its classification on the date of manufacture Sections 130 and 132 FA 1992 (as amended)	Yes
39TACD2021	**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
40TACD2021[7]	**Capital Acquisitions Tax**	Appeal against an assessment to CAT on the inheritance of a remainder interest in real property Sections 2 and 3 CATCA 2003	Unknown

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

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

41TACD2021	**VRT**	Appeal in respect of the amount of VRT charged on the basis that the vehicle was not registered within 30 days of the date of its arrival in the State Section 132(3A) FA 1992 (as amended) Regulation 8 of the Vehicle Registration and Taxation Regulations 1992 (SI 318 of 1992), as amended	Unknown
42TACD2021	**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
43TACD2021	**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
44TACD2021	**VRT**	"Hybrid Remission" in relation to the VRT charged on import of a vehicle Section 135C FA 1992 (as amended)	Unknown
45TACD2021	**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
46TACD2021	**IT – Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption" Section 195 TCA 1997	Unknown
47TACD2021	**Income Tax – PSWT**	Refusal of repayment of PSWT on the basis that a valid claim for repayment had not been made within the four-year limitation period Section 865 TCA 1997	Unknown
48TACD2021	**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

49TACD2021	VRT	Appeal against the classification of a vehicle for VRT purposes Section 132 FA 1992 (as amended)	Unknown
50TACD2021	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
51TACD2021	Income Tax	Appeal against the denial of a credit for income tax deducted from emoluments but not remitted by a company in which the appellant held a material interest. The Revenue Commissioners had agreed to a Compromise Scheme of Arrangement in respect of outstanding debts, including the income tax deducted, as part of the Examinership process. Section 997A TCA 1997	Unknown
52TACD2021	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
53TACD2021	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
54TACD2021	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
55TACD2021	VRT	Refusal of repayment of VRT on the basis of a subsequent finding that the milometer had been fraudulently altered before importation Section 134 FA 1992 (as amended)	Unknown

56TACD2021	**VRT**	Appeal relating to the importation of a vehicle to the State and to the imposition of VRT, regarding, in particular, the availability of transfer-of-residence relief Section 134(1)(a) FA 1992 (as amended) Vehicle Registration Tax (Permanent Reliefs) Regulations 1993 (SI 59 of 1993) Article 6 of Council Directive 83/183/EEC	Unknown
57TACD2021	**PAYE**	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
58TACD2021	**PREM**	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
59TACD2021	**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
60TACD2021	**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
61TACD2021	**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 132 FA 1992 (as amended) Section 146 FA 2001	Unknown
62TACD2021	**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

63TACD2021	**VRT**	Appeal in respect of the amount of VRT charged on the basis that the vehicle was not registered within 30 days of the date of its arrival in the State Section 132 FA, 1992 (as amended) Regulation 8 of the Vehicle Registration and Taxation Regulations 1992 (SI 318 of 1992), as amended	Unknown
64TACD2021	**Income Tax**	Appeal against assessments to income tax on the basis that the assessments were raised outside the four-year time limit. Appeal also grounded on the claim that the source of income and amount assessed were incorrectly allocated by the Revenue Commissioners Sections 58,931 and 955 TCA 1997	Unknown

Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations

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Tax Appeals Commission Determinations

01	**Loss Relief – Case Stated from TAC**	High Court
02	**Scope of Jurisdiction of Appeal Commissioners and Circuit Court – Judicial Review**	Court of Appeal
03	**Employment Investment Incentive – Meaning of "Qualifying Company"**	Tax Appeals Commission
04	**PAYE – Travel and Subsistence Expenses**	Tax Appeals Commission
05	**Income Tax – Same Trade or Different Trades?**	Tax Appeals Commission
06	**Capital Gains Tax – Time Limits for Retaining Records/ Amending Assessments**	Tax Appeals Commission
07	**Stamp Duty – Assignment of an Agreement**	Tax Appeals Commission
08	**Capital Acquisitions Tax – Date of Inheritance**	Tax Appeals Commission

01 High Court – O'Sullivan vs Revenue Commissioners [2021] IEHC 118

The High Court delivered its judgment in the case of ***Desmond O'Sullivan v Revenue Commissioners*** [2021] IEHC 118 on 22 February 2021. The case concerned the validity of the determination by the Tax Appeals Commission (TAC) that the appellant had not satisfied the burden of proof necessary to support his assertion that he had invested €700,000 in the Santa Maria Property Partnership (SMP) and could therefore avail of loss relief under s381 TCA 1997.

SMP had acquired a site with the intention of developing it for the construction of residential units. However, the development was abandoned in 2008, giving rise to significant losses for investors. The appellant made loss relief claims under s381 TCA 1997 against his PAYE income in his tax returns for both 2009 and 2010.

In 2014 Revenue queried the claims and ultimately issued amended assessments for both years disallowing the loss relief. On appeal, the TAC found that the appellant had not satisfied the burden of proof as to his investment and the amended assessments should stand. This was based on a number of factors, including discrepancies in the evidence provided by the appellant on the amount of his contribution to SMP and how those funds were allocated by SMP, as well as the absence of some supporting documentation.

The key questions considered by the judge (Sankey J) were, in summary, whether the Appeal Commissioner had erred in law:

- in permitting questions in relation to the particular transactions during the hearing of the appeal when such transactions had not dealt with at the initial hearing and relying on the evidence that emerged in relation to these issues and
- in relying on the appellant's inconsistencies of fact and his failure to adduce relevant evidence.

The judge found that the Commissioner did not err in law in permitting questions in relation to the transactions and relying on the evidence that emerged in relation to these issues to inform his conclusions.

Applying the standard set out in the case of *Ó Culacháin v McMullan Brothers Limited* [1995] IR 217, the judge noted that the Commissioner's findings of fact should not be disturbed "unless they are such that a reasonable [Commissioner] could not have arrived at them or they are based on a mistaken view of the law". The judge found that the Commissioner did not err in law in relying on the appellant's inconsistencies of fact and his failure to adduce relevant evidence. He was entitled to take such matters into account when assessing the appellant's credibility and the strength of his evidence, particularly in cases where there is an absence of documentation corroborating the appellant's case.

It was therefore held that an order of the court would be made affirming the determination of the Commissioner pursuant to s949AR(1)(a) TCA 1997.

02 Scope of Jurisdiction of Appeal Commissioners and Circuit Court – Judicial Review

The Court of Appeal delivered its judgment (unapproved) in the case of ***Kenny Lee v Revenue Commissioners*** [2021] IECA 18 on 28 January 2021. The case dealt with the scope of the jurisdiction of the Appeal Commissioners and the Circuit Court when hearing appeals under s933 and s942(1) TCA 1997, respectively.

The origins of the case were in a voluntary disclosure made by the taxpayer whereby a payment of €12,500 was made, accompanied by a letter from the taxpayer's agent stating that the amount may not be fully accurate but was the maximum that the taxpayer could raise. "The cheque is sent on the basis that if it is not accepted in [sic] that means you might return the cheque to us." Revenue acknowledged receipt of the "submission" and payment but subsequently requested information in relation to the offer. The taxpayer's agent objected on the basis that the payment was offered on the terms set out in the letter and had been accepted as such. It was therefore "not open to the Revenue to seek to re-open any matter" covered by the letter.

Revenue ultimately raised notices of assessments totalling *c.* €500,000 covering tax years 2000 to 2009. The taxpayer appealed the assessments, citing, as one of the grounds, the fact that a settlement had been made with Revenue for the tax years to 2008, the amount tendered having been accepted in full and final satisfaction.

Both the Appeal Commissioner and the Circuit Court confirmed the assessments raised on appeal, but they had differing views on whether they had jurisdiction to determine whether a settlement had been agreed between Revenue and the taxpayer.

On appeal, the High Court found that the Circuit Court does have jurisdiction under s942(3) TCA 1997 to determine whether the parties to an appeal have entered into a prior settlement or agreement in respect of the liability at issue as part of the jurisdiction conferred on it under s934(3) and (4) TCA 1997 to abate, reduce, let stand or increase the relevant assessment. However, it does not have jurisdiction to entertain a claim of legitimate expectation or promissory estoppel to the same effect. Such claims must be raised in separate proceedings before the appropriate court.

Revenue appealed this decision to the Court of Appeal. Murray J upheld the appeal finding that, although the trial judge was correct in the second finding, he had erred in the first.

> “A Judge of the Circuit Court, hearing an appeal from the Appeal Commissioner, does not have jurisdiction under s942(3) TCA 97 (as amended), or pursuant to his inherent jurisdiction, to determine whether the parties to an appeal have entered into a settlement in respect of the liability at issue in the said appeal.”

Reviewing a long line of judicial authorities in the area of jurisdiction of the Appeal Commissioners, Murray J concluded that the powers of the Appeal Commissioners and the Circuit Court under the relevant provisions are limited to determining whether an assessment charges the taxpayer in accordance with the relevant provisions of TCA 1997. He noted the distinction from a settlement whereby the sum tendered is received by Revenue pursuant to contract, and to that extent loses its character as tax, interest or penalties. It was held that the Appeal Commissioners have a jurisdiction in tax, not in contract, and the function they discharge is to determine the taxes due under the statute, not under the contract.

03 Employment Investment Incentive – Meaning of “Qualifying Company”

Tax appeal **29TACD2021** concerned an appeal against a decision to refuse to grant Employment Investment Incentive (EII) relief for an investment of €150,000 in new shares issued by the appellant company in 2017.

Revenue refused to certify the appellant as a “qualifying company” in accordance with s494(4A) TCA 1997 based on its view that the appellant did not comply with paras 5 and 6 of Article 21 of EU Regulation No. 651/2014, commonly referred to as the General Block Exemption Regulation (GBER). (This condition was removed from s494 TCA 1997 in the replacement provision on eligible shares introduced by Finance Act 2018.)

Revenue’s view was that the appellant failed to comply with para. 6(b), which stipulates that the risk finance aid may also cover follow-on investments made in eligible undertakings but only if “the possibility of follow-on investments was foreseen in the original business plan”. The appellant was unable to provide Revenue with the original business plan, as had been prepared 25 years previously, but did provide a written Appendix of Financial Projections to the original plan, which showed that it did foresee, *ex ante*, the need to raise additional finance. Revenue submitted that this did not constitute the “original business plan”, which must be interpreted in accordance with para. 14(c) of Article 21.

The Appeal Commissioner found that, in interpreting s494 TCA 1997, Revenue must confine itself to the provisions of paras 5 and 6 of Article 21 only. This precludes Revenue from applying criteria for EII relief outside those paragraphs that it believes may come within the broad ambition of the GBER.

The Commissioner found that paras 5 and 6 clearly necessitate all entities to have a viable business plan. In his view, the appellant had such a detailed plan at the time of the initial risk investment and that plan, as evidenced by the Appendix of Financial Projections presented, clearly shows that the "possibility of following investment" was foreseen.

The Appeal Commissioner therefore found that EII relief should be allowed as the appellant had met the conditions. 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 this determination.

04 PAYE – Travel and Subsistence Expenses

Tax appeal **32TACD2021** concerned an appeal against PAYE/PRSI/USC ("PAYE taxes") assessed as arising in respect of certain payments made by the appellant company to its directors, a husband and wife, for travel and subsistence (T&S) expenses incurred by them.

In Revenue's view, the payments were not "wholly and exclusively laid out or expended for the purpose of the trade or profession" as provided for under s81(2) TCA 1997 and should be treated as taxable payments to the directors attracting PAYE taxes.

The appellant was engaged in retail trading and undertook a services trade. In 2017 Revenue undertook an audit under the corporation tax, VAT and PREM tax heads for three accounting periods. In reviewing the T&S expenses incurred in those periods, Revenue noted that some related to extended trips abroad to several different countries. The appellant submitted that the expenses related to the prospective set-up of a foreign branch of its Irish operation and the import of a new range of products for the Irish operations. However, Revenue considered the payments to be taxable payments to the directors that attracted PAYE taxes.

The Appeal Commissioner disagreed with the position of both parties that the core issue to be determined was whether the T&S expenses were "wholly and exclusively laid out or expended for the purpose of the trade or profession" under s81(2)(a) TCA 1997, as this is prescriptive only in computing the amount of the chargeable profits or gains under Schedule D, Case I or II. The potential charge to PAYE taxes arises instead under ss112–118 TCA 1997, the key question being whether the directors were entitled to claim a deduction for the T&S expenses under s114 TCA 1997.

After a detailed review of the expenses, the Appeal Commissioner concluded that s114 applied to *c.* 75% of the disallowed expenses as relating to pre-sales and future trade scoping activities. The estimates to PAYE taxes should therefore be reduced accordingly.

It is worth noting that the corporation tax deductibility of the costs was not considered in the appeal. 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 this determination.

05 Income Tax – Same Trade or Different Trades?

Tax appeal **34TACD2021** concerned an appeal against assessments to VAT and income tax relating to tax years of assessment 2008 to 2011. (The VAT aspects of the appeal are outside the scope of this review.)

The taxpayer was a sole trader manufacturing and providing fitted kitchens. From 2008 to 2011 he received regular round-sum payments from a company, ABL Ltd. The taxpayer submitted that these payments were received on foot of a profit-sharing joint venture (JV) agreement with ABL. He viewed this as a continuation of his sole tradership and sought to offset trading losses forward against the JV profit under s382 TCA 1997.

Revenue did not accept that a JV existed with ABL, submitting that the payments received by the taxpayer were for the provision of training and consulting services to ABL. This was not the same trade as that in which the losses were generated.

In considering the evidence, the Appeal Commissioner found a number of issues with the written agreement between the taxpayer and ABL. He also noted that the actions of the parties were not consistent with the operation of a profit-sharing arrangement and that the taxpayer had raised invoices to ABL for consultancy services and had described the payments received as consultancy services in his income tax returns.

The Appeal Commissioner found that the appellant had provided insufficient evidence to establish the existence of a profit-sharing JV and concluded that the payments were received in exchange for consulting services rendered by the taxpayer. The provisions for offset under s382(1) TCA 1997 are not therefore available, as the trades are not the same. It was thus determined that the assessments to income tax should stand. The Tax Appeals Commission has not been requested to state and sign a case for the opinion of the High Court in respect of this determination.

06 Capital Gains Tax – Time Limits for Retaining Records/Amending Assessments

Tax appeal **30TACD2021** concerned an appeal against a notice of amended assessment raised in 2018 in respect of tax year 2011 disallowing a claim for enhancement expenditure for CGT purposes. The taxpayer had disposed of a number of properties to a company in which he was sole shareholder at that time. The transactions were reflected in his 2011 income tax return.

Revenue made enquiries into the return in late 2016 and submitted that the taxpayer failed to provide sufficient documentation to evidence the costs incurred and other information relating to the transactions. The taxpayer had responded that, given the passage of time, it had proven difficult to retrieve full records of the expenses.

Revenue ultimately issued an amended assessment in June 2018 disallowing a claim for enhancement expenditure of *c.* €640,000 incurred in 2008/2009 in respect of one of the properties.

In considering whether the taxpayer was entitled to a deduction for the enhancement expenditure incurred, the Appeal Commissioner found that the provisions of s886 TCA 1997 did not require him to retain the requested records in relation to the enhancement expenditure incurred in 2008/2009 beyond 2015. The taxpayer had accordingly complied with s534 and s552 TCA 1997 as regards the disposal of assets and the computation of the net gain chargeable to CGT.

The case considered the interaction of s955 and s956 TCA 1997 (as enacted at the time). Revenue was within the time limits to amend an assessment in accordance with s955 TCA 1997 only if the taxpayer had not made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011. The Commissioner found that the taxpayer had completed his tax return for 2011 to the best of his knowledge, information and belief and had, accordingly, made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011. Revenue was therefore not entitled to make an amended assessment in June 2018.

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

07 Stamp Duty – Assignment of an Agreement

The determination contains an analysis of case law on the difference between an absolute assignment and an assignment by way of a charge only and on the interpretation of commercial contracts.

Tax appeal **27TACD2021** concerns an appeal against assessments to stamp duty raised in accordance with s31 and/or s31A Stamp Duties Consolidation Act 1999 (SDCA 1999).

The taxpayer was one of five members of a partnership that held a property. To finance its development, the partnership entered into an arrangement with third-party investors, agreeing to sell the property to the investors by way of a lease for a period of 999 years. An exit mechanism for the investors was put in place in the form of a put-and-call option agreement ("the option agreement") granting them the option to require the members of the partnership to purchase all of the investors' rights in the property.

In 2013, under refinancing arrangements, the investors entered into a deed of mortgage, charge and assignment with a bank, which obliged them to assign their interest in the option to the bank as security for the loan. The investors exercised the option by way of notice in writing to the appellants in 2014, and the partnership concluded the repurchase by making a payment of *c*. €11m to the investors in February 2014.

Revenue viewed the notice together with the option agreement as constituting a conveyance on sale to the members for the purposes of s31 SDCA 1999. Additionally, or in the alternative, they constituted a contract or agreement for the sale of an estate or interest in land in respect of which more than 25% of the consideration has passed and were liable under s31A SDCA 1999.

The appellant asserted that, as the option agreement had been fully assigned to the bank of the third party, this was not a validly exercised notice. The Appeal Commissioner agreed with this, finding that the option agreement had been absolutely assigned by the investors to the bank in 2013.

However, the Appeal Commissioner concluded that the payment made by the investors was in pursuance of an agreement between the parties for the acquisition of the property. That agreement is the combined interdependent set of agreements represented by the transaction documents of 2013 and the option agreement of 2006. Stamp duty was therefore payable by the partnership on foot of this transaction under the provisions of s31A SDCA 1999, with the appellant and his partners being jointly and severally liable.

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

08 Capital Acquisitions Tax – Date of Inheritance

Tax appeal **40TACD2021** dealt with an appeal against an amended assessment to CAT issued in July 2018. The appellant's father had died in 1987, leaving a life interest in his dwelling-house to his wife and, after her death, to the appellant. The appellant's mother died in 2016.

The executor of the will requested a ruling from Revenue's CAT department on two occasions and had been informed that no tax was due as the appellant was deemed to have inherited 90% of the property in 1987 (when the property value was below her CAT threshold) and the balance in 2016.

However, on requesting a written ruling, he was advised that he had received incorrect information. It had wrongly been interpreted that the appellant had inherited the property in 1987 with a right of residence for her mother. Although the appellant submitted that this had been her father's intention, the wording of the will instead gave a life interest to her mother and provided for the appellant as the remainderman. The appellant's date of inheritance was therefore the date of cessation of the life interest.

A CAT charge arose for the appellant based on the value of the property in 2016, and Revenue raised an amended assessment to CAT in July 2018. Revenue did, however, agree to reconsider the application of the late filing surcharge given that incorrect advice had been provided by Revenue to the executor in the first instance.

The Appeal Commissioner found that s2 of the Capital Acquisitions Tax Consolidation Act 2003 defines the date of an inheritance as including the cessation of a life interest and that the amended assessment should therefore stand. The Commissioner noted the limits of the jurisdiction of the Appeal Commissioners, confirming that it would be *ultra vires* for him to embark on any consideration of the intentions of the appellant's father or to make any finding in relation to this. 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 this determination.


Direct Tax Cases: Decisions from the UK Courts

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	Topic	Court
01	**Trading Losses – Was a Partnership Carrying on a Trade?**	UK First-tier Tribunal
02	**Corporation Tax – Availability of Unilateral Relief**	UK First-tier Tribunal
03	**Income Tax – Employment or Self-Employment**	UK First-tier Tribunal
04	**Capital Allowances – Are Allowances Available on Amortisation of Intangible Assets?**	UK First-tier Tribunal
05	**Industrial Building Allowances – Is a Building "Temporarily Out of Use"?**	UK Upper Tribunal

01 Trading Losses – Was a Partnership Carrying on a Trade?

In ***Foundation Partners (GP) v HMRC*** [2021] UKFTT 18 (TC) the First-tier Tribunal (FTT) found that Foundation Partners GP ("the appellant") had not been trading and upheld HMRC's decision to disallow a trading loss of *c*. £36m claimed in its partnership tax return. The FTT also found that the expenditure incurred by the partnership was on capital account and should properly have been accounted for as an investment rather than as stock.

The loss arose on a construction project in Montenegro. The intention was that the appellant would provide construction services to the property owner in consideration for a future income stream and would sub-contract its construction obligations to a local company, paying the sub-contractor from capital totalling *c*. £100m to be contributed by individual investors and a corporate partner. However, the project did not proceed as originally planned, partly because the capital raised fell significantly short of target and due to other legal and regulatory difficulties. A single amount of *c*. £38m was paid in 2008/9 under the construction sub-contract. It was treated as stock on the appellant's balance sheet and subsequently impaired, giving rise to a trading expense in the profit and loss account for 2008/9 of *c*. £34m.

As at the date of the appeal hearing, construction had not started, and negotiations were in progress with a Turkish company to take over the development. It was regarded as highly unlikely that there would be any financial return to the investors.

In supporting the argument that the appellant was trading, it was submitted that:

- entering into a contract to provide construction services for a share of the profits is intrinsically a trading transaction;
- an entity can trade through the activities of its sub-contractors; and
- the activities of an entity are not prevented from amounting to a trade merely because they are motivated by obtaining a tax relief.

However, HMRC submitted that the appellant did not conduct a trade during the 2008/9 tax year, taking account of its minimal role and functions in the context of the arrangements as a whole and the lack of commerciality in its activities. If, in theory, the activities were capable of constituting a trade, that trade had not commenced in 2008/9. In reality, the appellant made an equity contribution to the development project in return for a share of the profits.

Dismissing the appeal, the FTT found the project to have been wholly uncommercial and artificial from the outset such that "no commercially motivated business would have entered into the suite of agreements in these circumstances". The primary reason why the appellant entered into the agreements was "to 'lock-in' a tax loss for individual investors for the tax year 2008/9".

The tribunal judge distinguished the facts of this case from other trading cases cited that considered tax-advantaged arrangements, pointing to the fact that, despite the failed capital raise, a decision had been made that this project should proceed:

> "The fact that tax avoidance may have been a motive for Foundation (or its partners) entering into various contracts and transactions does not prevent Foundation's activities from being treated as a trade – rather this is one of those cases where the arrangements are so distorted by tax considerations, that they break down as a credible trading proposition."

He found that the transaction undertaken by the appellant was essentially a financing arrangement.

The judge also considered the position if the appellant had been found to be trading. First, he agreed with HMRC that any such trade did not commence before the end of 2008/9. He also considered the payments made by the appellant, finding that they were capital in nature and were not incurred wholly and exclusively for the purposes of any trade of the appellant. The payment under the construction sub-contract was a lump sum paid to generate an income stream for the appellant. The judge found that it had been incorrectly accounted for under generally accepted accounting practice (GAAP). It should have been accounted for as a fixed or current asset investment instead of as stock. Furthermore, no impairment event had occurred that would justify its write-off on the balance sheet as at 3 April 2009.

The appeal was therefore dismissed in full.

02 Corporation Tax – Availability of Unilateral Relief

In ***Aozora GMAC Investments Ltd v HMRC*** [2021] UKFTT 99 (TC) the First-Tier Tribunal found that HMRC was incorrect in disallowing credit under s790 of the Income and Corporation Taxes Act (ICTA) 1988 for US withholding tax suffered on interest paid to Aozora GMAC Investments Ltd, a UK-resident company ("the appellant"), on loans that it had made to its US subsidiary.

The appellant had applied to the US Internal Revenue Service (IRS) for access to benefits of the UK–US double taxation convention ("the Treaty") but was refused on the grounds that it was not a "qualified person" within Article 23 (Limitation on benefits) of the Treaty. This was not disputed. However, the appellant's application to the IRS for discretionary treatment under Article 23(6) was also rejected, on the basis that the IRS refused to determine that "the establishment, acquisition, or maintenance of [the appellant] and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under [the Treaty]".

On receiving advice that there was no prospect of a successful challenge to this decision, the appellant submitted its tax returns for the accounting periods ending 31 March 2007, 2008 and 2009 incorporating claims for unilateral relief under s790 ICTA 1988 against the UK corporation tax due on the interest, thereby reducing its liability for each period to £nil. However, closure notices were issued by HMRC in 2016 on the basis that s793A(3) ICTA 1988 prevented the claim for unilateral relief. This sub-section provides that:

> *"[w]here arrangements made in relation to a territory outside the United Kingdom contain* ***express provision*** *to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances* [my emphasis]*".*

Tax was instead computed on the basis that tax was due on the net amount received after deduction of the US withholding tax.

The key question for consideration in this case was whether s793A(3) prevented the claim for unilateral relief. HMRC contended that the obvious purpose of this sub-section is to ensure that the reciprocal provisions agreed between the state parties in a treaty are respected in domestic law. If unilateral credit relief were allowed in circumstances where treaty credit relief was denied, this would upset the balance agreed between the state parties when they negotiated the provisions of the treaty.

The appellant disagreed, submitting that it is always open to the UK to provide greater relief from double taxation than the relief available under a treaty. The appellant contended that Article 23 is not an "express provision to the effect that relief by way of credit shall not be given", emphasising the significance of the word "express", which means that the provision in question must state in terms that relief by way of credit is not to be given. Article 23, which deals with all the benefits of the Treaty, does not expressly deny, or even refer to, credit relief.

The FTT allowed the appeal, agreeing with the appellant that, for s793A(3) to have effect in relation to the exclusion of credit relief, the terms of the relevant treaty must be explicit as to the cases and circumstances in which the credit relief is not available. This was not the case in Article 23.

03 Income Tax – Employment or Self-Employment

The issue of whether an individual was employed or self-employed was considered in some detail by the First-tier Tribunal in the case of ***Gareth Phillips v HMRC*** [2021] UKFTT 91 (TC). The appellant, Mr Phillips, had appealed against the decision of HMRC that he was self-employed in respect of his engagement with an entity ("C&G") providing bespoke insurance products to the market. The question arose in the context of whether the appellant was an "employed earner" or a "self-employed earner" for the purposes of the Social Security Contributions and Benefits Act 1992.

The case cites the key case-law principles, noting that, although the authorities give general guidance on the factors to be considered when deciding whether an earner is employed or self-employed, the question can be answered only by examining all of the facts of the case. Many of the cases take as their starting point the tests set out by Mackenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 for the existence of a contract of service:

> "A contract of service exists if the following three conditions are fulfilled.
>
> (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the contract are consistent with its being a contract of service."

The FTT undertook a detailed analysis of the nature of the engagement between the appellant and C&G. This included the intention of the parties in negotiating the engagement terms, the remuneration structure, the degree of control and direction that C&G exercised over the appellant's activities, the degree of financial risk that the appellant was at in respect of his engagement with C&G and the benefits that he was entitled to.

The FTT ultimately concluded that many factors supported HMRC's assertion that the appellant was self-employed. These included the fact that he was remunerated on the basis of commissions generated by C&G and had received advance payments on account of future expected commissions, his freedom to decide which insurers and clients to approach, and the fact that he had negotiated the retention of IP rights in an insurance product that he had worked on. Although some factors could support a conclusion of an employment relationship, the above outweighed these and supported the conclusion that the appellant was performing his activities as a person in business on his own account.

The appeal was therefore dismissed.

04 Capital Allowances – Are Allowances Available on Amortisation of Intangible Assets?

In ***Roger Preston Group Limited v HMRC*** [2021] UKFTT 38 (TC) the First-tier Tribunal upheld an appeal challenging HMRC's decision to disallow corporation tax deductions claimed by the appellant in respect of amortisation of intangible assets acquired in 2008. The case focused primarily on whether a licence had been properly recognised as an intangible asset for accounting purposes.

The case concerned a long-established partnership that carried on a business of providing engineering consulting services both in the UK and in other countries. In 1994 it was decided to restructure the business and to operate the UK trade through a limited company, Roger Preston and Partners Ltd ("RPPL"), while retaining the partnership for tax reasons. The business and assets were retained by the partnership, which granted RPPL a licence allowing it to operate and to promote the business using the trademarks, client lists, know-how and other assets of the partnership. This excluded goodwill, which remained in the partnership. An annual fee was paid to the partnership by RPPL in exchange for the licensing of the assets and the partnership's provision of management and marketing assistance. This was based on a specified formula set out in the licence, which was subject to a cap of 95% of RPPL's annual pre-tax profits.

In 2008 the partnership was approached by a third-party consulting engineer group interested in acquiring the operations of both the partnership and RPPL. The partnership's business and assets were acquired by Roger Preston Group Ltd ("the appellant"), a newly formed UK subsidiary in the acquirer group, and another group company acquired the shares of RPPL.

The appellant prepared audited accounts in accordance with International Financial Reporting Standards (IFRS), and the licence was recorded under "intangible assets". The appellant claimed a deduction for the accounting amortisation for corporation tax purposes.

HMRC challenged the deduction, claiming that no intangible asset existed in 2008 to be purchased by the appellant. It contended that the appellant's recognition of the licence as an intangible asset in its accounts for 2008 was incorrect and that its accounts were therefore not drawn up in accordance with GAAP. Rather, the licence was a financial asset. It was agreed between the parties that the fundamental difference between an intangible asset and a financial asset is that an intangible fixed asset needs to be used, or exploited, by an entity in order to gain financial benefit, whereas a financial asset gives a direct right to future cash-flows.

The FTT considered the licence agreement in detail. It upheld the commercial reality of the licence, noting that the contractual terms secured to the partnership a very significant level of ongoing control over the licensed assets and business. The tribunal judge rejected HMRC's submissions that the licence was an option and/or a "put" option. He placed significance on the fact that it had never been treated as such in the partnership accounts, which had been prepared and signed off by several different firms of established accountants and auditors over many years. Nor had HMRC challenged the accounting or tax treatment applied when reviewing the licence agreement before 2008 in the course of individual enquiries into the tax returns of the partnership and RPPL. The judge also found that the appellant had obtained control over the net assets and operation of the partnership so as to recognise goodwill in its accounts.

In relation to the accounting treatment of the licence, the judge found that it met the description of "asset" in FRS 5. Its acquisition gave the appellant the right to the future economic benefits flowing from the licence, being the rights to future licence fees from RPPL for the granting of the licence each year and the use of the licensed assets. The tribunal judge agreed that the licence was not a financial asset and concluded that the appellant was correct to record it as an intangible asset in its 2008 financial statements.

The FTT therefore upheld the appeal, and the amortisation was allowed.

05 Industrial Building Allowances – Is a Building "Temporarily Out of Use"?

In ***Mark Shaw (as nominated member of TAL CPT Land Development Partnership LLP) v HMRC*** [2021] UKUT 100 (TCC) the Upper Tribunal considered whether the First-tier Tribunal had erred in disallowing claims made by the partnership ("TAL") for industrial building allowances in the years ended 31 March 2005 to 31 March 2007.

The buildings concerned were not in use at the time of their acquisition by TAL, the previous owner having ceased to use them after the closure of its business at the site where the buildings stood. TAL had intended to bring the buildings back into use and, accordingly, contended that they were "temporarily out of use" within the provisions of s285 of the Capital

Allowances Act 2001 (CAA 2001) up to the point that it decided to cease its efforts to use the buildings and sell them. (Similar provisions in relation to the temporary disuse of a building or structure are included in s280 TCA 1997.) HMRC contended that the buildings were not "temporarily out of use" at any time during TAL's period of ownership because a period of actual use is required at both ends of a period of temporary disuse.

The FTT concurred with HMRC, concluding that the buildings ceased permanently to be used as industrial buildings when they stopped being used by the previous owner. The absence of reuse meant that the disuse could not have been temporary. TAL therefore had no entitlement to claim allowances in respect of the buildings as they were not "industrial buildings" at any time during its period of ownership.

In the view of the UT, the correct approach to establishing whether a period of disuse is temporary is to look objectively at all of the relevant circumstances and not only the physical state of the building. A period of permanent disuse can follow a period of temporary disuse, as a result of a change of circumstances from those prevailing at the time that the period of disuse began, without that affecting the characterisation of the earlier period of temporary disuse.

The UT found that the FTT had erred in its conclusions by determining that the taxpayer's intention was not a relevant factor in ascertaining whether s285 CAA 2001 applied to a period of disuse and also in holding that its application in a given chargeable period could change by reference to events and subsequent chargeable periods.

The UT found that the period of temporary disuse of the buildings continued until TAL no longer wanted them to be used as industrial buildings. Only then did they cease to be used permanently as industrial buildings. It found that TAL's intention that the buildings be used as industrial buildings was evidenced by its marketing efforts to attract potential tenants, as well as by undertakings made to the previous owner in the acquisition agreement that certain buildings would be brought out of temporary disuse back into use within three years of the acquisition. These included an undertaking to indemnify the previous owner for any future tax liabilities that it could incur if TAL failed to bring the relevant buildings back into use.

TAL's appeal was therefore allowed.

Compliance Deadlines

Helen Byrne
Senior Manager, Tax Knowledge Services, EY

General

Jun 30	Claims under the VAT compensation scheme for charities for VAT on expenditure in 2020 must be submitted by 30 June 2021.
Jul 1	Commencement of new VAT rules for cross border business to consumer (B2C) ecommerce activities in the EU. Introduction of electronic Professional Services Withholding Tax (ePWST). Paper F45 Forms to be replaced with electronic Payment Notifications (PNs).
Jul 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 30 June are due on 7 July.
Jul 30	Due date for submission of return and payment of IREF withholding tax for accounting periods ended between 1 July and 31 December 2020. Due date for IREFs to file financial statements electronically (in iXBRL format) with Revenue for accounting periods ended between 1 July and 31 December 2020.
Aug 31	Capital acquisitions tax on gifts and inheritances with a valuation date in the 12-month period ending on 31 August 2021 must be paid and the return filed by 31 October 2021. Gifts/inheritances received in the period 1 September to 31 December 2021 are accountable for in 2022.

Aug 23	PSWT F35 return for the period 1 January 2021 to 30 June 2021 and all amendments to F45s occurring in this period must be made on or before this date. Any F43s which need to be issued to amend any previously issued F45s must be done prior to 23 August 2021.
Aug 31	Deadline for filing new electronic Employer's Share Awards return for the tax year 2020
Sep 30	Deadline for EU cross-border VAT repayment claims for 2020.

Relevant Dates for Companies

Jul 14	Dividend withholding tax return filing and payment date (for distributions made in June 2021).
Jul 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 August 2021. If this is paid using ROS, this date is extended to 23 July 2021. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 31 January 2022. If this is paid using ROS, this date is extended to 23 July 2021.
Jul 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 October 2020 if filed using ROS (otherwise, 21 July 2021). Certain elections, including the close company election in s434 TCA 1997 regarding the treatment of dividends/distributions, must be included with the return. 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 October 2020 may need to be repaid by 23 July 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 July 2020 year-ends, this should extend the iXBRL deadline to 23 July 2021.
Jul 31	Last date for filing third-party payments return 46G for companies with a financial year ended on 31 October 2020. Latest date for payment of dividends for the period ended on 31 January 2020 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only).(Note 1)

Covid-19 interim corporation tax loss relief claims for losses in the year ended on 28 February 2021 must be made by 31 July 2021.

CbC reporting notifications relating to the fiscal year ending on 31 July 2021 must be made to Revenue (where necessary) no later than 31 July 2021, via ROS.

CbC reports/equivalent CbC reports for the fiscal year ended on 31 July 2020 must be filed with Revenue (where necessary) no later than 31 July 2021.

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Note

(1) 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. (2) Under the EU mandatory disclosure of reportable cross border transactions regime (DAC6), returns in respect of arrangements, the first step of which was taken on or after 1 July 2020, must be submitted 30 days after the reporting obligation is triggered.


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International Tax Update

01 US Tax Developments

US Treasury report expands on White House tax priorities

A Treasury Department report released on 7 April 2021 provides additional detail on changes – especially in the international tax space – that the White House would like to see made to the tax code as part of the "Made in America Tax Plan", the financing component of the $2 trillion infrastructure package recently unveiled by President Biden.

The proposed measures include:

- The headline rate of federal corporate tax would increase from 21% to 28%.
- A 15% minimum tax on the book income of large companies that report high profits but have little taxable income would be enacted.
- The Base Erosion and Anti-abuse Tax (BEAT), which was introduced in the 2017

tax reform, would be replaced with a new system called Stopping Harmful Inversions and Ending Low-tax Developments (or SHIELD). SHIELD would deny deductions for cross-border related-party payments if they were subject to a low effective tax rate in the destination jurisdiction. The report suggests that what defines a low effective tax rate could come out of the OECD's discussions on Pillar Two, but if not, then it would be equal to the proposed rate on GILTI income. The report also says that SHIELD would act as an encouragement to other countries to introduce strong minimum tax regimes, and it could be "turned off" for entities resident in countries that have adopted a globally agreed minimum tax regime.

- The changes around Global Intangible Low-Taxed Income (GILTI) conform to those previously proposed, being:
  - an increase in the effective rate from 10.5% to 21%,
  - removal of the 10% allowance for a return on foreign tangible assets (called QBAI) and
  - requiring GILTI to be calculated on a country-by-country basis.
- The Foreign-Derived Intangible Income (FDII) regime would be repealed, and the revenues that would have been spent on FDII would be redeployed to enhancing R&D incentives.
- The existing rules to prevent inversions of US companies would be tightened.

Although the Treasury report fills in some blanks in the Biden administration's tax policy platform, it stops short of providing specific details on how these tax proposals would operate or when they would take effect – the author's expect that further detail may be included when the President releases in the coming weeks his budget blueprint for fiscal year 2022. In their current form, the US tax proposals are certainly far from a done deal and will need to navigate both the Senate and the House of Representatives. In the Senate, the Democrats have 50 of the 100 seats, with Vice President Harris casting the tie-breaking vote when needed. In the House, they have a majority of 10. With midterm elections coming up in 2022, gaining the necessary political support to broker a deal may prove considerably challenging, and therefore what may ultimately get passed could differ somewhat from the above.

02 BEPS: Recent Developments

BEPS

White House proposal re-energises global talks on corporate tax reallocation

Longstanding multilateral talks being held by the OECD and G20 nations that are aimed at reallocating corporate taxes among countries were given a new lease of life in April, with the Biden administration delivering a fresh negotiating position that would shrink the number of companies impacted but apply the new rules regardless of business sector.

Rethinking Pillar One

To date, the so-called Pillar One negotiations on taxation of the digital economy have focused on reallocating income earned only by consumer-facing businesses and automated digital services, with a goal of taxing multinationals based on where their customers are, regardless of a company's physical nexus. Although not published by the US, a new US proposal has been widely commented on in the media through leaks. In this proposal the US pitches a new design that would use quantitative criteria to include no more than 100 of the largest and most profitable multinational groups "regardless of industry classification or business model".

International reactions to the proposal were generally positive. Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration, welcomed it, saying that the proposal "reboots the negotiation of a comprehensive solution to address a comprehensive issue: digitalisation and globalisation. Very interesting and positive dynamic. Good prospect of a simplified but meaningful P1 and robust minimum tax." The Netherlands welcomed the US proposal as being "fully in line" with its efforts to modernise the international tax system. The Italian Prime Minister, Mario Draghi, also welcomed the proposal, particularly on the global minimum tax. Other world leaders, including French Finance Minister Bruno Le Maire, were more circumspect, promising to study the US proposal but withholding full endorsement for now. Some industry analysts reacted negatively, noting that the plan would disproportionately affect US-based tech companies.

A boost for Pillar Two?

The US Treasury Department report released on 7 April provides support for a global minimum tax, which is Pillar Two of the OECD project. The report proposes a simplified but robust global minimum tax system. The Treasury Secretary, Janet Yellen, said in a speech delivered on 5 April that the US believes that a global minimum tax will help "stop the race to the bottom" among nations, as Democrats look to increase the US corporate rate.

03 UK Updates

UK Budget highlights

On 3 March 2020 the Chancellor of the Exchequer delivered the first Budget since Britain's exit from the EU, and the Finance Bill was published on 11 March 2020. The key measures announced were as follows.

Corporation tax rate increase

Arguably, the headline tax announcement of the Budget is an increase in the rate of corporation tax from 19% to 25% with effect from April 2023 where a company has profits exceeding £250,000. The 19% rate will generally remain applicable to companies with profits of less than £50,000, and relief will be available where profits are between £50,000 and £250,000.

The Chancellor also announced an increase in the rate of Diverted Profits Tax (DPT) from 1 April 2023 to maintain the current differential between the DPT rate and the corporation tax rate. The DPT rate will therefore increase from 25% to 31%. DPT was introduced in 2015 to counteract certain contrived arrangements that result in the erosion of the UK tax base.

Enhancements to the capital allowances regime

The Chancellor announced two changes to the capital allowances regime, which significantly increase the tax relief available on investment in new plant and machinery:

- a new super-deduction of 130% in the year of acquisition, for the cost of most new plant and machinery investments that would previously have only qualified for capital allowances in the main pool (previously attracting an 18% allowance per annum on a reducing-balance basis); and
- a 50% first-year allowance on most new plant and machinery investments that would ordinarily have only qualified for capital allowances in the special rate pool (previously a 6% allowance per annum on a reducing-balance basis).

These rules will apply to qualifying expenditure incurred between 1 April 2021 (excluding expenditure on contracts entered into before that day) and 31 March 2023.

Stamp Duty Land Tax (SDLT)

In July 2020 the Government temporarily increased the SDLT nil-rate band for purchases of residential property in England and Northern Ireland from£125,000 to £500,000 that were completed between 8 July 2020 and 31 March 2021. In the Budget, the Chancellor announced an extension to this temporary increase until 30 June 2021. The limit of the nil-rate band will then be reduced to £250,000 for purchases that complete between 1 July and 30 September 2021, before returning to its normal level of £125,000. Taxpayers purchasing a second home who are not replacing their main residence are subject to an additional 3% SDLT charge. Where this is the case, taxpayers will be subject to SDLT at a rate of 3% on amounts within the nil-rate band. The Chancellor had previously announced the introduction of a further 2% SDLT surcharge for non-resident purchasers of residential property in England and Northern Ireland with effect from 1 April 2021. This will take the highest rate of SDLT on residential properties to 17% for purchases completing on or after that date.

Freeports

The Chancellor announced plans for eight freeports across the UK, which will begin operations from late 2021. These freeports will benefit from tax reliefs and other Government support and are areas where business can be carried out or goods stored free of import VAT and customs duties. If goods ultimately leave the freeport to come into the UK, then taxes will arise at that point. Otherwise, they can be exported without any incidence of UK VAT or customs duties.

Withdrawal of the Interest and Royalties Directive

When the UK left the European Union on 31 January 2020, a transitional period came into effect, with the result that the EU Interest and Royalties Directive continued to apply. As the transitional period ended on 31 December 2020, legislation is being introduced to confirm that the benefits of the Interest and Royalties Directive will cease to apply where UK companies make payments to companies in the EU. As a consequence, the UK withholding tax position of any interest or royalty payments made from 1 June 2021 will be determined in accordance with the UK's double taxation treaty with the payee country, if another domestic exemption does not apply. Where a payment is made before that date with a main purpose of avoiding a withholding tax payment, then these provisions will take effect from 4 March 2020. Companies should consider whether any new treaty clearances should be applied for in the context of these new rules.

UK Tax Day

On 23 March 2021, "Tax Day", the UK Government published a range of consultations and reviews. The main announcements to affect businesses included the launch of the following:

- a consultation to understand how the tax administration framework could be reformed and modernised,
- a consultation into UK transfer pricing documentation requirements and
- a second consultation on the notification requirement for uncertain tax treatments.

Regarding the last-mentioned consultation, one of the announcements in the March 2020 Budget was that large businesses would need to notify HMRC when taking an uncertain tax treatment. A consultation was subsequently launched, the results of which were delayed owing to Covid-19. HMRC has now published the results of the consultation, along with a second consultation. To summarise, it is expected that large businesses will need to notify HMRC where they take an uncertain position (defined as a position with which HMRC disagrees or where its view is not known) if there is tax at stake of at least £5m. This will apply to corporation tax (with transfer pricing matters excluded in certain circumstances), income tax (including PAYE) and VAT. The Government is proposing that the rules apply only to companies and groups that are within the Senior Accounting Officer regime or that have to publish a UK tax strategy. If notification is required, it would take place annually, when the relevant return is due to be filed, and a £5,000 penalty will be levied on the company for failure to notify. The consultation will run until 1 June 2021, and the new rules are currently expected to take effect from April 2022.

HMRC explains tax treatment of crypto-assets

On 30 March 2021 HMRC published a manual providing guidance on the tax implications that can arise from transactions involving crypto-assets. Irish Revenue had issued Tax and Duty Manual Part 02-01-03, "Taxation of Cryptocurrency Transactions", in 2020, but this is much shorter in its analysis than the HMRC document.

04 Irish Department of Finance Hosts Virtual Seminar on International Taxation

The International Tax Seminar hosted by the Irish Department of Finance took place virtually on 21 April and provided a timely opportunity to take stock of recent developments in international tax. The seminar heard a range of views on the best way to reframe international tax rules and brought together key stakeholders – including speakers from the OECD, the European Commission, other jurisdictions, and key Irish and US stakeholders – to discuss how we can reach a global agreement on reframing international tax rules for the modern age and the post-pandemic era.

The Minister for Finance, Paschal Donohoe TD, opened the event and expressed that Ireland's commitment to reaching an agreement remains resolute:

> "Ireland will continue to engage constructively in the discussions in the months ahead, as we have been doing for many years. In these discussions, we need to ensure that we get both the architecture and the construction right. We need solid foundations to ensure we have a sustainable structure that we can all buy into, one that will stand the test of time. We believe that any agreement should be grounded in guiding principles, bearing in mind that whatever is agreed at the OECD will need to be underpinned in the European Union by Directives, which will be binding on Member States."

When speaking about Ireland's 12.5% corporation tax rate, Minister Donohoe remained committed to the rate and stated that:

> "I firmly believe that the long-established Irish corporate tax rate of 12.5% is a fair rate and within the ambit of healthy tax competition. It is a rate which can contribute to Exchequer revenues for investment in infrastructure and capacity and one which that can also stimulate investment, growth and innovation, which are core to Ireland's industrial policy. I believe that an agreement can be reached and I will work constructively towards such an agreement. But, I also believe that it is a legitimate objective that any agreement can facilitate healthy and fair tax competition, while meeting the needs of all, not just some of the participants."

In his concluding remarks, Minister Donohoe noted the need for stability, with a tax framework that supports growth, provides certainty, guards against abuse, is implementable across the globe and caters the for fair tax competition. He finished by stating that he desired "an outcome that is a fair and balanced compromise by and for all the 139 countries in the OECD Inclusive Framework".

05 Italy: Guidance on Digital Services Tax – Payment and Filing Obligations Deferred

On 24 March 2021 the Italian tax authorities released official guidance on the digital service tax (DST) that is being implemented in Italy pending broader solutions from the OECD on the taxation of digital services. The extensive guidance provides significant clarifications on the definitions of taxable persons and services, exemptions, territorial nexus requirements, reporting and accounting obligations, refunds and double taxation relief. In addition, through Law Decree No. 41, published in the official gazette on 22 March 2021, the Italian Government has further postponed the payment and reporting deadlines for the DST to allow taxpayers time to comply with the additional guidance. In particular, as a result of the postponement:

- the new deadline for payment of the DST due for fiscal year (FY) 2020 is 16 May 2021 (extended from 16 March 2021); and
- the new deadline for filing the DST return related to FY 2020 is 30 June 2021 (extended from 30 April 2021).

With respect to the deductibility of DST and application of tax treaties, according to the clarifications provided, the Italian DST (and foreign DST) is deductible for Italian income tax purposes on a cash basis. Also, it has been clarified that the DST is not an income tax, and therefore it is not covered by the tax treaties concluded by Italy.

06 Supplementary Review by Global Forum Key to Barbados's Status on EU List

After the October 2020 addition of Barbados to the EU list of non-cooperative jurisdictions for tax purposes following the country's receiving a "partially compliant" rating from the Global Forum on Transparency and Exchange of Information for Tax Purposes, a European Council press release issued on 22 February 2021 announced that Barbados was removed from the list and added to a "state-of-play document" (annex II, or "grey list"). According to the press release, the change in status was made pending the outcome of a supplementary review of Barbados granted by the Global Forum.

The outcome of the EU's assessments is critical for a developing country such as Barbados, as a positive result (i.e. remaining on the grey list or being removed from that list after fulfilling all commitments) could bolster investor confidence, whereas an unfavourable outcome (being moved to the black list) could trigger investor uncertainty about the legitimacy of conducting business in Barbados. In addition, whether a country is on the EU black list is important in determining whether any of the EU recommended defensive measures need to be applied to payments/transactions with companies resident in that country. The next revision to the EU lists is expected in October 2021.

07 OECD: "No or Only Nominal Tax" Jurisdictions Start Information Exchange

The OECD has announced that the 12 "no or only nominal tax" jurisdictions have begun their first tax information exchanges under the Forum on Harmful Tax Practices (FHTP) global standard on substantial activities. The 12 jurisdictions include Guernsey, the Isle of

Man, Jersey, Bermuda, the British Virgin Islands and the Cayman Islands. The new, annual, exchanges cover information on the identity, activities and ownership chain of entities established in the "no or only nominal tax" jurisdictions that either are non-compliant with substance requirements or engage in certain high-risk activities. The information is shared with the tax jurisdictions of the entities' immediate and ultimate parents.

08 India: Supreme Court Judgment on Software Payments to Non-residents

The Supreme Court in India has put to rest a decade-long tax controversy by ruling in favour of taxpayers that certain software payments are not taxable as a royalty under Article 12 of the Indian tax treaties. In a landmark decision issued on 2 March 2021, the Supreme Court held that amounts paid by Indian-resident end-users/distributors to non-resident computer software manufacturers/suppliers as consideration for the distribution/use of computer software related to purchase of goods and, therefore, did not give rise to a tax withholding obligation under the Indian tax law. This ruling is of importance to non-resident taxpayers who are facing litigation in India on this issue.

Although the ruling is very positive for non-residents, the potential effect on the applicability of the equalisation levy (EQL) will need to be considered. As from 1 April 2020, the scope of India's EQL was extended to introduce a 2% levy on consideration received or receivable by a non-resident "e-commerce operator" from an "e-commerce supply of goods or services" in India. A proposed amendment to the levy in the 2021/22 Union Budget provides that only those payments not otherwise taxable as royalties or fees for technical services would be subject to the EQL. As software licence fees are no longer taxable as royalties after the Supreme Court's decision, it must be examined whether the fees would be subject to the 2% EQL.

09 Dutch Tax Developments

There have been some recent Dutch developments around informal capital structures (e.g. interest-free/royalty-free licence structures and certain, not arm's-length, IP onshoring transactions) and Dutch reverse hybrids (e.g. a Dutch CV as a holding company) that are of interest.

On 4 March 2021 the Dutch State Secretary of Finance published two consultation documents with law proposals to regulate reverse hybrid entities for Dutch tax purposes and to combat transfer pricing mismatches. It is intended that the proposals will enter into effect for financial years starting from 1 January 2022. The proposals are still under consultation and thus do not entail a formal legislative proposal, but it seems likely that this consultation draft will form the basis for a formal legislative proposal later this year. The main proposed changes are:

- Transfer pricing mismatches, which may include informal capital, arising from interpretation differences on the arm's-length principle will be combated in such a way that it would no longer be allowed to take a downward adjustment for Dutch corporate income tax (CIT) purposes to the extent that no corresponding upward adjustment is taken into account by the counterparty to the transaction. The proposed changes would also apply in the case of double deductions arising from transfer pricing mismatches (e.g. mismatch in the allocation of costs).

- Dutch reverse hybrid entities will become liable to tax in the Netherlands and thus be subject to CIT to the extent that their income is not taxed at the level of the investors. This also means that the reverse hybrids will become liable to Dutch dividend withholding tax and the conditional withholding tax on interest/ royalty payments and will act as withholding agent towards their investors that view the reverse hybrid as an entity (non-transparent).

In view of the proposed changes, special attention should be given to structures with informal capital elements, as deductions might be denied as of 1 January 2020. Also, under the proposed changes, Dutch reverse hybrids entities (e.g. a Dutch CV) that act as a holding company (also in structures without any Dutch subsidiaries) may become subject to tax in the Netherlands.

10 Covid-19 Measures

European Commission proposes to exempt from VAT vital goods and services distributed by EU bodies in times of crisis

The European Commission has put forward a proposal to exempt from VAT the importation of goods and to zero rate the supply of goods and services made to the European Commission and to other agencies and bodies of the European Union when those purchases are distributed during an emergency response to the Covid-19 pandemic within the European Union. Goods and services covered under the proposed exemption include:

- diagnostic tests, testing materials and laboratory equipment;
- personal protective equipment (PPE) such as gloves, respirators, masks, gowns, disinfection products and equipment;
- tents, camp beds, clothing and food;
- search-and-rescue equipment, sandbags, life jackets and inflatable boats;
- antimicrobials, antibiotics, chemical threat antidotes, treatments for radiation injury, antitoxins and iodine tablets;
- blood products or antibodies;
- radiation-measuring devices; and
- quarantine facilities, clinical trials and disinfection of premises.

If adopted, the rules will apply retroactively from 1 January 2021

VAT Cases & VAT News

Gabrielle Dillon
Director, Twomey Moran

VAT Cases

01 Exemption for Services and Goods Closely Linked to Welfare and Social Security Work – Services of Lawyer Acting under Certain Powers of Representation

On 15 April 2021 the CJEU delivered its judgment in ***EQ v Administration de l'Enregistrement, des Domaines et de la TVA*** C-846/19, which related to the interpretation of Articles 9(1) and 132(1)(g) of the EU VAT Directive. The Luxembourg tax authority assessed EQ to VAT in relation to his supply of services as a lawyer, which were performed for the protection of adults lacking legal capacity under certain powers of representation granted to him by the competent judicial authority. EQ has been a member of the Luxembourg Bar since 1994 and since 2004 has represented adults in his capacity as agent, curator and guardianship manager (referred to herein as "representative services").

EQ argued that his "representative services" were not economic activities and that in any event the services were exempt from VAT under Article 132(1)(g). He also argued that the tax authority had accepted that the services were not subject to VAT in the period 2004–2013 and that making them liable to VAT for 2014–2015 breached the principle of protection of legitimate expectation. The tax authority argued that EQ's services were an economic activity as he provides the services in the course of his professional activity as a lawyer and obtains a significant income therefrom, and that the exemption did not apply as it cannot be relied on by a practising lawyer and he does not fulfil the condition of being a body devoted to social wellbeing.

Article 132(1)(g) provides exemption for "the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing". This exemption can be made subject to conditions – "the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied". In addition, the exemption does not apply where the supply is not essential to the transactions exempted and where the basic purpose of the supply is to obtain additional income for the body in question through transactions that are in direct competition with those of commercial enterprises subject to VAT.

A number of questions were raised by the referring court, which essentially fell into three categories – whether EQ's activities were an economic activity, whether the exemption under Article 132(1)(g) applied and whether the principle of protection of legitimate expectation was breached.

The first issue for determination was whether the "representative services" constituted an economic activity. In this context, the court considered whether the services were supplied for consideration and indicated that there only needs to be a direct link between that supply and the consideration actually received by the taxable person. As reiterated by the court in earlier cases, such a direct link is established 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 actual consideration for the service supplied to the recipient.

EQ did receive payments in respect of the representative services. But the court noted that although the performance of the services was entrusted to EQ by the competent authority rather than the recipient of the service, this was not relevant in determining whether the supply was of services for consideration. Equally, the fact that the services were not paid for by the recipients due to their financial circumstances but were instead paid for by the State did not mean that it was not consideration for the purposes of the Directive. The court was also of the view that the method and frequency of payment or the level of payment did not affect the direct link between the supply and the consideration. As a consequence, there was no reason why the supply of services was not for consideration.

Consideration was also given to whether the services constituted an economic activity. The definition in the Directive is broad and is objective in character in that the purpose or result of the activity is irrelevant. An activity is considered to be an economic activity where it is permanent and is carried out in return for remuneration that is received by the person carrying out the activity. Consideration was also given to whether the fact that in some instances the consideration received did not cover the operating costs of EQ impacted on the interpretation of economic activity. The court noted that all of the circumstances of the activity have to be considered, so the result of the activity cannot be decisive in determining whether an economic activity is carried out. The court held that, subject to verification by the referring court, EQ carried on an economic activity.

The second issue related to the application of the exemption to the type of services provided and to whether a lawyer providing the services could qualify as a "body devoted to social wellbeing". The court reviewed the wording of the exemption, which has in effect two elements – the supply must be "closely linked to welfare and social security work" and it must be made "by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing". In this regard, the services must be essential to the transactions relating to welfare and social security work. There is no definition of "welfare and social security work", but the court had outlined in earlier cases what type of services would constitute services relating to welfare and social security work (e.g. provision of care and domestic help by an out-patient care service to persons in a state of physical or economic dependence or services provided to persons in a state of mental dependence and intended to protect them in civil matters). By reference to the opinion of the Advocate-General, the court noted that the supply of services for the benefit of adults lacking legal capacity and intended to protect them in civil matters falls within the concept of "the supply of services closely linked to welfare and social security work". But where the services are provided in a more general context with other services that would be linked to the specific skills of a lawyer, the exemption would not apply even if they are performed in the context of assistance to a person lacking legal capacity.

The second condition of the exemption is that services have to be supplied by bodies governed by public law or other organisations recognised by the Member State as being devoted to social wellbeing. EQ could fall within the exemption only if he came under the category of "other bodies recognised by the Member State concerned as being devoted to social wellbeing". The rules are to be decided by each Member State. In doing so, the Member State would have to take into account a number of factors, which:

> "may include the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies, in particular when the private operators maintain contractual relations with those bodies".

The court noted that where a Member State fails to observe the limits of its discretion, a taxable person can rely on the exemption to oppose national legislation incompatible with that provision.

Luxembourg did not avail of the option to refuse to grant the exemption provided for in Article 132(1)(g) to bodies that systematically aim to make a profit, with the result that that Member State cannot object to the taxable person's wishing to be granted that exemption if that person pursues such an objective. The court provided some guidelines for the referring court to take into account in considering whether EQ fell within the exemption. The court held that:

> "it is not excluded that a lawyer supplying such services of a social nature may benefit, for the purposes of the business he or she operates and within the limits of those supplies, from recognition as a body devoted to social wellbeing, and such recognition must however necessarily be granted by a judicial authority only if the Member State concerned, by refusing that recognition, exceeded the limits of the discretion which it enjoys in that regard".

The third issue related to the principle of the protection of legitimate expectation, which extends to any person in a situation in which an administrative authority has caused that person to entertain expectations that are justified by precise assurances provided to him or her. The court stated that the mere acceptance, even for several years, by the Luxembourg tax authority of the VAT returns submitted by EQ, which did not include the amounts relating to the "representative services", does not amount to a precise assurance given by that authority that VAT is not to be applied to those transactions. It cannot, therefore, give rise to a legitimate expectation on the part of that taxable person that the transactions concerned are not taxable. In addition, where the supplier of the services did not collect VAT on the consideration received and is not in a position to pass on the VAT charge subsequently levied by the tax authority, that consideration is to be treated as VAT-inclusive.

02 Taxable Persons Acting as Such – Non-economic Activity

The decision of the CJEU in ***The Commissioners for Her Majesty's Revenue & Customs v Wellcome Trust Ltd*** C-459/19 was delivered on 17 March 2021 and concerned the interpretation of Article 44 of the VAT Directive. Wellcome Trust Ltd (WTL) is the sole trustee of a charitable trust, the Wellcome Trust, which makes grants for medical research. WTL receives income from investments and from other, minor activities (sales, catering and rental of properties) in respect of which it is registered for VAT. The funding for the grants is derived mainly from investment income, a significant proportion of which comes from overseas investments. WTL receives services from investment managers established within and outside the EU. It applied the reverse charge to services received from outside the UK. The issue was whether input VAT recovery arose on supplies outside the EU. WTL submitted claims for refunds on the ground that it had overpaid output VAT in relation to the services received.

It argued that, although it was a taxable person under Articles 2 and 9 of the VAT Directive, it was not a taxable person "acting as such" within the meaning of Article 44 of the VAT Directive. The court previously dealt with a case involving the Wellcome Trust that related specifically to whether economic activity included the purchase and sale of shares by a trustee in the course of the management of the assets of a charitable trust. It was held that the concept of "economic activity" did not include such an activity.

In this case, the provisions of the Implementing Regulation (EU) No. 282/2011 (IR) were relied on. Recital 19 provides that "it should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person". Article 19(2) of the IR provides that:

> "for the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of [the VAT Directive], a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person. ....Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of [the VAT Directive], provided there is no abusive practice."

WTL used the services purchased from suppliers established outside the EU exclusively for its business activity and did not use those services for taxable supplies of services within the meaning of Article 2(1) of the VAT Directive. The referring tribunal raised a number of queries, the first of which related to the situation where a taxable person carrying on non-economic activities acquires services for the purposes of those non-economic activities. Are those services regarded as being supplied to the taxable person acting as such so that Article 44 applies? Under Article 44 the place of supply of services to a taxable person acting as such is, in principle, the place where that taxable person has established its business. The phrase "taxable person acting as such" also appears in Article 2(1), and under Article 9(1) a taxable person acts as such where it acts for the purposes of its economic activity. In the context of WTL's investment activities, it is not a "taxable person acting as such" within the meaning of Article 2(1)(c). But the court stated that this does not necessarily mean that WTL is not a taxable person acting as such in the context of Article 44, as Article 43 indicates that the EU legislature wanted to give the expression a different meaning when it came to looking at the place-of-supply rules.

The court stated that:

> "Article 43(1) of the VAT Directive specifically provides that, for the purpose of applying the rules concerning the place of supply of services, a taxable person who carries out both taxable supplies of services, within the meaning of Article 2(1) of that directive, and activities 'that are not considered to be taxable supplies of… services in accordance with [that provision] shall be regarded as a taxable person in respect of all services rendered to him'."

Article 43(1) provides an extended and derogating definition of the concept of "taxable person" solely for the purpose of applying the rules concerning the place of supply of services.

Under these provisions a taxable person can be acting as such even when it is acting for the purposes of its non-economic activities. But the court said that such an interpretation of Articles 43 and 44 cannot lead to a situation in which entities that are taxable persons, within the meaning of Article 43(1), and to which services are rendered are always to be regarded as acting as such. A distinction is made between economic and non-economic activities according to criteria that are different from those distinguishing between business use and use for non-business purposes, in particular for private purposes. So, in applying Article 44, the taxable person acts as such as regards its non-economic activities in so far as they are carried out in a business capacity. The activities of WTL in the context of its management of assets of the trust were carried out in a business context, not in a private capacity. The services that it received were for the purposes of its business activity. The court referred to Directive 2008/8 Recital 4, which provides that the general rule for supplies of services to taxable persons with respect to the place of supply of services should be based on the place where the recipient is established, and that taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Where the services are received for private use, the person is regarded as a non-taxable person.

The court held that, where a taxable person carrying on a non-economic activity acquires services for the purposes of that non-economic activity, those services are supplied to that taxable person acting as such, within the meaning of Article 44 of the VAT Directive, with the exception of services intended for the private use of the taxable person or for that of its staff. The court rejected the argument that WTL carried out its activities similar to a private investor or that it was carrying out the activities on a private basis, as its non-economic activity was not carried out in a private capacity.

03 Head Office to Branch Supplies – Head Office Member of a VAT Group

The CJEU delivered its judgment in the case of ***Danske Bank A/S, Danmark, Sverige Filial v Skatteverket*** C-812/19 on 11 March 2021, dealing with the VAT group provisions (Article 11 of the EU VAT Directive). Danske Bank's principal place of business is Denmark, and it operated in Sweden via its branch Danske Bank, Danmark, Sverige Filial (DBDSF). Danske Bank is a member of a Danish VAT group. Its branch in Sweden is not part of any Swedish VAT group. Similar to the Irish provision, only entities established in Denmark could be a member of a VAT group there. The matter at issue was the charging of costs for use of a computer platform by Danske Bank to DBDSF.

The question referred was whether a head office and its branch are treated as separate taxable persons where the head office is a member of a VAT group and provides services to its branch. The court referred to ***Morgan Stanley*** C-165/17, in which it was held that a supply between head office and branch:

> "is taxable only if there is a legal relationship between the provider of the service and the recipient in which there is

> reciprocal performance. In the absence of any legal relationship between a branch and its principal establishment, which, together, form a single taxable person, reciprocal performance between those entities constitutes non-taxable internal flows of funds, unlike taxed transactions carried out with third parties."

In assessing whether a legal relationship exists, the activities of the branch have to be considered – i.e. does it carry on an independent economic activity and bear the economic risk for such activities? In addition, consideration has to be given to whether either the head office or the branch is a member of a VAT group in its place of establishment (bearing in mind that in Denmark only permanent establishments there can be members of a VAT group).

Under the VAT group provisions, a VAT group is treated as a single taxable person. In ***Skandia*** C-7/13 the court held that services supplied by a principal establishment in a non-EU country to its branch established in a Member State constitute taxable transactions when the branch is a member of a VAT group. The court indicated that the same principle applies where the services are supplied between a principal establishment situated in one Member State and belonging to a VAT group within that Member State and a branch established in another Member State. As Danske Bank is a member of a VAT group, it is the VAT group that supplies the services to DSDSF (of which it cannot be part due to the territorial limits). This means that Danske Bank and its branch are not regarded as being a single taxable person. The issue of fiscal neutrality had been raised by Danske Bank, but the court rejected the suggestion that this principle was breached. In this regard it stated that:

> "having regard to the effects of the formation of a VAT group and its territorial boundaries, a transaction between Danske Bank's branch in Sweden and the Danish VAT group at issue, to which that company's principal establishment belongs, cannot be regarded as similar to a transaction between a branch and a principal establishment which is not part of a VAT group".

On the basis that Danske Bank was a member of a VAT group, it is to be treated as a separate taxable person where it provides services to DBDSF.

04 Exemption for Medical Services – Composite and Multiple Supplies

On 4 March 2021 the CJEU delivered its judgment in the case of ***Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira*** C-581/19, which related to the interpretation of Articles 2(1)(c) and 132(1)(c) of the EU VAT Directive. The Portuguese Tax and Customs Authority raised VAT assessments on Frenetikexito in relation to certain services supplied by it. It had treated the services as being exempt from VAT (nutrition monitoring and advice services and services concerning sports, physical wellbeing and fitness activities). Frenetikexito is a commercial entity that manages and operates sports facilities, physical wellbeing and fitness activities, and activities promoting and supporting human health, such as nutrition monitoring and advice and physical evaluation. It provided nutrition monitoring services on its premises through a qualified, certified nutritionist. Not all courses included nutrition monitoring, but where customers signed up for the service, a fee was payable whether or not the service was availed of. The nutritionist was an employee of Frenetikexito and supplied the services one day a week. VAT was not applied to these services. As customers paid for the service even where it was not availed of, the tax authority took the view that such a service was ancillary to the principal supply of physical wellbeing and fitness services.

The questions raised included whether there was an independent supply of services where a nutrition monitoring service was supplied by an authorised and certified professional in sports facilities, potentially in the context of programmes that also include physical wellbeing and fitness services. Where the service falls within the exemption in Article132(1)(c), must the service be actually provided, or is it sufficient to make the service available (on the assumption that an exemption applied)?

The court first considered whether the exemption would actually apply. Article 132(1)(c) does not cover services supplied in a hospital environment, centres for medical treatment or diagnosis and other establishments of a similar nature (as exempted under Article 132(1)(b)) but medical and paramedical services supplied outside that context, both at the private address of the person providing the care and at the patient’s home, or at any other place. The court noted (and has held previously) that the concepts of “medical care” and “the provision of medical care” are both intended to cover services that have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders.

Article 132(1)(c) presupposes that two conditions are to be satisfied – the first relates to the purpose of the supply, and the second relates to the fact that the supply is provided in the context of the exercise of the medical and paramedical professions (as defined by the Member State). The nutrition monitoring service in question was provided by a person with a professional qualification entitling them to carry out paramedical activities. If this is confirmed by the national court, then the purpose of a supply must be the focus. The exemptions under Article 132 are exemptions for certain activities in the public interest. Hence, the activity must satisfy this for the exemption to apply. The court noted that the service, in principle, has a health purpose but not, or not necessarily, a therapeutic purpose. Where there is no indication that it is provided for purposes of prevention, diagnosis or treatment of a condition or restoration of health, and accordingly with a therapeutic purpose, a nutrition monitoring service does not fulfil the public-interest requirement. Therefore it is in principle liable to VAT.

A further question raised was whether, if the nutrition monitoring services were independent of the physical wellbeing and fitness services, this would this be relevant in determining the VAT treatment of the services. The court provided some points for consideration in assessing whether the supply of nutrition monitoring services is a distinct and independent supply and reiterated the principles applicable in determining whether there are one or more supplies – a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied; account should be taken of the respective value of each of the benefits making up the economic transaction, one being minimal or even marginal in relation to the other; and account should be taken of the perspective of the customer.

The company is engaged in managing and operating sports facilities and physical wellbeing and fitness activities and it supplies nutrition monitoring services through a professional who is duly qualified and certified for that purpose. The various services supplied were invoiced separately, and it was possible to benefit from some of them without recourse to others. In the court’s view the services are not indivisibly linked and the supplies should be regarded as not constituting a single supply of a complex nature.

The court also considered the services from the perspective of the average consumer. Even if such dietary monitoring services were provided or could be provided in the same sports premises as physical wellbeing and fitness services, the purpose of the dietary monitoring services is not a sporting one but a health and aesthetic one, notwithstanding the fact that a dietary regime may have the effect of contributing to athletic performance. In addition, a significant proportion of the total monthly fees payable related to nutritional advice. The court held that the dietary monitoring services cannot therefore be regarded as ancillary to the main services, which constitute physical wellbeing and fitness services.

VAT News

Ireland

New e-commerce rules

Revenue eBrief No. 70/2021 (30 March 2021) announced the publication of the Tax and Duty Manual (TDM) on "VAT eCommerce – Registration for the One Stop Shop (OSS) and Import One Stop Shop (IOSS) from 1 April 2021". New rules are coming into effect on 1 July 2021 in relation to a variety of e-commerce measures, and the TDM provides an overview of the registration requirements for pre-registrations for the OSS and IOSS from 1 April 2021. (See also article by Dermot Donegan and Denise Corrigan, "VAT e-Commerce Package – 1 July 2021", in this issue.)

Construction services

Revenue eBrief No. 66/2021 was published on 26 March 2021 and stated that the TDM on the VAT treatment of the procurement of certain goods and services by a public body has been updated. The update relates to the implications of the requirement to apply the reverse-charge mechanism to received construction services. The author understands that further guidance is to be provided in due course.

Employee pension funds

Revenue eBrief No. 59/2021 of 23 March 2021 noted that TDM on VAT & Employees' Pension Fund has been updated to provide further clarification on the circumstances where an employer can claim deductibility for costs incurred in relation to such pension funds.

Postponed accounting

Revenue eBrief No. 50/2021 of 9 March 2021 related to changes to the TDM on Postponed Accounting. The TDM provides additional information on the entries required on the VAT3 return and RTD in relation to transactions coming within the postponed accounting procedure.

Passenger motor vehicles

Revenue eBrief No. 31/2021, dated 16 February 2021, outlined that the TDM on "Partial Recovery of VAT on Qualifying Passenger Motor Vehicles" has been updated. The changes were required to reflect the amendment to the definition of "qualifying vehicle" that is effective from 1 January 2021 as a consequence of changes introduced by Finance Act 2019.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Review of Auditors' Transparency Reports

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published "Transparency Reporting: Thematic Review" dealing with reporting by auditors under its jurisdiction (primarily auditors of quoted companies, banks or insurance companies). Transparency reports are a requirement for audit firms that audit public-interest entities, to present information about themselves on their website. It is an opportunity to present information on their processes and systems, governance structure and internal quality control system. Transparency reports also communicate a firm's assessment of challenges that it is facing in relation to audit quality and the effectiveness of its actions to overcome them. With some exceptions, the IAASA found that transparency reports were typically prepared to a good standard, compliant with the Regulation and readily accessible.

New Anti-Money-Laundering Legislation Passed

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 was passed on 18 March. The AML legislation is now described, for the purposes of engagement letters, as the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2021.

The new legislation extends the designation of "tax adviser" to "tax adviser or any other person whose principal business or professional activity is to provide, directly or by means of other persons to which that other person is related, material aid, assistance or advice on tax matters". The definition of "property service provider" has also been extended, to include the letting of property where the monthly rent roll is more than €10,000. Art dealers, galleries, auction houses, and storers or traders of art are also brought in scope where transactions or linked transactions exceed €10,000.

In an extension of the supervision that must be undertaken, the new legislation now specifically requires accountants, tax advisers and other designated persons to "examine the background and purpose of all transactions that – (a) are complex, (b) are unusually large, (c) are conducted in an unusual pattern, or (d) do not have an apparent economic or lawful purpose". This is a more explicit requirement than that in the previous legislation. The Act also provides that enhanced customer due diligence measures are required when dealing with a customer established or residing in a high-risk country. The period of enhanced supervision of politically exposed persons (PEPs) is also extended to "as long as is reasonably required to take into account the continuing risk posed by that person".

The Act tightens up the Regulations regarding the identification of beneficial owners of trusts and restricts banks from dealing with such trusts until their beneficial-ownership information is added to the Register of Beneficial Ownership.

IAS 36: Impairment of Assets

The Irish Auditing and Accounting Supervisory Authority has published an Information Note, "IAS 36 Impairment of Assets – Information Requests from IAASA". The note lists the impairment review information requests that the IAASA has made to issuers during previous financial statement examinations. These include requests to issuers for information on whether impairment reviews were carried out on foot of impairment indicators; details of the growth rate assumptions used on specific CGUs (cash-generating units); and key assumptions used in respect of the calculation of fair value of a CGU. This full list of queries that the IAASA issued to companies in respect of impairment is included in the document, serving as an aide-mémoire for preparers undertaking a reasonableness assessment of their IAS 36 calculation and disclosures.

Charities Governance Code Declarations

Charities have started to receive requests from the Charities Regulator to complete a declaration on their compliance with the Charities Governance Code. If the charity is fully compliant, it completes Declaration A; Declaration B is for charities that are partially compliant; and Declaration C is "not yet started implementing the Code". The Regulator has said that it will be monitoring a number of charities against their declarations during 2021. It acknowledges that "for…smaller charities that are run entirely by volunteers, achieving full compliance with the Code may be an incremental process".

The Charities Governance Code sets out the minimum standards that should be in place to manage and control a charity effectively. Resources and toolkits to help charities implement the Code are available at https://www.charitiesregulator.ie/.

Changes to Audit Regulation Proposed in UK

The UK Department for Business, Energy and Industrial Strategy has issued a white paper on "Restoring Trust in Audit and Corporate Governance" to reform the UK's audit, corporate reporting and corporate governance system. The proposals are very wide-ranging and include a new profession of corporate auditing and additional responsibilities for directors.

Auditors Relying on Technology

The Technology Working Group of the International Auditing and Assurance Standards Board has released support material to help auditors address the risk of overreliance on technology, whether it arises from using automated tools and techniques or using information produced by an entity's systems. See https://www.iaasb.org/publications/addressing-risk-overreliance-technology-arising-use-automated-tools-and-techniques-and-information.

Credit Union News

The Central Bank of Ireland has issued edition 14 of *Credit Union News*. The newsletter covers the application process for the 15% combined concentration limit for house and business lending, a review of the "Financial Conditions of Credit Unions" report for 2020, pre-approval of all PCF roles, anti-money-laundering and details of a CEO forum to facilitate business model development.

Central Bank and Fintech

The Central Bank of Ireland has published updated details of its Innovation Hub. The hub provides a direct and dedicated point of contact for all firms innovating in financial services, from start-ups to incumbents. It was launched in April 2018 to facilitate open and active engagement with the fintech sector. The 2020 update provides details of the types of queries received during the year.

Classification of Debt with Covenants as Current or Non-current (IAS 1)

IAS 1 has been amended effective for annual reporting periods beginning on or after 1 January 2023, with earlier application permitted. The amendment in para. 69 has a very strict requirement for classifying debt as long-term, which requires, in summary, the absolute right to defer repayment for 12 months. To provide some clarity on the requirement, The IFRS Interpretations Committee issued a Tentative Agenda Decision illustrating the application of the amendment. The Committee provided three examples:

- where breached covenants are waived before year-end but only for three months;
- where covenants are only tested at the year-end but are breached at the sign-off date;
- where the covenant requirement increases at a future date and is not currently met but is expected to be met at that future date.

In all three cases the loan was required to be reclassified as short-term.

Disclosure of TWSS, EWSS and CRSS

The Temporary Wage Subsidy Scheme (TWSS), although in theory a “pay-through” scheme, was really just a wage subsidy and should be disclosed as such. The fairest and most transparent way of presenting this in the financial statements is to include the subsidy, along with the Employee Wage Subsidy Scheme (EWSS), as a separate single-line negative expense in the appendix to the financial statements which has the detailed list of expenses and include the wages amount gross in that appendix as well. However, FRS 102 requires specific disclosure of

- the accounting policy adopted for grants,
- the nature and amounts of grants recognised in the financial statements,
- unfulfilled conditions and other contingencies attaching to grants that have been recognised in income and
- an indication of other forms of government assistance from which the entity has directly benefited.

This specific disclosure must be made in the formal financial statements, not just in the appendix. It would be sufficient to disclose “Covid-19 wage subsidies received” and an amount rather than splitting the grant into the component parts. It would not be necessary to separate or to separately identify any social insurance savings attaching to the EWSS or TWSS payments.

The Covid-19 Restrictions Support Scheme (CRSS), also called an advance credit for trading expenses, is different from the TWSS and EWSS. The CRSS does not attach to wages and is an acceleration of the recognition of future expenses; it will therefore attract deferred taxation. Because the CRSS is designed to support businesses that are closed owing to Covid-19, and is not linked to employees, it can be disclosed in "other income" or as a negative expense, although the latter would be more usual and consistent with the treatment of grants generally. The deferred taxation attaching to the CRSS will be the tax deduction forgone in the future because of accepting the subsidy. That will be the CRSS multiplied by the entity's tax rate. Even where there is a loss, the CRSS will reduce any potential deferred tax asset attaching to that tax loss. For very small CRSS claims the deferred taxation may be immaterial and, in those cases, could be ignored.

Can Wage Subsidies Become Repayable If There Is a Successful Business Interruption Insurance Claim?

The Emergency Measures in the Public Interest (Covid-19) Act 2020, as amended by Finance Act 2020, introduced the temporary Covid-19 wage subsidies. Qualification for the subsidies requires, at s28B(2)(a)(i) of the Act, that "there will occur [in the specified period] at least a 30 per cent reduction...in either the **turnover** of the employer's business or in the **customer orders** being received by the employer by reference to the [same period in 2019] [emphasis added]".

Turnover is defined in the Companies Act 2014 as "the amounts of revenue derived from the provision of goods and services falling within the company's ordinary activities", and in FRS 102 revenue is defined as "[t]he gross inflow of economic benefits during the period arising in the course of the ordinary activities of an entity". Receipts under a business interruption insurance policy would not meet the definition of turnover either in the Companies Act 2014 or under GAAP. Therefore, even though a business may be compensated for loss of sales, it still incurred that loss of sales and would be entitled, all other things being equal, to continue to claim the wage subsidy.

Lease Concessions

The International Accounting Standards Board has issued an exposure draft extending the optional Covid-19 lease concession for a further year to cover rents due up to the end of June 2022. The concession allowed for lease holidays given because of the pandemic not to be treated as a lease modification. As a result, the reduction in rent will be recognised in income in the period. Without the concession, the lease right-of-use asset and lease liability would have to be recalculated, with a lot of accounting effort for very little benefit to the end-user of the financial statements. The European Financial Reporting Advisory Group has issued a draft endorsement advice letter relating to this change.

Integrated Reporting

For many users of financial statements, the actual profit made is less important than how that profit was made. Nobody wants to invest in or trade with a company that, for example, uses forced labour anywhere in its supply chain. But many go much further than that and want to invest in or do business with only companies that commit to paying a living wage, treading lightly on our world and engaging in sustainable business practices. Integrated reporting is a way of explaining how the business meets these criteria and integrating those outcomes into the information about how profitable the company is.

However, setting a standard framework of rules for integrated reporting is not as easy as setting accounting standards. The criteria are so diverse, and some aspects are very difficult to measure – and without a way of measuring, it is difficult to provide assurance services on these disclosures. Without assurance, integrated reporting could descend into a "greenwash" farce.

To increase confidence in integrated reporting, the International Federation of Accountants and the International Integrated Reporting Council are launching a new joint initiative: Accelerating Integrated Reporting Assurance in the Public Interest. The initiative recognises that new thinking is required to determine what comprises integrated report assurance and how to best deliver it, given integrated reporting's broad and forward-looking focus on value creation. The first instalment of the initiative sets out what integrated reporting assurance involves for organisations, auditors and others. It also addresses the difference between the two types of assurance – limited and reasonable – and what is required of auditors and organisations to strive for reasonable integrated reporting assurance.

VAT Compensation Scheme for Charities

The deadline for claims is approaching, and claims made after 30 June 2021 will not be included in the scheme. The funding is capped at €5m and divided among the applicants on a pro rata basis. In 2019 13% of claims were successful, and in 2020 10%. However, it is anticipated that, with the shortfall in fundraising and the corresponding reduction in eligible spending, the amount claimed in 2021 will reduce and the percentage refunded will therefore increase. There are reasonable terms and conditions attaching to the scheme, particularly relating to what can be claimed and what is ineligible.

Engagement Letters

A set of free-to-download example engagement letters for accountants in practice is available from ACCA: for Ireland, at https://www.accaglobal.com/content/dam/ACCA_National/ie/technical/engagement%20letters%20Ireland.docx; and for the UK (including Northern Ireland), at https://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2018/april/engagement-letters-for-tax-practitioners.html.

Exceptional Items

Old UK GAAP used to require the disclosure of "exceptional items" on the face of the income statement. FRS 102 has a requirement at para. 5.9 to disclose "additional line items, headings and subtotals in the [profit and loss account] when such presentation is relevant to an understanding of the entity's financial performance". It amounts to the same requirement, but the term "exceptional item" is not used to describe the matter being disclosed. Extraordinary items, which were not allowed under old UK GAAP, continue to be disallowed under FRS 102.

In the case of exceptional expenses arising from Covid-19, a company could choose to disclose separately specific impairments or costs directly arising. However, the separate disclosure should not include general expenses that would have happened anyway or include notional lost sales.

Group Audit and Consolidation Exemptions

One entity regulated by the Central Bank of Ireland (CBI) in a group renders the group non-small, requiring an audit and consolidation and the additional disclosure required of a non-small company, and the PAASE (Provisions Available for the Audit of Smaller Entities) cannot be used for the parent or consolidation. One group company being late filing its annual return means, with the exception of dormant subsidiaries, that the whole group loses audit exemption. The statutory references are below.

A parent company is entitled to the exemption from preparing consolidated account if it is a "small" holding company. However, s280B(5) of the Companies Act 2014 as amended states that the exemption "shall not apply to a holding company of a group if any member of the group is an ineligible entity". An ineligible entity is defined in s12(a)(ii)(d)(I) of the Act as any entity that is regulated by the CBI. If any member of a group is regulated by the CBI, then the group needs to do consolidated accounts, no matter how small it is.

Under s359, audit exemption "applies to any group company in respect of its statutory financial statements for a particular financial year if the group qualifies as a small group in relation to that financial year." As above, s280B out-scopes from the definition of "small group" any group that has a CBI-regulated company in it.

This provision is repeated in s362: "a holding company and the other members of the group are not entitled to the audit exemption referred to in that section if…the holding company…or any of those other [group] members is…a company falling within any provision of Schedule 5 [i.e. CBI regulated]".

Under s364, a group is barred from obtaining audit exemption if any member of the group is late filing its annual return. "[A] holding company and the other members of the group are not entitled to the audit exemption…where any [company in the group] failed to deliver [an annual return on time] to the Registrar [excluding the first annual return of a company]".

Failure to comply with the consolidation or audit exemption requirements is a category 2 offence under the Companies Act 2014.

Government-Funded Not-for-Profit

A number of Government agencies provide funding for community schemes – examples would be Tusla, Pobal, the HSE and local councils. All of this funding comes in scope of the reporting requirements in Department of Public Expenditure (DPER) Circular 13/2014. One of the key requirements of this circular is that each activity that is separately funded within any one entity has to have a separate fund account disclosed in the notes to the annual financial statements. A simple example would be a community facility with funding for a childcare programme and separate funding for an elder-care programme. Such an entity will need to do a mini income and expenditure for each of these activities, showing the separate funding and separate costs of each. This is then consolidated in the main statutory income and expenditure account.

Any wage subsidies received by the entity will need to be included in each fund account. The Government was clear that there is to be no "double-dipping", and entities should not, for example, get full Pobal funding and full wage subsidy funding for the same employee. The rules attaching to the wage subsidies effectively banned a community group from making more in Government supports than the total employee costs. The wage subsidies should only replace the loss of community fundraising or commercial funding where, for example, a charity shop was forced to close due to the pandemic. Auditors will need to look closely at the need for an accrual for repayment where they determine that any of the wage subsidy terms or conditions or any of the other funding conditions were breached for any individual activities on an activity-by-activity basis.

The CRO and the Two-Step Filing Process

When the ACCA collated all of the issues that accountants were having with the new CORE system, the one most mentioned was the “two-stage filing process”. Here is a suggested one-step process for audit-exempt companies to file with the Companies Registration Office (CRO):

- E-mail the completed accounts to the client or otherwise get initial approval from them that they are happy with the accounts.
- Commence the annual return process by uploading these accounts to CORE and getting the signature page.
- Send the signature page, financial statements, abridged accounts, corporation tax computation etc. to the client for signing.
- When the client returns everything signed, complete the filing process.
- If the client is unable to sign or to approve the accounts for whatever reason, abandon the CORE saved file, delete the application and start again at the first step above.

This process does not work for audited accounts for the reasons set out below. The legality of uploading unapproved/unsigned accounts is also discussed below.

Section 324 of the Companies Act 2014 has a requirement that “[e]very copy of every balance sheet which is laid before the members in general meeting or which is **otherwise circulated, published or issued** shall state the names of the persons who signed the balance sheet on behalf of the board of directors [emphasis added]”. It would appear that uploading a set of financial statements would meet the definition of “otherwise circulated, published or issued”. The upload is not publicly visible and is also not “issued”.

That section also states that “[i]f any copy of a balance sheet is…delivered to the Registrar without the balance sheet [the original of it, as distinct from a copy] having been signed as required by this section or without the required statement of the signatory’s name on the copy being included, the company and any officer of it who is in default shall be guilty of a category 2 offence.” It appear that uploading a set of financial statements would meet the definition of “delivered”, as the “delivery” is made when the accounts are submitted, which happens at the end of the process and after a fee is paid. If you like, the accounts have been put in an envelope and addressed but not yet posted. Note also that the CRO system will not let you “go back” in the process: if an issue arises and the financial statement have to be replaced, then the filing needs to be abandoned and started again with the revised financial statements.

Sections 332 and 337 of the Act have similar requirements in respect of the directors' report and auditor's report. However, there is an issue with the signing of the audit report as s337(5) requires that it be dated and signed when filed. An audit report should not be dated and signed before the directors' report and financial statements are signed by the directors. So it would be problematic to have uploaded the financial statements with an audit report attached when you do not know what date the audit report will be signed as you do not know how long it will take the directors to sign the accounts. The one-step process works only for audit-exempt accounts.

European Single Electronic Format (ESEF) Regulation

The Department of Finance has advised that it will postpone the requirement to file ESEF financial statements to financial years beginning on or after 1 January 2021 (previously, 2020). ESEF is for companies that have securities listed on an EU regulated market and was designed to ensure that annual reporting takes place in a single, structured, electronic format so that the financial statements are machine readable. The Central Bank of Ireland has said that it will continue to accept annual financial reports from Irish issuers, subject to the Transparency Regulations and the ESEF Regulation, in PDF format for financial years beginning between 1 January 2020 and 31 December 2020. However, companies may adopt ESEF earlier if they choose.

IAASA Reporting Enforcement 2020

A summary of enforcement activities in the area of financial reporting has been published by the Irish Auditing and Accounting Supervisory Authority. The document covers a review of Bank of Cyprus Holdings, C&C, FBD Holdings, Irish Continental Group and Permanent TSB. Findings were made in the areas of IAS 10: Events after the Reporting Period, IAS 36: Impairment of Assets, IFRS 7: Financial Instruments – Disclosures and IFRS 16: Leases.

C&C Group plc successfully argued that Covid-19 was an adjusting event for a year ended on 28 February 2020. The World Health Organisation (WHO) declared Covid-19 a pandemic on 11 March 2020 (it had declared it "a public health emergency of international concern" on 30 January); Ireland was first "locked down" on 12 March, and the UK on 21 March. C&C successfully argued that the virus was in Europe before its year-end reporting date, and because of that, it recognised an exceptional charge of €47.6m. FBD defended its impairment testing process but agreed to additional disclosures in future. Irish Continental Group successfully defended its accounting for long land leases. Permanent TSB Group also defended its impairment accounting and agreed to expand its disclosures in this regard.

Loans from Directors to a Company: The Company Law Disclosure

A common query to advisory services in ACCA is the disclosures required for credit directors' loans. Section 307 of the Companies Act 2014 requires detailed disclosure of loans entered into by the company "with or for" its directors. What is unclear is whether "with or for" means debit loans only or debit and credit loans.

If it means debit loans only, then the disclosures required are at s309:

- particulars of the principal terms of the arrangement or transaction,

- the name of the director or other person with the material interest and
- the nature of the interest.

There is a blanket exemption for loans that are less than 1% of net assets to a maximum of €15,000 with a minimum of €5,000, and there are other terms and conditions in s309.

If it means debit and credit loans, then s307 applies and the disclosures are:

- the name of the person for whom the arrangements were made and, where that person is or was connected with a director of the company or undertaking, the name of the director,
- the value of the arrangements at the beginning and end of the financial year,
- advances made under the arrangements during the financial year,
- amounts repaid under the arrangements during the financial year,
- the amounts of any allowance made during the financial year in respect of any failure or anticipated failure by the borrower to repay the whole or part of the outstanding amount,
- the maximum amount outstanding under the arrangements during the financial year,
- an indication of the interest rate and
- the arrangements' other main conditions.

If the amount is more than 10% of the net assets of the company, the aggregate amount shall be stated and the percentage of net assets that the total represents. There is a blanket exemption in this section for loans that are less than €7,500.

Covid-19 Ethical Guidance from the FRC and IESBA

The staff of the UK's Financial Reporting Council and the International Ethics Standards Board for Accountants jointly released the publication "Ethical and Auditing Implications Arising from Government-Backed Covid-19 Business Support Schemes". The document sets out important ethical considerations for accountants who are called on to assist their employing organisations or clients in applying for and using Covid-19-related funding or financial support. It also includes guidance for those who prepare related financial information and disclosures, as well as those who independently audit or provide assurance services regarding such information.

Family Leave and Miscellaneous Provisions Act 2021

The Family Leave and Miscellaneous Provisions Act 2021 entitles working parents to an additional three weeks of paid parent's leave for each parent. Previously, parents were entitled to just two weeks of parent's leave. It also extends the period in which the leave can be taken to the first two years after the birth or adoption of a child. The leave is non-transferrable between parents to ensure that both parents are encouraged to and supported in taking time out from work with their child. The Act also removes an anomaly whereby same-sex couples were treated differently to opposite-sex couples. Note that parent's leave is different from parental leave, maternity leave and paternity leave. A summary of all of the provisions in respect of leave for new parents is available at https://www.citizensinformation.ie/en/employment/employment_rights_and_conditions/leave_and_holidays/.

Government Remote Working Strategy

Post-pandemic, the author expects that many people will be returning to blended working, with some days at home and some in a central office. The Government recognises this and has published a remote working strategy (see https://enterprise.gov.ie/en/Publications/Making-Remote-Work.html). The strategy includes measures ranging from better broadband to the right to disconnect and certain rights to request remote working. The creation of remote working hubs and a review of the tax treatment of home office expenses are also addressed.

Recruiting During a Pandemic for Remote Working

The International Federation of Accountants has issued guidance on how to recruit staff to undertake remote working during a pandemic, "Solutions for Staff Onboarding under Remote Work". The guidance looks at getting the technology and environment right, setting work expectations and facilitating staff interaction and includes a checklist of matters for the employer to consider.

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Revenue Commissioner's Update

Maura Conneely Principal Officer, Revenue

Topical and practical updates for Chartered Tax Advisers (CTAs).

Electronic Professional Services Withholding Tax

Introduction

Revenue plans to introduce electronic Professional Services Withholding Tax (PSWT) on **1 July 2021**. This new online service was provided for in Finance Act 2020 and is another step in Revenue's continued digitalisation of its services.

PSWT applies to payments by **accountable persons**, generally State and semi-State bodies, for certain professional services that are provided by **specified persons**. Currently, when accountable persons deduct PSWT from payments, they provide a paper F45 Form to the specified person.

The use of F45 Forms will end on 1 July 2021. Instead, a streamlined online process will allow accountable persons to submit electronic Payment Notifications via the Revenue Online Service (ROS). Specified persons will be able to access up-to-date information on withheld PSWT directly via ROS.

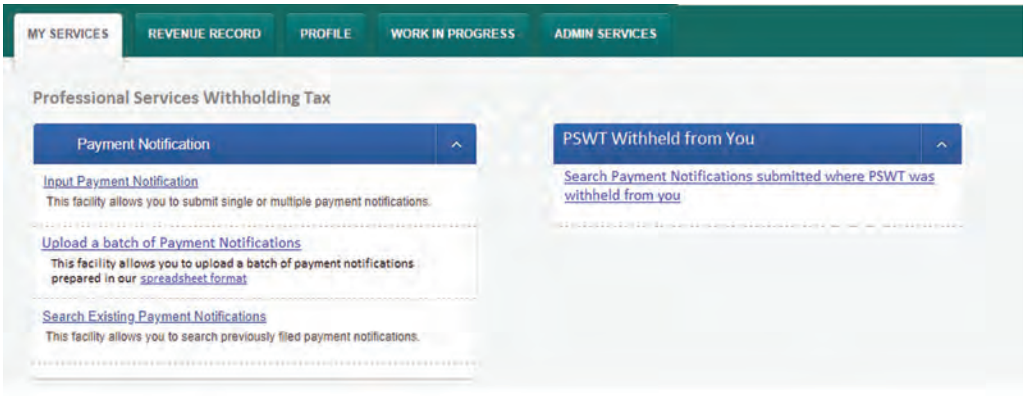
PSWT changes

Finance Act 2020 (section 13) provides for several changes to the administration of PSWT. The following changes will come into operation on 1 July 2021, subject to an order by the Minister for Finance:

- replacement of the paper F45 Form with electronic Payment Notifications (PNs) that are submitted by the accountable person to Revenue,
- acknowledgement of a PN by Revenue with a Payment Notification Reference Number (PNRN),
- requirement for the accountable person to provide the specified person with the details of the PN and, if requested, the PNRN,
- details of each PN being made available by Revenue directly to the specified person,
- cancellation or amendment of PNs if there are errors or omissions,
- information to be provided by non-resident specified persons to the accountable person,
- submission of the PNRN by the specified person to support a claim for a PSWT refund from Revenue,
- requirement for accountable persons to file a one-off part-year F35 Form by 23 August 2021 to cover the period from 1 January 2021 to 30 June 2021 and
- mandatory electronic filing and online submission by accountable persons of the annual F35 Form via ROS by 23 February each year, from 2022 onwards.

ROS changes

From 1 July 2021 a new link will be available on ROS called Manage Professional Services Withholding Tax, for customers who are registered for PSWT. The options available will depend on whether the ROS customer is an accountable person, a specified person or both.



Accountable persons, or their agents, can choose to input individual PNs or to upload multiple PNs as CSV batch files via ROS. Features will include:

- search functionality, including export of search results for calculation of total PSWT deducted in a period,
- amendment or cancellation of previously submitted PNs and
- a facility to produce a Payment Notification Acknowledgement PDF file for each PN submitted or for a group of PNs, which the accountable person can provide to the specified person.

Specified persons will have access to PN details on ROS but cannot make amendments. Features will include:

- search functionality, including export of search results, and
- a facility to produce Payment Notification Acknowledgement PDF files.

Further detailed information and sample batch notification files are available on Revenue's website at https://revenue.ie/en/self-assessment-and-self-employment/epswt/index.aspx.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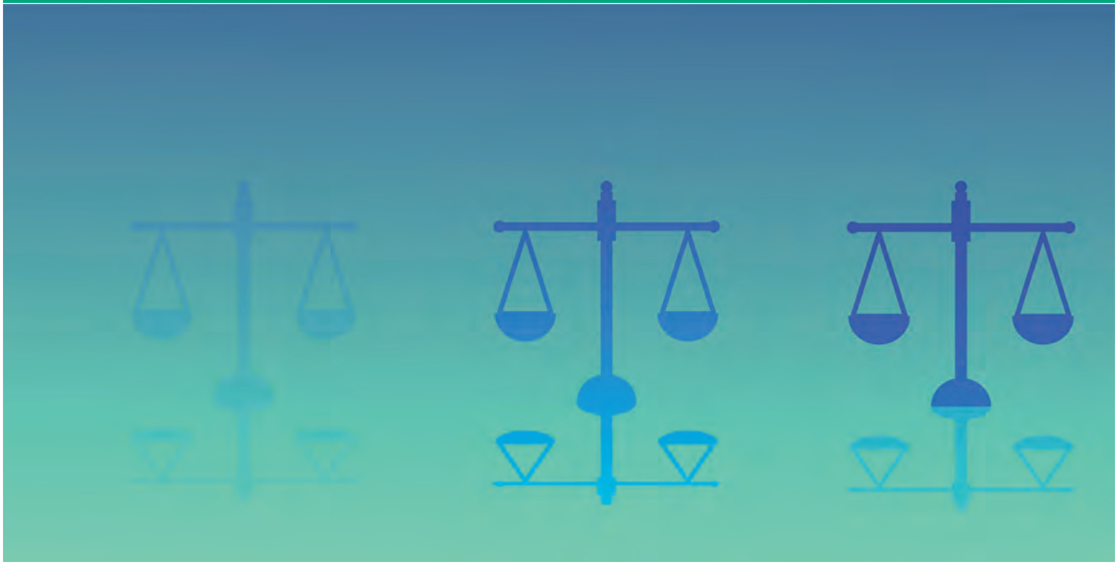
Lee v Revenue Commissioners: Mapping the TAC's Jurisdiction



Introduction

The recent decision of the Court of Appeal (CofA) in *Lee v Revenue Commissioners*[1] clarifies the principles that are applicable in determining the jurisdictional scope of the Tax Appeals Commission (TAC). Although the jurisdiction of the TAC's predecessor, the Appeal Commissioners (ACs), was at issue in this case, the principles promulgated by the CofA are relevant to the TAC's jurisdiction.

Overview of the TAC

The TAC was established in 2016 pursuant to s3 of the Finance (Tax Appeals) Act 2015 ("the 2015 Act") to replace the Office of the ACs as the independent statutory body responsible for the administration and determination of tax appeals. The TAC's functions are broadly stipulated in s6 of the 2015 Act as including:

> "doing **all such other things** as they consider **conducive to the resolution of disputes** between appellants and the Revenue Commissioners **and the establishment of the correct liability to tax of appellants** [emphasis added]".

The TAC's procedural autonomy is reflected in Part 40A of the Taxes Consolidation Act 1997 (TCA 1997), which prescribes the appeals process.[2] In addition to determining the validity

1 [2021] IECA 18.

2 Part 40A of TCA 1997 replaced Part 40, which dealt with appeals to the ACs before the introduction of the TAC by the Finance (Tax Appeals) Act 2015.

of an appeal and the steps to be taken by the parties to resolve the dispute, the TAC is entitled to determine an appeal without a hearing where appropriate.[3]

The Decision

Overview

In *Lee v Revenue Commissioners* the taxpayer claimed that Revenue had accepted a payment he made as settlement of a tax liability and was bound by the agreement. The case concerned whether the ACs had jurisdiction to determine whether a contract had been concluded between the taxpayer and Revenue in the circumstances. The High Court held that the ACs had such jurisdiction, emphasising the elaborate procedures enacted by the Oireachtas for determining a taxpayer's liability and the need to avoid an artificially narrow construction of the powers and authority conferred on the ACs.

Almost exactly three years from the date of the High Court decision the CofA delivered its judgment, on 28 January 2021. At the very outset, the CofA framed the appeal as presenting a "net issue as to the scope of the jurisdiction of the Appeal Commissioners… when hearing appeals against assessments to income tax". Ultimately, the CofA overturned the High Court's decision, concluding that the ACs' jurisdiction extended to determining whether an assessment properly reflects the statutory charge to tax, having regard to the relevant provisions of the taxing Act and any incidental questions of fact and law. The CofA held that the ACs' jurisdiction did not extend to findings otherwise relevant to dealings between taxpayers and Revenue and, therefore, that the ACs were not entitled to adjudicate on whether a liability to tax had been contractually settled.

Jurisdiction mapped by statute

The CofA applied the well-established "trite and historical principle of law that a creature of statute must live by the statute",[4] highlighting that the ACs' functions are limited to those expressly conferred by the TCA and that the ACs do not otherwise enjoy any inherent or general jurisdiction.

In light of the foregoing, the CofA proceeded to analyse carefully the provisions of Part 40 of TCA 1997[5] to determine the scope of the ACs' jurisdiction. The CofA noted the following four key features in this context:

- the definition of the appellate jurisdiction of the ACs,
- the parameters of the permissible grounds of appeal,
- the orders that the ACs may make and
- the powers conferred on the ACs to enable the appeal to be heard.

The CofA concluded that the statutory scheme prescribed by TCA 1997 limited the ACs' jurisdiction to determining whether Revenue had correctly reflected the statutory charge to tax in the relevant assessment in accordance with the applicable charging provision and in light of the relevant facts and law.

Existing case law on jurisdiction of tax tribunals

After its review of the statutory scheme prescribed by TCA 1997, the CofA proceeded to consider case law on the jurisdiction of tax adjudicative bodies in Ireland and the UK. The CofA divided the precedents into two categories:

- older cases concerning the jurisdiction of the appellate tribunal established under the Income Tax Act 1918[6] and

3 In 2020 59% of the TAC's determinations were issued without a hearing.

4 *County Louth Vocational Educational Committee: (now known as Louth and Meath Education and Training Board) v The Equality Tribunal* [2016] IESC 40 at 35.

5 As noted, Part 40 of TCA 1997 prescribed the appeals process under the AC system before the introduction of the TAC by the Finance (Tax Appeals) Act 2015. Part 40 was replaced by Part 40A for appeals under the TAC system.

6 See, for example, *IRC v Sneath* [1932] 2 KB 362; *R v Income Tax Special Commissioners ex parte Elmhirst* [1936] 1 K.B. 487.

- more modern cases concerning the extent to which the ACs had jurisdiction to determine challenges to Revenue assessments based on public law.[7]

In relation to the first category, the CofA noted that although the extent of jurisdiction was not directly at issue, it was generally described in narrow terms and by reference to the concept of "assessment". The CofA was, however, careful to point out that the focus on "assessment" did not detract from the important function of the ACs in interpreting and applying questions of fact or law incidental to assessment, as follows:

> "the appellate tribunal may have to determine issues of fact or law in order to decide if there is a liability to tax in the first place and may in that context have to decide questions of fact or law incidental to that issue or to questions of quantum. **The questions of law thus arising before the Commissioners may sometimes be complex, and indeed may on occasion (and in particular when issues of European law arise) stray outside the direct interpretation of the tax code**. However, they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount. That liability, and those questions, all arise from the assessment to tax which defines the appellate body's jurisdiction [emphasis added]."

The CofA noted that the second category of cases presented similar issues to the facts under consideration in *Lee v Revenue Commissioners* in that they concerned the question of whether the ACs have jurisdiction to determine matters not relevant to the assessment to tax and charging provisions but relevant to whether Revenue has by its actions disabled itself from enforcing a tax liability. Based on its review of the cases in this category, the CofA made the following findings on the jurisdiction of the ACs:

- The ACs do not have jurisdiction to grant any form of declaratory relief.
- The ACs have jurisdiction to determine that no tax is due in a particular tax dispute. Although the reduction of an assessment to nil could be portrayed as being similar to declaratory relief, the CofA confirmed that the ACs' ability to determine quantum must include nil quantum and the ability to determine that no tax was properly due in accordance with the relevant charging provisions.
- Irish law does not support the UK position, which entitles tribunals to determine certain public law questions (including settlements between the revenue authority and the taxpayer) without such jurisdiction being expressly conferred on the tribunal by statute.

Determination of the appeal

Acknowledging that the High Court's decision was "one of practicality and convenience", the CofA ultimately found that it was not supported by the provisions of TCA 1997 and could not, therefore, be upheld. The CofA summarised the jurisdiction of the ACs as follows:

> "their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment."

7 See, for example, *Aspin v Estill* [1987] STC 723; *Menolly Homes Ltd v The Appeal Commissioners* [2010] IEHC 49; *Stanley v Revenue Commissioners* [2019] 2 IR 218.

In this case, the taxpayer's claim was one of contract law (i.e. the existence and enforceability of a settlement agreement with Revenue), the determination of which was not within the jurisdiction specifically conferred on the ACs by TCA 1997. Reiterating the importance of the statutory framework in this context, the CofA stated that if the legislature had intended to confer additional functions on ACs, it would have been "expressly noticed in the legislation, and lucidly identified and delineated".

Scope of EU law and constitutional obligations

Having determined the case in Revenue's favour, the CofA proceeded to provide further detail on the scope of the ACs' jurisdiction by confirming that, in exercising its functions, as detailed above, the ACs are subject to the following obligations:

- to uphold the supremacy of EU law when dealing with any matters within their remit and
- to afford parties constitutional fair procedures in matters before them.

Although *obiter*, this passage of the judgment provides a very useful insight into the CofA's view of the relevant jurisprudence, confirming that although the jurisdiction of the ACs is directed towards the statutory charge to tax, that jurisdiction cannot be exercised in a vacuum divorced from these fundamental, overarching principles.

Supremacy of EU law

The CofA upheld the long-standing principle of EU law that national courts and tribunals are obliged to give full effect to EU law by disapplying, where necessary, national law that conflicts with or infringes a provision of EU law. The CofA noted that this obligation to disapply, and its application to domestic tribunals, had recently been reaffirmed by the Court of Justice of the European Union (CJEU) in *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission* C-378/17, highlighting that:

"The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners **must address that contention if it is relevant to the matter with which they** are seised and, if it is appropriate and necessary to do so to decide that case, to **disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated** [emphasis added]."

The CofA clearly recognised that the ACs' obligation to uphold the supremacy of EU law in this context meant that the ACs must have the power to give full effect to EU law in matters falling within their jurisdiction. The established mechanisms to achieve this objective include direct effect, which involves the disapplication of a domestic law that is inconsistent with EU law, and indirect effect or conforming interpretation, which involves interpreting the domestic provision in a manner that ensures that it does not infringe the relevant EU law.[8] Indeed, the obligation to disapply and the duty of conforming interpretation were recently upheld and applied by the TAC to set aside an assessment to stamp duty by reference to the Capital Duties Directive.[9]

Constitutional fair procedures

The CofA also acknowledged that the ACs are under an inherent obligation to discharge their statutory role in a manner that adheres to the

8 The doctrine of indirect effect requires national courts and tribunals to adopt a conforming interpretation of national law in the light of the wording and purpose of EU law in order to achieve the result required by the relevant EU law provision where possible (see *Von Colson* C-14/83). The doctrine of indirect effect has been applied on numerous occasions by the UK First-tier Tribunal to give full effect to EU law (see, for example, *Baillie Gifford v HMRC* [2019] UKFTT 410 (TC)).

9 Determination 08TACD2021. The TAC has been requested to state and sign a case for the opinion of the High Court in respect of this determination.

principles of procedural fairness, in line with the High Court's decision in *CG v The Appeal Commissioners*, where it was stated that:

> "If the applicant's claim that to proceed with the appeal hearing is in breach of his constitutional right to a fair trial or his privilege against self-incrimination is well founded then the Appeal Commissioner would be acting contrary to the presumed intention of the Oireachtas that the appeal procedure prescribed by the Taxes Consolidation Act 1997 be conducted in accordance with the principles of constitutional justice if it were to proceed."[10]

In the same way as EU law necessarily overlays the jurisdiction of the ACs, the CofA recognises that the ACs must exercise that jurisdiction in a manner that does not offend relevant constitutional principles.

Comment

The CofA's decision in *Lee v Revenue Commissioners* assists in delineating the TAC's jurisdiction, clarifying that the scope of its remit is to be determined based on the express wording of the 2015 Act and Part 40A TCA 1997. The TAC does not have an inherent or general jurisdiction beyond these legislative provisions. As noted above, the 2015 Act and Part 40A TCA 1997 cast the TAC's functions and procedural autonomy quite broadly. As the CofA's decision was based on the pre-TAC legislative framework, it would be interesting to see whether the CofA would have been influenced by the additional obligations and autonomy conferred on the TAC when compared with its predecessor and, in particular, how the CofA would have construed s6(2) of the 2015 Act, which, as noted, describes the TAC's functions as including doing anything that the TAC considers conducive to the resolution of a dispute between a taxpayer and Revenue and the establishment of the correct liability to tax. Although these additional features do not relate directly to the question of jurisdiction, the four key features highlighted by the CofA when assessing the scope of the ACs' jurisdiction in light of Part 40 TCA 1997 suggest that a more holistic approach to the construction of the relevant statutory provisions is required. It remains to be seen whether the changes introduced by the 2015 Act and Part 40A TCA 1997 would impact on the question of jurisdiction in a similar dispute under the TAC system.

The CofA clearly viewed EU law as being within the remit of the ACs' jurisdiction by virtue of the principle of supremacy, notwithstanding that it may involve straying "outside the direct interpretation of the tax code". The CofA also helpfully, but perhaps unsurprisingly in light of the jurisprudence of the CJEU, confirmed that the ACs are obliged to give full effect to EU law where relevant due to "the mandates of European law". By extension, this effectively requires the TAC to resolve an infringement of EU law by a provision of domestic tax law in one of the following ways:

- It could give indirect effect to the relevant EU law by adopting, insofar as is possible, an interpretation of the infringing domestic provision that conforms with the relevant EU law. Although the TAC is not bound by the confines of domestic rules of statutory interpretation in this context,[11] a conforming interpretation is not permissible where it produces a result that is *contra legem* (i.e. contrary to the clear meaning of the domestic legislation).[12]

10 *CG v The Appeal Commissioners* [2005] 2 IR 472 at 477, 478.

11 See *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60; *Murphy v Bord Telecom Eireann* [1989] ILRM 53. The doctrine of indirect effect has been applied by the UK courts in a number of cases, including *Lister v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] STC 1252 and *Vodafone 2 v HMRC* [2009] STC 1480, and by the UK First-tier Tribunal in a number of cases, including *Ampleaward Ltd v Revenue and Customs Commissioners* [2020] STC 2054, *BAV-TMW-Globaler-Immobilien Spezialfonds v Revenue and Customs Commissioners* [2019] UKFTT 129 (TC) and *Trustees of the P Panayi Accumulation and Maintenance Trusts Nos 1–4 v Revenue and Customs Commissioners* [2020] SFTD 209.

12 See *Environmental Protection Agency v Neiphin Trading Limited* [2011] 2 IR 575; *The Minister for Justice, Equality and Law Reform v Ciaran Tobin* [2008] 4 IR 42; *Albatros Feeds Limited v Minister for Agriculture* [2007] IR 221.

- Where a conforming interpretation is not available in the circumstances, it could give direct effect to the relevant EU law by disapplying the relevant domestic provision in the circumstances.[13]

Although, as noted, the TAC recently exercised its powers in this context in light of CJEU jurisprudence,[14] the CofA's articulation of the relevant principles provide additional clarity to this evolving area of law.

13 The ability of the TAC and other statutory bodies to disapply domestic law that infringes EU law was also highlighted by the Supreme Court in *An Taisce v An Bord Pleanála* [2020] IESC 39 and, more recently, in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24.

14 TAC determination 08TACD2021.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The Susquehanna Case – Group Relief s411 TCA 1997

Introduction

The Tax Appeals Commission delivered its determination in the appeal by Susquehanna International Group Ltd against the Revenue Commissioners on 12 April 2019, finding in favour of the appellant. In November 2020 the High Court heard an appeal by the Revenue Commissioners against the Tax Appeals Commission determination. The judgement in the High Court appeal is still pending.

Background

Tax Appeal 17TACD2019, otherwise known as the Susquehanna case, concerned entitlement to group relief under s411 of the Taxes Consolidation Act 1997 (TCA 1997). The Revenue Commissioners (Revenue) denied the Susquehanna Group's claims for group relief on €46.6m of losses for the years 2010, 2011 and 2012 because the parent in the Susquehanna Group structure is a Delaware corporation under the Delaware Limited Liability Company Act, i.e. an LLC. Revenue submitted that:

- the LLC is not a company for Irish tax purposes; and
- the LLC is not resident in the US for tax purposes on the basis that it is treated as transparent for US tax purposes.

The relevant Irish-resident companies controlled by the LLC in this case are referred to as "SL", "GL" and "AL". As shown in Fig. 1 below, claims for group relief were made as follows:

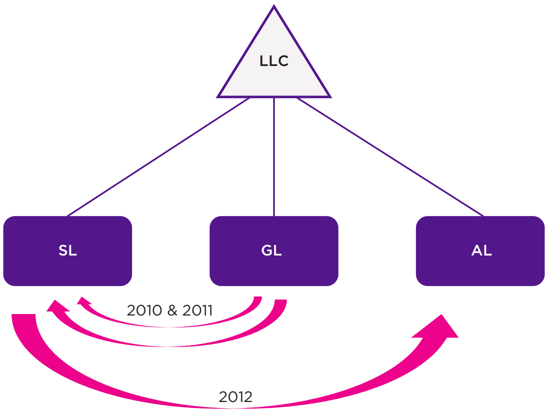

Fig. 1: Susquehanna International Group Ltd structure.

- 2010 – GL surrendered group relief to SL,
- 2011 – claim for GL to surrender group relief to SL and
- 2012 – claim for SL to surrender group relief to AL.

Issues To Be Determined

Section 411 TCA 1997 provides for the allowance of trading losses of a group member against the profits of other group members. A group for this purpose consists of a parent **company** and its 75% subsidiaries. Two companies are deemed to be members of a group of companies if one company is a 75% subsidiary of the other company or both companies are 75% subsidiaries of a third company. The group relief provisions apply to **relevant-territory resident companies** only, i.e. countries that are Member States of the EU or the EEA or countries with which Ireland has signed a double taxation agreement.[1]

Accordingly, the main questions to be answered by the Tax Appeals Commission (TAC) were:

- Is the LLC a "company" for the purposes of s411 TCA 1997?
- If so, is it resident in the US for the purposes of tax?

The Susquehanna Group also submitted that, under the non-discrimination provisions[2] of the Ireland–US double taxation agreement ("the DTA"), there is an entitlement to group relief as if their common parent were an Irish-resident company. Accordingly, another question to be answered by the TAC was:

- What, if any, is the impact of anti-discrimination provisions in Article 25 of the DTA?

Is the LLC a "company" for the purposes of s411 TCA 1997?

Section 4(1) TCA 1997 defines a "company" for the purposes of the Tax Acts as "any body corporate".

The TAC heard evidence from expert witnesses on both sides. In its analysis the TAC stated that an LLC is a hybrid entity with some of the characteristics of an Irish company and some of the characteristics of a transparent entity such as a partnership. The corporate characteristics of an LLC, supporting the proposition that it is a "body corporate", include its:

- separate legal personality distinguishable from its members;
- ability to own property in its own right; and
- ability to sue and be sued in its own right.

A fourth characteristic of a "body corporate", and one that was considered to be essential for the LLC to be a "body corporate", is perpetual succession.[3] Much of the evidence given by the expert witnesses focused on this point – each

1 Before Finance Act 2012 (i.e. for the tax years 2010 and 2011 in this case) group relief applied only to companies resident in the EU or EEA – it would not have applied to companies resident in the US. It is accepted in this case that the version of s411 TCA 1997 that existed before Finance Act 2012 discriminated against companies resident outside the EU/EEA but resident in DTA countries. Accordingly, it is accepted in this TAC decision that the Susquehanna Group is potentially able to claim group relief under s411 TCA 1997 in respect of both the claims arising in tax years before the change in legislation and the claim in the tax year after the legislation was changed.

2 Article 25 of the DTA.

3 Perpetual succession refers to continuous succession; it is a principal characteristic of a body corporate and is therefore essential if the LLC is to be considered a body corporate.

arguing opposing views on whether the LLC has perpetual succession or not. The existence (or otherwise) of perpetual succession turned on the consequences arising for the LLC when its members cease to exist.

The expert witnesses for Revenue submitted that where an LLC agreement is silent on what happens when the members cease to exist[4] (as was the case here), s18-801(a)(4) of the Delaware statute operates to dissolve the LLC and by virtue of this dissolution, they argued, the LLC itself ceases to exist; accordingly, the LLC does not have perpetual succession and, as a result, is not a body corporate.

However, the TAC agreed with the expert witnesses for the Susquehanna Group, who submitted that an LLC does not cease to exist simply because dissolution has been effected by virtue of s18-801(a)(4) of the Delaware statute. Rather, it continues to exist, still owning assets and remaining subject to liabilities. A winding-up would be needed for the LLC to come to an end and, in fact, s18-201(b) of the Delaware statute provides that an LLC does not cease to exist until its certificate of formation is cancelled.

Dissolution is simply a change in status comparable to an Irish company's being struck off the register where no filings are made with the Companies Registration Office within the requisite time periods. Such an Irish company can make an application to court for an order under s738(3) of the Companies Act 2014 to deem that the company continued in existence as if it had not be struck off. Similarly, an LLC can be brought back to life with the appointment of new members or even just the appointment of personal representatives for the estate of the last surviving member.

The TAC came to the conclusion that, under Delaware law, an LLC enjoys perpetual succession and, accordingly, it is a body corporate for the purposes of s411 TCA 1997.

The TAC determination also provides that the more appropriate test is to determine whether an entity **is capable of** perpetual succession. An LLC and an Irish company both enjoy the possibility of perpetual succession by the introduction of new members, thereby preserving the life of the entity.

Is the LLC resident in the US?

Article 4 of the DTA sets out the definition of "resident of a Contracting State" as:

> "any person who, under the laws of that State, is liable to tax therein, by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature".

Section 411(1)(a) TCA 1997 states that "tax":

> "in relation to a relevant Member State other than the State, means any tax imposed in the Member State which corresponds to corporation tax in the State".

The expert witnesses for Revenue confirmed that the US Tax Code does not have a definition of "residence" for corporations or other business entities. Rather, the Code sets out the procedure for taxing the entity depending on the structure employed.

The TAC concluded that, using a literal interpretation of Article 4 of the DTA, an LLC is not resident in the US as it is not liable to tax in that jurisdiction by reason of any of the criteria listed in Article 4 of the DTA. However, the TAC stated that this is not determinative of the matter as the TAC was required to consider the legal basis for the interpretation and application of an international agreement.

Interpretation of a Tax Treaty

The TAC considered *Kinsella v Revenue Commissioners* [2011] 2 IR 417 and *McGimpsey*

4 The expert witness also stated that if the LLC agreement had provided for a continuation requirement, the LLC would have had perpetual succession and, accordingly, would have been a body corporate.

v Ireland [1988] IR 567, as well as the general rule of interpretation in Article 31 of the Vienna Convention, in determining that it had a responsibility to use a purposive interpretation of Article 4 of the DTA. It noted that the preamble to the DTA sets out its purposes of reducing or eliminating double taxation of income earned by a resident of one country from sources in the other country, and of preventing tax avoidance or evasion. However, the TAC also observed that the purpose of the treaty included the promotion of international trade between two countries and the mitigation of administrative complexities arising from having to comply with two uncoordinated taxation systems.

To mitigate the administrative complexities of the US and Irish domestic tax policies (such complexities being the use of a residence-based system of taxation in Ireland whereas the US lacks a concept of tax residence), the TAC followed a purposive interpretation of the DTA and determined that the LLC was resident in the US for the purposes of s411 TCA 1997.

The TAC came to this conclusion by taking a purposive approach to the interpretation of the term "liable to tax" for the purposes of the DTA. The LLC members were also flow-through entities for tax purposes and, ultimately, the profits of the LLC were taxed in the hands of five US individuals at the ultimate owner level. Expert witnesses for the Susquehanna Group argued that this taxation brought the LLC within the US tax code, albeit that the tax on the profits of the LLC is paid at member level. They submitted that the ability in the US Tax Code to "check the box" open or closed (thereby treating the LLC as either transparent or opaque) gives a choice. It permits that either the LLC can pay the tax or the members can pay the tax, but ultimately the tax paid in the US would be federal income tax.

The TAC followed the very similar case of *TD Securities (USA) LLC v HMQ* [2010] 12 ILTR 783/2010 TCC 186, which concluded that:

> "implicit in the clear intention of the OECD countries, including Canada and the US, that treaty benefits be enjoyed by TD LLC in the present circumstances, and given the context of the Canadian and US tax regime and the text of the US treaty:
> (i) TD LLC must be considered to be a resident of the US for purposes of the US treaty otherwise the treaty could not apply;
> (ii) TD LLC must be considered to be liable to tax in the US by virtue of all of its income being fully and comprehensively taxed under the US Code albeit at the member level; and
> (iii) The income of TD LLC must be considered to be subject to full and comprehensive taxation under the US Code by reason of a criterion similar in nature to the enumerated grounds in art IV, namely the place of incorporation of its member which is the very reason that TD LLC's income is subject to full taxation in the US".

It also made reference to *Tax Briefing*, Issue 55 (April 2004), in which Revenue acknowledges the practical difficulties in denying an exemption from withholding tax where interest is paid to a US resident through a US LLC (refer to commentary below). It states that in "recognition of the difficulties arising from the use of US LLCs, Revenue are prepared to 'look through' the US LLC to the ultimate recipients of the interest".

Conclusion

Ultimately, the TAC granted the Susquehanna Group's claim for group relief on the basis that the LLC is a company for the purposes of s411 TCA 1997 and the LLC is resident for the purposes of tax in the US, as it is liable to tax in the US by virtue of all of its income being fully taxed under the US Code, albeit at member level. Accordingly, there was no need to consider the third question, on the impact of anti-discrimination provisions in Article 25 of the DTA.

In the Author's View, although the decision of the TAC is very well reasoned, logical and in line with case law on the subject matter, it seems to conclude that an LLC is "liable to tax" in the US because its members are taxed in the US which is questionable in the author's opinion. If the five individuals who were ultimately taxed in the US at member level had been tax resident outside the US, it appears that a different conclusion could have been reached.

The TAC came to its conclusion on the tax residence of the LLC only by following a purposive interpretation of the DTA. This, in the view of the author's, seems at odds with the literal interpretation taken of the domestic legislation in s411 TCA 1997. The intention behind the Irish domestic group relief provisions is to provide a synthetic consolidation whereby losses can be subsumed within a homogenous group of companies – but **only** within a homogenous group of companies. If, for example, three Irish companies were held by five Irish individuals, group relief would not be available. Accordingly, under a purposive interpretation, the author's would have thought that group relief would not be available in this case, where three Irish companies are effectively owned by five US individuals, given the transparent nature of the LLC.

It is also interesting that the TAC referred to Revenue's statement in *Tax Briefing*, Issue 55. It is generally considered that *Tax Briefings* are not law with binding or precedential value but, rather, are issued for administrative convenience.

Impact of the Decision

Revenue has appealed the decision of the TAC to the High Court, and judgement from that appeal is pending. If the decision is upheld in the High Court, it will have far-reaching implications for Irish tax legislation unless the decision is appealed further.

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"A Great Engine of Finance": PAYE 60 Years On

Introduction

PAYE was introduced in Ireland on 6 October 1960. Although it may come as no surprise that the PAYE system has been with us for over 60 years, it may perhaps be more surprising to reflect that there was ever a time when employment earnings were not subject to deduction of tax at the time of payment, or that the greatest level of opposition to the introduction of PAYE came from the Revenue Commissioners. Yet, such indeed was the case in Ireland before 1960. How and why Ireland came to introduce PAYE is a story worth recalling.

Background

This fundamental change in the tax system needs to be viewed against the dismal economic backdrop of 1950s Ireland. Alone in Western Europe, the population of Ireland declined in the 1950s and by 1961 had fallen to below three million. Industrial employment, booming elsewhere, actually fell by 14% during the decade. Such was the level of emigration, with as many as one in six leaving, that one pessimistic commentator suggested that within 100 years the Irish would have disappeared, "much like the

Mayans, leaving only their monuments behind them".[1] That this apocalyptic vision did not come to pass can be attributed to the restructuring of the Irish economy under the Lemass/Whitaker First Programme for Economic Expansion, which began in the late 1950s.

Before 1960, individuals in receipt of employment earnings, with the exception of civil and public servants and certain other employees who were subject to a statutory withholding system, paid tax on their earnings through direct assessment. The manner in which this system operated is summed up in a White Paper presented to the Dáil in 1959:

> "A taxpayer is normally...charged under Schedule E by reference to his earnings of the previous Income Tax year. The Income Tax year ends on the 5th April, and Schedule E tax is payable in two equal instalments, one on the 1st January in the Year of assessment and the other on the following 1st July. Thus in the normal case the basis of assessment to Income Tax for 1959/60 is the earnings of the year to the 5th April 1959; and one half of the tax is payable on the 1st January 1960, and the other half on the 1st July 1960."[2]

The principal features of the scheme, therefore, were (a) a prior-year basis of assessment and (b) direct collection of the tax by two lump sum instalments, in arrears. In the example above, the tax on income earned in 1958 would not have been fully due for payment until 1 July 1960, an interval of almost two years. As the White Paper noted with a degree of understatement, "tax under Schedule E does not become payable until an appreciable time after the income is earned".

Collection Issues Pre-1960A system that permitted employees to be paid their wages without deduction of tax, and which then allowed almost two years before the tax became payable, was bound to present challenges for all but the most prudent taxpayers. And so, it proved. In January 1958 the Revenue Commissioners, estimated that there were upwards of 80,000 Schedule E taxpayers who owed tax for one or more years since 1950/51.[3] This statement only hinted at the wider extent of the problems arising from the existing collection system. Many employees made little or no provision for payment of tax due on their wages, which for many were modest in any event. Even for those who attempted to make provision, the half-yearly instalments were typically a multiple of their weekly income. An individual earning £12 per week, for example, would have received two half-yearly demands each of which was equivalent to about four weeks' gross earnings. The reality for many wage earners was that their pay was expended on household and living expenses almost as soon as they received it. It was hardly surprising, therefore, that for many "the payment of tax so long after the end of the period during which the income...has been earned" presented "great difficulty, involving much worry and frequently considerable hardship".[4] It was reported that many young men, faced with significant demands for income tax, simply emigrated to the UK, thus compounding the emigration problem described above.[5]

For much of the 1950s, up to 25% of the annual total tax due under Schedule E was uncollected. Revenue was not, however, entirely without means of bringing recalcitrant taxpayers to heel. The principal weapon in its armoury was s6 of the Finance Act 1923. This allowed Revenue, in cases where tax was outstanding for three months or more, to issue a direction to an employer to deduct outstanding taxes from an employees' wages. Originally intended to be an exceptional measure to deal with

1 Patrick Fitzgerald and Brian Lambkin, *Migration in Irish History, 1607–2007* (London: Palgrave Macmillan, 2008), p. 224.

2 White Paper on "A New System for the Taxation of Wages and Salaries (Pay As You Earn)" presented to the Dáil, November 1959.

3 First Report of the Commission on Income Taxation 1958 (PR.4891), referring to letter dated 30 January 1958 from the Revenue Commissioners, p. 8.

3 *Ibid.*, submission by the Provisional United Trade Union Organisation, p. 12.

5 *Ibid.*, p. 85.

the arrears that had built up during the War of Independence and the Civil War, by 1958 Revenue was issuing 1,000 s6 demands every week. The widespread use of s6 was controversial and was greatly resented by both employees and their employers, who had the onerous task of enforcing collection and could also be made liable if the tax was not paid over promptly. One of the complaints about s6 notices was that they typically landed close to the time that one of the two current annual instalments was due, leaving the employee without the means to pay current tax demands, and so the cycle repeated itself.

Proponents and Opponents of PAYE

There had for some time been demands for the introduction of a PAYE system in Ireland. PAYE had been introduced in Britain and Northern Ireland commencing in 1944/45, and many Irish people who had worked in the UK were familiar with it. Among the leading proponents of the introduction of PAYE in Ireland was the trade union movement. Throughout the 1950s the annual conference of unions such as the ITGWU, as well as local trades councils, had passed motions calling for the introduction of PAYE. Official Ireland was, however, equally adamant in its opposition. As far back as 1950, Liam Cosgrave TD, then Parliamentary Secretary to the Minister for Finance, had told the Dáil that there would be “no PAYE scheme for Ireland”.[6] Writing in 1985, the Second Commission on Taxation remarked that “[i]n view of the developments which have taken place since 1960, it is ironic that opposition to PAYE should have come from the Revenue Commissioners”. Yet, such indeed was the case.

Revenue’s opposition to the introduction of PAYE could be attributed primarily to two issues. In the first instance, there was a genuine concern that the task of bringing such a system into operation could overwhelm the limited resources of Revenue, with a significant negative impact on the administration of the tax system as a whole. The second ground was somewhat more subjective. As pointed out by Revenue, in 1956/57 there were just 138,000 Schedule E taxpayers. Of these, 40,000 were public servants who were already subject to a statutory form of payroll withholding, and a further 8,000 participated in voluntary tax withholding schemes administered by their employers. Of the remaining 90,000, around 50,000 were up to date with their tax payments. Looked at in this way, Revenue argued, the cost and effort involved in rolling out a PAYE system for just 40,000 taxpayers was entirely disproportionate to any benefit that might accrue from it.

Commission on Income Taxation and the Introduction of PAYE

In February 1957 the Government established the Commission on Income Taxation. Its members included Cearbhall Ó Dálaigh (chairman), then a Justice of the Supreme Court and later the fifth President of Ireland, and the Very Reverend, later Cardinal, Dr William Conway. Its brief included a requirement “[t]o enquire generally into the present system of taxation of profits and income, its scope and structure, including the provisions for collection and…to recommend such amendments of the law as appear desirable and practicable”. Given the pressing nature of the issue, the Commission dedicated its first report entirely to the question of the taxation of employment earnings. It received submissions from employers, trade unions and bodies representing trade interests. In addition to the British PAYE system, it examined collection systems in several European countries, the USA, Canada, New Zealand and Australia. Nor was PAYE the inevitable choice of the Commission. In total, six possible systems were presented for consideration. However, when the Commission delivered its first report to the Minister for Finance early in 1959, it was unequivocal in its conclusions:

> “The present system of collecting tax from the main body of Schedule E taxpayers should, in our opinion, be replaced as soon as possible by a statutory tax deduction

6 *Irish Examiner*, 2 March 1950.

> scheme on the general lines of the Pay As You Earn (P.A.Y.E.) scheme now operating in the Six Counties and in Britain."

The Commission's recommendation was accepted by the Government. Matters moved quickly from that point. A White Paper on the PAYE system was presented to the Dáil in November 1959, and the enabling legislation for the system was passed later that month in the Finance (No. 2) Act 1959. PAYE would come into effect in Ireland in the following year. An enormous amount of work was required in a short space of time to enable the transition from the old system to the new. To its credit, and despite its previous reservations, which had been forcefully reiterated in its submission to the Commission, Revenue accomplished this task in the space of a year. The changeover presented many challenges, not least being that on the transition to collection of tax on a current-year basis, PAYE taxpayers would potentially have a double liability in the first year, represented by the tax due for the previous tax year under the old system and the tax due for the current year under the new. To resolve this difficulty, it was decided that PAYE would commence on 6 October 1960 and an abatement would be granted to all Schedule E taxpayers equivalent to one-half of the net tax liability for the year 1960/61. In effect, they only paid tax on half of that year's earnings.

Although the system to be adopted was based closely on the British PAYE system, as the legislation passed through the Oireachtas, TDs were very active in looking closely at the detail of the scheme and ensuring that it would be as efficient as possible. Two key changes that arose from this process were the decision not to use a system of "PAYE codes", as in the UK, and a much simplified set of tax tables for use by employers. In a move that has echoes in more recent times, senior Revenue officials were despatched to address public meetings around the country to explain how the new system would work. To judge from contemporary' newspaper reports, these meetings were well attended and many questions were raised by attendees. The changeover seems to have gone smoothly, as the Revenue Commissioners' Annual Report for 1960/61 drily notes no more than the fact that "[t]he Pay As You Earn system for the taxation of salaries and wages...came into effect on 6 October 1960". The process of extending PAYE to the entire Schedule E taxpayer population was not finally completed until 1975, when PAYE was extended to the public service.

"A Great Engine of Finance"

Notwithstanding the successful of introduction of the new system, some early evidence of "buyer's remorse" started to become evident. The *Sligo Champion* of 20 October 1960 noted somewhat presciently that "[a] direct tax on the incomes of everyone in a small population, and collected rigidly every week, is political dynamite. Fianna Fail may live to rue the day that PAYE was introduced." With the benefit of hindsight, it is striking that none of the parties in the debates around the introduction of PAYE seemed to identify the fact that once a PAYE system was in place, it could become, to borrow William Gladstone's description of the income tax, "a great engine of finance". With a captive audience and effective measures to enforce collection, it soon exceeded expectations. The yield from Schedule E had averaged between £6m and £7m in the 1950s, but by 1964 this had doubled, and by the end of the 1960s it was over £58m. This massive increase in the yield was not of, course, attributable solely to more efficient collection systems but was also a reflection of the growth in employment and wages that Ireland experienced as a result of the economic boom of the 1960s. However, it might be argued that without an efficient collection system to provide the tax revenues to support its programmes (which included, for example, the introduction of free secondary education in 1967), the State would not have been in a position to implement these programmes in the first instance. Therefore, the introduction of PAYE in Ireland in 1960 could be seen as a component of the economic reforms that were the platform for the country's later prosperity.

The downside to all of this was the overreliance on PAYE receipts that began in the 1960s and that – through a combination of inflation and the "fiscal drag" effect caused by failure to index tax-free allowances – resulted in Ireland's having one of the most regressive personal tax systems in Europe by the 1980s. A single person on the average industrial wage in 1960 paid 7% of total earnings in tax and social insurance. By 1987, taxes on the average industrial wage amounted to over 35%, a staggering five-fold increase.[7] The same unions that had championed the introduction of PAYE became its harshest critics, eventually leading to significant reforms from the 1990s onwards. Dissatisfaction with the incidence and impact of taxation on the PAYE sector has long been, and remains, a central feature of the ongoing debate on what constitutes a "fair" tax system – a debate that, thankfully for the reader, is outside the scope of this article.

Conclusion

If one conclusion emerges from a review of PAYE over the past 60 years, it is that the PAYE system has shown itself to be remarkably adaptable. In the years since 1960 it has seen major changes, from the implementation of the unified tax system in the 1970s to PAYE Modernisation in the 21st century. That it has taken all of these changes in its stride is a testament to the genius of those who devised the system back in the 1940s. For future historians of the PAYE system, perhaps the most unlikely of all these developments will be the one referred to by the Minister for Finance, Paschal Donohoe TD, on 27 March 2020, when, introducing the Temporary Wage Subsidy Scheme, which was to be administered through the PAYE system, he noted that "[i]f nothing else, the Revenue Commissioners will tonight become an institution of the State that pays people, which shows the kind and speed of change that is happening". Given the circumstances, perhaps we should fervently hope not to see such changes again in our lifetime.

7 Niamh Hardiman, "The Development of the Irish Tax State", *Irish Political Studies*, 17/1 (2002), pp 29–58.

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Finance Act 2020: Overview of Covid-19-Related Measures

Introduction

In October 2020 I commenced my review of the Finance Bill 2020 in preparation for the Institute's Finance Act webinar series. I had expected at that time that there would be a lockdown over the coming winter months and there would therefore be amendments and extensions to the provisions being introduced. However, like many, I did not envisage the lockdown running well into the summer of 2021, and for some businesses (e.g. nightclubs) possibly for much of 2021.

At the time of writing this article, the Government has announced that certain businesses can reopen in May (e.g. non-essential retail, hairdressers) and that the pubs and restaurants can reopen in June for outdoor trading. This is a welcome development for those businesses that can recommence trading. However, talk soon turned to ensuring that those businesses do not reach a "cliff edge" if the supports were suddenly ceased and how the businesses would cope with the legacy debt (including tax debt warehousing, rates and bank moratoriums) built up since March 2020. Those fears were assuaged by the announcement of the Minister of Finance on 1 June 2021 for further economic supports for businesses as they re-open, including the extension of existing emergency supports. Whilst the legislation to enact the further economic supports is yet to be published, the proposed measures are referenced in the article given their significance.

The emergency supports introduced last March and July and enhanced in Finance Act 2020 will

therefore still have an important part to play in supporting those businesses most negatively affected by the Covid-19 pandemic.
This article provides an overview of some of those measures.

Debt Warehousing: VAT/PAYE/TWSS/EWSS

The Financial Provisions (Covid-19) (No. 2) Act 2020 introduced measures allowing for the warehousing of VAT and employer PAYE liabilities of a business arising as a result of the disruption caused by the Covid-19 pandemic. Finance Act 2020 extended debt warehousing to TWSS liabilities, in particular those arising from the reconciliation process. It also made a technical amendment to ensure that when payments of warehoused liabilities are made, interest is calculated on a reducing-balance basis. Per the Government announcement of 1 June 2021, EWSS overpayments can now also be warehoused.

The warehousing scheme provides for three periods that are used to determine what VAT and PAYE/TWSS/EWSS a business may warehouse, when the liabilities must start to be repaid and the rate of interest to be applied to the outstanding liabilities.

Table 1: Debt warehousing periods for VAT, PAYE, TWSS & EWSS

Period 1: 0% interest	**This covers the period when a business was first restricted from trading due to Covid-19 restrictions and ceases on 31 December 2021.** Prior to the Government announcement on 1 June 2021, Period 1 was to cease on the last day of the next bi-monthly VAT period after the VAT period in which the business recommenced trading. For example, if the business recommenced trading in May 2021 (in the May/June 2021 VAT period), then Period 1 was to end on 31 August 2021.
Period 2: 0% interest	**From 1 January 2022 to 31 December 2022.** Prior to the Government announcement on 1 June 2021, Period 2 was to start when Period 1 ended and was to run for 12 months, subject to Period 2's ceasing on 31 December 2022, even if it meant that Period 2 would be less than 12 months. For example, if Period 1 ended on 31 August 2021, then Period 2 was to run for 12 months to 31 August 2022.
Period 3: 3% interest p.a. (0.0082% per day)	Period 3 starts on 1 January 2023 and runs until such time as all of the warehoused liabilities have been discharged.

The example in the updated Revenue guidance following the Government announcement of 1 June 2021 notes that all of the following type of businesses will have an extended end date for Period 1 of 31 December 2021:

- Hairdressers who resumed trading on 10 May 2021
- Hotels and guesthouses who resumed trading on 2 June 2021
- Restaurants and pubs who resume for outdoor service on 7 June 2021
- Restaurants and pubs resuming indoor service on 5 July 2021 (provisional date)

Period 2 will be the calendar year 2022 with Period 3 starting on 1 January 2023. Whilst the Revenue example above details certain businesses, all eligible businesses should be able to avail of the extended Period 1 end date of 31 December 2021.

To be able to avail of debt warehousing, the business must:

(a) be a small or medium enterprise (SME) with turnover of less than €3m; or, if not an SME, obtain agreement from the Revenue branch that deals with the business or the Collector-General's Division. Revenue guidance states that all taxpayers dealt with by the Personal and Business Divisions will automatically qualify for warehousing;
(b) ensure that all current filing and payment obligations for all taxes are up to date during the warehousing scheme (i.e. during Periods 1 to 3, inclusive); and
(c) enter into an arrangement with the Office of the Collector-General before the start of Period 3 to agree the payment terms for the warehoused liabilities and comply with the terms of that agreement.

If the taxpayer does not comply with either (b) or (c) above, interest at the rate of approximately 10% p.a. (0.0274% per day) will become payable. The higher interest will become due in relation to:

(b) when the failure to keep current tax obligations up to date occurs,

and in relation to:

(c) on the first day of Period 3 if an arrangement to pay the taxes has not been made before the start of Period 3 or on the date the failure to comply with the terms of the arrangement entered into to pay the PAYE (income tax) liabilities in Period 3 occurs.

Revenue notes that the timeframe to collect the warehoused debt in Period 3, will be flexible and determined by the individual capacity of a business to pay the tax arrears, whilst also paying any current tax liabilities as they arise. One would expect that it if the taxpayer seeks a significant period of time to pay the tax debt, then Revenue may request a statement of affairs (e.g. Form PPA1) to assess the request.

Debt Warehousing: Income Tax

PAYE workers who had tax liabilities for the tax year 2020 arising from receipts under the Temporary Wage Subsidy Scheme and the Pandemic Unemployment Payment (PUP) can have the collection of the taxes on those receipts deferred. In general, the liabilities are to be collected over four years by reducing the tax credits of those individuals for the tax years 2022 to 2025, inclusive.

Finance Act 2020 inserted a new s1080B in TCA 1997, which provides for the warehousing of "Covid-19 income tax". This allowed a person who was required to file an income tax return, and who satisfies the relevant conditions, to warehouse income tax payable in 2020 (i.e. balance of income tax for 2019 and preliminary income tax for 2020). In addition, provision is made for income tax liabilities falling due to be paid in 2021 to be warehoused. Income tax for this purpose of this section includes USC and PRSI.

Conditions to be eligible for warehousing in 2021

To avail of debt warehousing for income tax liabilities due for payment in 2021 (balance of 2020 income tax liability and preliminary income tax for 2021):

(a) The taxpayer must be a relevant person, being a person who is required to file an income tax return where notified to do so by Revenue or a chargeable person for the purposes of the self-assessment provisions.
(b) The person must be unable due to Covid-19 to pay the balance of income tax for 2020 and the preliminary income tax liability for 2021 (referred to as the "Covid-19 income tax") and must have complied with his/her obligations to file an income tax return.
(c) A person will be deemed to have been unable to pay the Covid-19 income tax where the person makes a declaration to the Collector-General that his/her

total income for 2021 will be less than 75% of the total income for 2019 as a result of Covid-19 restrictions (being the Level 1 to 5 restrictions introduced under regulations made under ss5 and 31A of the Health Act 1947).

In considering the reduction in income, Revenue guidance notes that:

- In the cases of joint assessment, the 75% test is applied to the combined income of the spouses/civil partners. However, where one spouse/civil partner is self-employed and the other is a PAYE employee, the assessable spouse/civil partner will be able to avail of the debt warehousing if the income of the self-employed spouse/ civil partner for 2021 is estimated to be less than 75% of that person's income for 2019.
- A landlord can warehouse their income tax liability if a tenant is unable to pay its rent due to the Covid-19 restrictions and all other conditions for warehousing the income tax debt are satisfied.

(d) Where the person was not required to file an income tax return in 2019 (e.g. the person was not a chargeable person in 2019 as he/she was a PAYE worker only), that person will be deemed unable to pay the Covid-19 income tax where the person forms a view that due to the Covid-19 restrictions he/she is unable to pay the tax and makes a declaration to the Collector-General to that effect.

(e) The declaration referred to in (c) and (d) must be made no later than the return filing date for the 2021 income tax return (being 31 October 2021 or the extended ROS pay and file date of 17 November 2021 as published by Revenue).

A Revenue Officer may make enquiries to satisfy himself/herself that:

- the relevant person's total income for 2020 or 2021, as appropriate, is less than 75% of that person's total income for 2019; or
- if the relevant person was not a chargeable person in 2019, the person is unable to pay the income taxes due in 2020 or 2021 as a result of the Covid-19 restrictions.

Periods of warehousing

The warehousing scheme provides for three periods that are used to determine when the Covid-19 income tax is to be repaid and the rate of interest to be applied to the outstanding liabilities.

Implications of non-compliance with terms of warehousing

Declaration proves to be incorrect

If the relevant person makes a declaration that is incorrect (i.e. the total income for 2020 or 2021, as appropriate, is not less than 75% of the total income for 2019 or the inability to pay the income tax payments due in 2020 or 2021, as appropriate, of a person who was not a chargeable person in 2019 did not arise by virtue of the Covid-19 restrictions), then the following implications will arise:

(a) For tax payments due in 2020:

- the balance of the 2019 income tax, if appropriate, and the full 2020 income tax liability will be due on 31 October 2020, and
- interest on the late payment of taxes of approximately 8% p.a. (0.0219% per day) will apply.

(b) For tax payments due in 2021:

- the balance of the 2020 income tax, if appropriate and assuming (a) does not apply, and the full 2021 income tax liability will be due on 31 October 2021, and
- interest on the late payment of taxes of approximately 8% p.a. (0.0219% per day) will apply.

In effect, the warehousing provisions are regarded as having never applied and the normal rules for the application of interest to the late payment of taxes apply.

Table 2: Debt warehousing periods for income tax.

Period	2020 tax year (balance of 2019 income tax and 2020 preliminary income tax)	2021 tax year (balance of 2020 income tax and 2021 preliminary income tax)	Interest rate
Period 1	**From 31 October 2020 for a paper filer and 10 December 2020 for mandatory e-filers until 31 December 2021.** Prior to the government announcement of 1 June 2021, Period 1 was a set date of 31 October 2020 for paper filers and 10 December 2020 for mandatory e-filers.	**From 31 October 2021 for a paper filer and 17 November 2021 for mandatory e-filers until 31 December 2021.** Prior to the government announcement of 1 June 2021, Period 1 was a set date of 31 October 2021 for paper filers and the extended ROS filing date of 17 November 2021 for mandatory e-filers.	0%
Period 2	**From 1 January 2022 to 31 December 2022.** Prior to the Government announcement on 1 June 2021**,** Period 2 was to start when Period 1 ended and was to run for 12 months. For example, for a mandatory e-filer, Period 2 was to run for 12 months to 10 December 2021.	**From 1 January 2022 to 31 December 2022.** Prior to the Government announcement on 1 June 2021**,** Period 2 was to start when Period 1 ended and was to run for 12 months. For example, for a paper filer, Period 2 was to run for 12 months to 31 October 2022.	0%
Period 3	Period 3 starts on 1 January 2023 and runs until such time as all of the warehoused liabilities have been discharged.	Period 3 starts on 1 January 2023 and runs until such time as all of the warehoused liabilities have been discharged.	3% p.a. (0.0082% per day)

Current tax affairs

To be able to avail of the debt warehousing for the Covid-19 income tax, the relevant person must:

(a) ensure that all current filing and payment obligations for all taxes are up to date during the warehousing scheme (i.e. during Periods 1 to 3, inclusive); and

(b) enter into an arrangement with the Office of the Collector-General before the start of Period 3 to agree the payment terms for the warehoused liabilities and comply with the terms of that agreement.

If the relevant person does not comply with either (a) or (b) above, simple interest at the rate of approximately 8% p.a. (0.0219% per day) will become payable on the amounts outstanding. The higher interest will become due in relation to:

(a) when the failure to keep current tax obligations up to date occurs,

and in relation to:

(b) on the first day of Period 3 if an arrangement to pay the taxes has not been made before the start of Period 3 or on the date the failure to comply with the terms of the arrangement entered into to pay the income tax liabilities in Period 3 occurs.

Employment Wage Subsidy Scheme (EWSS)

The EWSS supports eligible businesses that have been significantly disrupted by Covid-19. It replaced the Temporary Wage Subsidy Scheme (TWSS), and the qualifying period of the scheme is 1 July 2020 to 31 December 2021,[1] subject to the ability to extend the scheme by means of a Ministerial order. For pay dates in 2020, an employer had to demonstrate to the satisfaction of Revenue, based on guidelines issued by it, that there was at least a 30% reduction in turnover or customer orders due to Covid-19 in the six months to 31 December 2020 compared to the six months to 31 December 2019.

Where an employer qualifies for the subsidy, a flat-rate subsidy is paid to the employer for qualifying employees. When the EWSS provisions were introduced, proprietary directors and certain persons connected to the employer were excluded from the scheme. However, Revenue issued guidance on a concessionary treatment[2] to allow proprietary directors and connected persons to be regarded as qualifying employees for the purpose of the scheme.

Finance Act 2020 provides that:

- Certain proprietary directors and connected persons are regarded as qualifying employees for the purposes of the EWSS. This amendment places on a statutory footing the Revenue treatment announced in a press release on 31 August 2020.
- Only a single claim for the EWSS can be made by a proprietary director, irrespective of the number of proprietary directorships in eligible companies held by that individual. The proprietary director must notify a company that he/she is electing to be treated as a qualifying employee of that company for the purposes of making a claim for the subsidy. This election is deemed to be made at the time of the first submission of an EWSS claim and is irrevocable. The author understands that this is an area that Revenue has been reviewing to confirm that only single claims are being made.
- For pay dates in 2021, the employer must demonstrate a reduction in turnover or customer orders by reference to a new basis period, being the six months to 30 June 2021 when compared to the six months to 30 June 2019.

Basis period for reduction in turnover/customer orders

From 1 January 2021 (i.e. for 2021 pay dates), as outlined above the employer must demonstrate a reduction in turnover/customer orders by reference to a new basis period. There must be a reduction in turnover or customer orders in the period 1 January 2021 to 30 June 2021 compared to:

- the same period in 2019 where the business was in existence before 1 January 2019 (i.e. the six months to June 2019);
- where the business commenced trading between 1 January and 1 May 2019, from the date of commencement to 30 June 2019; or
- where a business commenced after 1 May 2019, the projected turnover or orders for 1 January 2021 to 30 June 2021.

The 30% reduction test in turnover/customer orders is not required to be satisfied by childcare businesses registered in accordance with s58C of the Child Care Act 1991. This is the same position as applied before Finance Act 2020.

Similar to the original basis period (i.e. the six months to 31 December 2020), Revenue is required to publish guidelines on matters to be considered in determining whether the 30% reduction in turnover/customer orders occurs by reason of Covid-19 and the disruption to

1 Finance Act 2020 provided that the qualifying period for the EWSS was to 31 March 2021, but it has been formally extended to 30 June 2021. The Government announcement on 1 June 2021 states EWSS will be extended to 31 December 2021.

2 Which was subsequently legislated for by Finance Act 2020 as outlined in this article.

businesses arising therefrom. Revenue updated the EWSS guidance,[3] and the salient points include:

- Employers should have prepared projections for turnover/customer orders for the six months to 30 June 2021 at the start of the of the new basis period.
- The employer must undertake a review of the six-month period (i.e. the 6 months to 30 June 2021) on the last day of every month to ensure that the 30% reduction test is satisfied.
- The review must be undertaken on a rolling monthly basis comparing the actual and projected business performance.
- There has been no change in the Revenue guidance on how turnover or customer orders are to be determined.
  - The employer needs to include all sources of trade income, specifically including sales, donations, State funding, etc.
  - The treatment of grants and public funding (i.e. whether it is included in turnover) will depend on the nature of the funding and applicable accounting standards.
  - The Restart Grant will not be treated as turnover for the purposes of the EWSS. However, it will be taxable income if it is expended on revenue items (e.g. utility costs). If it is expended on capital costs, then if the asset qualifies for capital allowances, the qualifying cost will be the net of grant cost.
  - Covid-19-related State-funded grants/income supports specifically provided to meet operational costs other than staff wages, where eligibility is based on a percentage turnover reduction test, may be excluded from the definition of turnover when assessing EWSS eligibility.
  - The cash reserve position of the employer does not affect eligibility.

Similar to the TWSS, Revenue has been reviewing EWSS claims by employers. The main focus of the reviews has been confirmation that the reduction-in-turnover test has been satisfied. The following extract from Revenue guidance summarises matters identified, when considering the reduction-in-turnover test, that give rise to incorrect claims for the subsidy:

“• preparation of inaccurate financial projections which do not align to the recent operating conditions and recent past performance of the trade, subject to any exceptional circumstances;
- not reporting or under reporting revenues generated in the normal course of business;
- exclusion of any element of State funding from the turnover test where the appropriate accounting practice requires that it be included as part of turnover (subject to specific exclusions mentioned in these guidelines e.g. restart grants);
- inappropriate deferral of revenues having the effect of delaying revenue recognition where the required revenue recognition criteria has been met;
- businesses in existence at 1 November 2019 for 2020 paydates and 1 May 2019 for 2021 paydates, comparing actual results in the relevant period in 2020 or 2021 to projections instead of against actual results in 2019 as required by legislation;
- inappropriate use of the ‘orders’ test in circumstances where it does not accurately reflect the financial activity of the business including where the ‘orders’ are not ‘real-time’ orders requiring real-time or near real-time fulfilment and delivery e.g. professional firms identifying a slowdown in the onboarding of new clients to meet the ‘orders’ test;
- utilising the ‘separate business divisions’ concession as detailed in Appendix II [of the EWSS guidelines] and claiming in respect of employees in one or more ‘divisions’ in instances where no evidence exists to demonstrate that those divisional management and reporting structures

3 At the time of writing, the most recent version of the guidelines issued by Revenue on the EWSS issued on 31 March 2021.

were in place and operational prior to the COVID-19 pandemic."

It is likely that over the coming months, similarly to the TWSS, Revenue will review compliance by the employer with the EWSS rules, in particular, whether the 30% reduction test has been satisfied. The points identified above by Revenue as matters giving rise to incorrect claims should be carefully considered as part of the monthly self-review process.

The Government announced on 1 June 2021 that the EWSS will be extended to 31 December 2021. The announcement noted that to benefit more firms, the time period for assessment of the reduction in turnover and customer orders will be broadened from the current 6 month period of assessment to a full 12 month period. At the time of writing, Revenue Guidance has not been updated to take account of the proposed changes. However, one would expect that the principles outlined above when working out if the percentage reduction test has been satisfied will continue to apply.

Subsidy rates

Finance Act 2020 introduced enhanced weekly subsidy rates that were to run from 20 October 2020 to 31 January 2021, but these rates were subsequently extended to 30 September 2021. A decision on the rates that will apply from 1 October 2021 will be made later in the year, to include if an employer contribution should be made to employee wages under the scheme.

Table 3: EWSS subsidy rates payable to an employer per eligible employee.

Employee gross weekly wage	Subsidy payable Up to 31 January 2021 (but extended to 30 September 2021 by the Minister of Finance on 01 June 2021)
Less than €151.50	Nil
From €151.50 to €202.99	€203
From €203 to €299.99	€250
From €300 to €399.99	€300
From €400 to €1,462	€350
More than €1,462 (€76,024 p.a.)	Nil

Other measures relating to EWSS in Finance Act 2020

- Payments of the subsidy to employers are to be made as soon as practicable after the employer files the notification with Revenue of the payment of emoluments to the qualifying employee(s). Previously, the payment was to be made as soon as practicable after the return date for the income tax month to which the payment of emoluments relates (i.e. the 14th day of the following month).
- Revenue can offset an amount of subsidy due to an employer against an amount that the employer is required to repay Revenue in relation to the subsidy.
- Where an assessment or amended assessment is issued for the payment of relevant tax (the amount of EWSS that Revenue is seeking to be refunded), the employer will have 30 days to appeal the assessment to the Appeal Commissioners. (A similar measure was introduced for appealing an assessment or amended assessment in relation to the payment of a TWSS liability.)

Covid Restrictions Support Scheme (CRSS)

The CRSS provides for a cash payment, known as an Advance Credit for Trading Expenditure (ACTE), to businesses significantly impacted by the imposition of public health restrictions (i.e. the Level 1–5 restrictions). An unusual feature of the CRSS legislation is that it is statutorily provided that Revenue is to publish guidelines[4] in relation to certain aspects of the scheme that determine eligibility of a person to claim the ACTE. The legislation provides that Revenue will set out in the guidelines those matters that it considers are relevant to determining:

- whether a business has been prohibited, or significantly restricted, from allowing the public access to the business premises by reference to the Covid-19 restrictions (i.e. the imposition of Level 1–5 restrictions); and
- whether the turnover of the business has fallen by at least 75% due to the prohibitions/restrictions imposed by the Level 1–5 restrictions.

In general, Revenue guidance is merely Revenue's interpretation of the legislation, and the Tax Appeal Commissioners and the courts need not take it into account when interpreting tax legislation. However, as the guidelines on the above matters (i.e. restriction of access to the business premises and fall in turnover) are to be published in accordance with provisions in Finance Act 2020, the guidelines on those matters have effectively been given a statutory footing.

A summary of the key features of the scheme follows.

Condition 1: Relevant business activity

- A person (sole trader, company or precedent partner on behalf of a partnership) must carry on a relevant business activity that is located wholly in a relevant geographical location. A relevant geographical location means a geographical location where Covid-19 restrictions (i.e. Level 1–5 restrictions) are in operation.
- A business activity means the carrying on of a Case I trade either solely or in partnership at a business premises where customers (being members of the public) of the trade acquire goods or services from that person. A person can have more than one business premises from which it trades, i.e. carries on a business activity. Each premises can therefore be regarded as a relevant business activity if located in a relevant geographical location.
- A business premises means a building or other, similar, fixed physical structure from which the business activity is ordinarily carried on.
- Revenue guidance notes the following matters when considering the meaning of "business premises":
  - There must be a fixed place of business where the general public as customers attend to acquire goods or services. Therefore a business that sells wholly online, for example, will not have a business premises for the purposes of the CRSS, albeit that it may have offices and warehousing. This is on the basis that it does not have premises that the general public comes to in order to buy goods or services.
  - A person can have more than one business premises. For example, if an individual operates three restaurants, each restaurant can be regarded as carrying on a relevant business activity. Separate claims under the scheme can be made for each restaurant, as each will be regarded as a business premises.
  - In general, the operation of outdoor activities will not require the trade to be ordinarily carried on at a business premises. Revenue guidance states that

4 Guidelines on the operation of the CRSS were first issued on 23 October 2020. At the time of writing, the most recent version of the guidelines was published on 04 June 2021.

the following outdoor activities would not be considered to be ordinarily carried on from a business premises:

- outdoor theme and amusement parks,
- commercial visitor farms (petting zoos) and zoos generally,
- camping and caravan sites,
- commercial gardens and commercial parks,
- outdoor activity centres, e.g. paint-balling, go-karting, zip-lining,
- golf courses, pitch-and-putt courses and driving ranges,
- clay-pigeon shooting/game shooting/falconry,
- outdoor water sport centres, including surf schools, diving schools and similar water-based activities, and
- bus tours/bike tours.

Albeit that there may be a premises in which tickets are sold or payments made to purchase the above services, the relevant business activity (i.e. the provision of the service) takes place outdoors and not in a business premises.

- A trade may be partly carried on from a business premises. In such cases, the relevant business activity comprises those trading activities carried on from the business premises. For example, an activity park will operate a single trade for tax purposes composed of turnover for access to the park and rides and other outdoor activities and turnover from business premises comprising gift shops, indoor activities and restaurants located in the activity park. The relevant business activity will comprise of those activities carried on in a business premises (i.e. the gift shop, indoor activity centre and restaurant). In such scenarios the turnover will need to be apportioned on a just and reasonable basis between the outdoor activities and those activities carried on in a business premises.
- The guidance also confirms that businesses that are assessed under Case II (professions) are exempt from corporation tax (and therefore exempt from the charge to tax under Case I), and those businesses that do not generally provide access to members of the public to their business premises to sell goods or services (e.g. wholesalers supplying the retail or hospitality industry) are not regarded as carrying on a relevant business activity and will not be eligible for the ACTE.

Condition 2: Impact of Covid-19 restrictions and access to business premises

- Even if a business premises is located in a region that is subject to one of the five levels of Covid-19 restrictions, to be able to claim the ACTE, it is necessary to demonstrate to the satisfaction of Revenue that as a direct consequence of Covid-19 restrictions (being the imposition of the Level 1–5 restrictions):
    - the business must prohibit or significantly restrict access by customers (being members of the public) to the business premises and
    - the turnover for the claim period will be no more than 25% of the average weekly turnover in 2019, or 2020 if a new business (for further details, see Condition 3, below).
- A key point is that the restriction of access to the business premises must arise from the targeted imposition of the Level 1–5 restrictions to the premises (e.g. closure of premises, move from in-house dining to takeaway). These targeted restrictions are referred to as the “applicable business restrictions provisions”. General adverse implications arising due to a drop-off in footfall because of domestic or international travel restrictions or the requirement to ensure social distancing (e.g. 2 metre spacing) will not satisfy this test. Revenue guidance provides examples of when significant restrictions will be considered to apply, based on differing levels of Covid-19 restrictions.
- The business must intend to resume trading after the Covid-19 restrictions that prohibited

Table 4: How "relevant turnover amount" is calculated for CRSS.

Established business (commenced before 26 December 2019)	Newly established business (commenced on or after 26 December 2019 and before 13 October 2020)
Average weekly turnover in 2019 x no. of full weeks of the claim period	Average weekly turnover from date of commencement to 13 October 2020 x no. of full weeks of the claim period

or significantly restricted the business activity cease. If a business intends never to reopen, it should not make a claim under the scheme. However, if a business makes a claim but chooses not to open until a later date after the end of the Covid-19 restrictions, the decision not to reopen will not affect any prior claim.

Condition 3: Impact of Covid-19 restrictions on turnover

Even where it is demonstrated that the business is prohibited or significantly restricted in allowing access by the public to the business premises, the turnover of the business must have fallen by a prescribed amount to qualify for the relief. The turnover during the claim period must be an amount that is 25% or less of the "relevant turnover amount". A claim period, in general, is the period for which the Covid-19 restrictions that significantly restrict or prohibit customers' access to the business premises are in operation.

When the relevant turnover amount is calculated, it must be compared to the turnover in the claim period to determine whether it will be 25% or less of the relevant turnover amount.

Example 2: Calculation of "relevant turnover amount"

A long-established retail shop is required to close for 5 weeks due to Covid-19 restrictions. Its annual turnover in 2019 was €208,000 (net of VAT), representing an average weekly turnover of €4,000. The relevant turnover amount is €20,000 (€4,000 × 5 weeks).

The actual turnover during the 5 weeks of Covid-19 restrictions was €1,500 (net of VAT), representing online sales.

$$\frac{€1,500 \times 100}{€20,000} = 7.5\%$$

As the actual turnover is less than 25% of the relevant turnover amount, the business is regarded as having been disrupted due to the Covid-19 restrictions.

Note: At the start of a claim period, it is possible for a business to estimate its expected turnover to see whether it will satisfy the reduction-in-turnover test and then make a claim for payment of the ACTE. However, it must recalculate once the actual turnover is known, to confirm that the percentage reduction test is still satisfied. If it is not satisfied, the ACTE is repayable.

Revenue has provided a number of important concessions that will allow persons that have succeeded to a business in 2020 or 2021 to base the calculation of turnover on the 2019 turnover of the previous operator of the business. This could arise, for example, where a business was transferred within a group (and s617 TCA 1997 applied such that it was a no gain/no loss transfer for CGT purposes). The concessions are detailed in the Revenue guidance.

Other aspects of CRSS

- A qualifying business (being a company, individual, partnership) can make a claim for a cash payment (i.e. ACTE). The cash payment equates to 10% of the business's average weekly turnover in 2019 up to

€20,000 and 5% thereafter, subject to a maximum weekly payment of €5,000, for each full week that the business is affected by the Covid-19 restrictions. The period for which the business is entitled to make a claim is known as the "claim period".

- Appendix III of the Revenue guidelines summarises the:
  - public health regulations (i.e. Level 1–5 restrictions) by date and geographical location and
  - the types of businesses impacted at each level of restrictions.
- For businesses established between 26 December 2019 and 12 October 2020 (i.e. "newly established businesses") the claim is to be based on the weekly average turnover in the period between the date of commencement and 12 October 2020. The 10% and 5% limits and the weekly cap of €5,000 also apply.
- Those businesses subject to restrictions from 31 December 2020 (such as non-essential retail, gyms, leisure centres and swimming pools) were eligible to a double ACTE payment for the Christmas and New Year period (subject to the weekly cap of €5,000). The double week applied for the weeks commencing 28 December 2020 and 4 January 2021.
- Eligible businesses (e.g. restaurants, pubs serving food, hairdressers) that were subject to restrictions from 24 December 2020 were entitled to claim the double week (subject to the weekly cap of €5,000) for each of the weeks commencing 21 December 2020, 28 December 2020 and 4 January 2021.
- When the business resumes trading within a reasonable period of time after the Covid-19 restrictions cease, the business will be entitled to an additional support that is equal to one week's ACTE. This is referred to in Revenue guidance as the "restart week". There is no need to consider the turnover percentage reduction test for the restart week. Furthermore, if a business resumes trading, claims the restart week and is subsequently entitled to further ACTE claims (as further Covid-19 restrictions are imposed), the restart week payment will not be clawed back. Each time that a business resumes trading after the end of a Covid-19 restriction period, it can claim the restart week.
- On 1 June 2021, the Government announced an increased support for those businesses reopening on 2 June 2021. If the business qualified for CRSS and is entitled to the restart week payment on reopening the business, a single claim for a restart week payment that will cover 3 weeks at double the normal rate (i.e. up to €10,000 per week as opposed to €5,000 per week) can be made. Revenue guidance refers to the payment as a "triple restart week". The Revenue guidance also provide examples of how the triple restart week will apply to those restaurants, bars and cafés providing outdoor services only from 7 June 2021.
- The person operating the business (known as the "qualifying person") must register and make the claim via ROS. A number of other conditions (e.g. maintaining tax clearance) must also be satisfied.
- Provision is made to apply interest and penalties for incorrect claims. In certain instances, the interest provisions will be relaxed where the business made a claim in good faith and, within a reasonably practicable time after identifying the error, notifies and repays the ACTE (in full or in part, as applicable) to Revenue.
- Similarly, to other Covid-19 support schemes, provision is made to publish the name and address of businesses claiming the ACTE under the scheme.
- Finance Act 2020 provided that the qualifying period was to run to 31 March 2021, with the ability to extend beyond that date but not beyond 31 December 2021. At the time of writing, the Government had announced that the scheme has been extended to 31 December 2021.

Time limits

- A claim for ACTE can be made at the start of a Covid-19 restriction period but no later than eight weeks from the start of the restriction period to which the claim relates.
- If the restriction period is to extend beyond three weeks, then the eight-week time limit starts on the first day of each three-week period during which the restrictions continue to apply.
- If a business has applied to register before the eight-week time limit has expired and has supplied Revenue with the requisite information but is registered after the expiry of the eight-week time limit, it will be entitled to make a claim for that period, but it must be made within three weeks of the business's being registered for the scheme.
- In relation to a restart week, the claim must be made within eight weeks of the date on which the restrictions ceased thereby allowing the business to resume trading.

Where a taxpayer appeals a Revenue determination (which must be done within 30 days of the determination) that the person is not a qualifying person for the purposes of the scheme and the Appeal Commissioners issue a determination that the person is a qualifying person, then that person will have eight weeks from the Appeal Commissioners' determination to make the claim (s485(24) TCA 1997).

Summary

Although there will always be questions about whether reliefs have been targeted at those who require them, given the nature of the Covid-19 pandemic, in the author's opinion the Government has been proactive in seeking to ensure that the adverse impact on the economy, businesses and individuals has been mitigated through the use of the measures detailed above. However, as businesses start to resume trading in the coming months, it will be important to ensure that the measures are unwound over time to allow those businesses most affected the opportunity to generate cash-flow to finance restart costs and to start to pay legacy debt.

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VAT e-Commerce Package – 1 July 2021

Introduction

A number of amendments have been made to the Value-Added Tax (VAT) Directive[1] that will enter into force from 1 July 2021. These changes will significantly alter the way VAT operates for cross-border business-to-consumer (B2C) e-commerce activities in the European Union (EU).

This article explains the key concepts underpinning these changes, as a follow-up to our high-level overview published in *Irish Tax Review* last year. Revenue will also provide detailed operational guidance for traders on its website, www.revenue.ie.

The main changes that will enter into force from 1 July 2021 are as follows:

- extension of the VAT Mini One Stop Shop (MOSS) to a **One Stop Shop** (OSS),
- introduction of a **Deemed Supplier provision** for supplies through electronic interfaces, such as online marketplaces and platforms,
- introduction of a new **Import One Stop Shop** (IOSS) and
- introduction of **Special Arrangements** for the declaration and payment of VAT on certain imports.

1 Council Directive 2006/112/EC.

The IOSS and the Special Arrangements for the declaration and payment of import VAT can only apply where the consignment of goods has an intrinsic value[2] not exceeding €150.

The changes being made to the VAT Directive will be transposed into Irish law through a Regulation made under section 3 of the European Communities Act 1972.

The extended One Stop Shop (OSS)

MOSS currently only covers the supply of telecommunications, broadcasting and electronic (TBE) services to consumers in the EU. From 1 July 2021, MOSS will become the One Stop Shop (OSS). The scope of transactions which can be declared under the OSS will be extended. Under the OSS, a business supplier will be permitted to register electronically in a Member State to declare:

- cross-border business-to-consumer (B2C) supplies of services and
- intra-Community distance sales of goods in the EU.[3]

The VAT due in all Member States on supplies covered by the OSS will be declared and paid to the Member State of registration in a quarterly return.

The use of the OSS is not mandatory. However, if the OSS is not availed of, the supplier will be required to register in each Member State in which they make supplies to consumers.

Both the non-Union scheme and the Union scheme will continue under the OSS, but the scope of the supplies that are covered by both schemes will be extended.

Non-Union scheme

The non-Union scheme will continue to be used by suppliers who are not established or do not have a fixed establishment in the EU. From 1 July, the scope of this scheme will be extended to cover all services supplied on a B2C basis by a supplier not established in the EU to consumers in the EU.

Where a supplier is registered to use this scheme, the EU VAT due on all eligible supplies must be declared and paid through this scheme. A supplier that is eligible to avail of this scheme can opt to register in any Member State as its Member State of Identification (MSID) for the purpose of the scheme.

Union scheme

The scope of supplies which can be declared using the Union scheme will also be extended. From 1 July, both suppliers established in the EU and those that do not have an establishment in the EU can avail of the Union scheme to declare different supplies, as follows:

- Suppliers established in the EU can use the scheme to declare EU VAT due in respect of cross-border B2C supplies of services to consumers in the EU, and VAT due in respect of intra-Community distance sales of goods.
- Suppliers established outside of the EU can use the scheme to declare EU VAT due in respect of intra-Community distance sales of goods only. Those suppliers wishing to declare the VAT due on B2C services under the OSS must do so through the non-Union scheme only.
- Deemed suppliers[4] can also use this scheme to declare the VAT due on domestic supplies of goods in a Member State. This does not apply in the case of other suppliers.

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2 Intrinsic value means: for commercial goods, the price of the goods themselves when sold for export to the customs territory of the Union, excluding transport and insurance costs, unless they are included in the price and not separately indicated on the invoice, and any other taxes and charges as ascertainable by the customs authorities from any relevant document(s); and for goods of a non-commercial nature, the price which would have been paid for the goods themselves if they were sold for export to the customs territory of the Union.

3 Intra-Community distance sales of goods are supplies of goods that are dispatched or transported from one Member State to another Member State by or on behalf of the supplier (taxable person selling these goods) to a non-taxable person or a person who is treated as a non-taxable person. New means of transport and goods supplied after assembly or installation are excluded from this definition and can therefore not be the subject of an intra-Community distance sale. However, goods subject to excise duties fall under this definition.

4 A deemed supplier is a taxable person who facilitates a supply of goods that is concluded between a supplier (underlying supplier) and a customer through the use of an electronic interface (e.g. marketplace, platform, portal etc.).

Where a trader opts to register and avail of the Union scheme, the VAT due on all eligible supplies must be declared through that scheme.

Suppliers eligible for the Union scheme can register as follows:

- If the supplier is established in the EU, the supplier must register for the Union scheme in the Member State in which they have established their business.
- If the supplier is established outside the EU and has one fixed establishment in the EU, the supplier must register for the Union scheme in the Member State in which that fixed establishment is located.
- If the supplier is established outside the EU and has fixed establishments in more than one Member State, the supplier can choose to register for the Union scheme in any one of the Member States in which they have a fixed establishment. The supplier will be bound by that decision for the calendar year concerned and the two following calendar years.
- If the supplier has no establishment or fixed establishment in the EU and they wish to register for the Union scheme in respect of intra-Community distance sales of goods, they must register in the Member State where the dispatch or transport of the goods begins. Where there is more than one such Member State, the supplier will indicate which Member State they wish to register in and will be bound by that decision for the calendar year concerned and the two following calendar years.

The deemed supplier provision

A new deeming provision is introduced in respect of certain supplies facilitated through an electronic interface. Where a taxable person facilitates certain supplies of goods through the use of an electronic interface, that taxable person operating the electronic interface will be deemed to have received and supplied those goods and will be liable for the VAT due on those supplies.

Where the deeming provision applies, the supply from the underlying supplier to the end customer is artificially split into two supplies:

- a business-to-business (B2B) supply from the underlying supplier to the taxable person operating the electronic interface and
- a B2C supply from that person as deemed supplier to the end customer.

The term electronic interface is not defined in VAT legislation, but it is understood as a broad concept that includes an online marketplace, platform, portal or similar means. This deeming provision applies where the use of the electronic interface allows for a customer and an underlying supplier to enter into contact resulting in a supply of goods through that electronic interface.

A taxable person can be considered as facilitating the supply through the use of an electronic interface where the taxable person operating the electronic interface:

- either directly or indirectly sets any of the terms and conditions under which the supply of the goods is made,
- either directly or indirectly is involved in authorising the charge to the customer in respect of the payment made or
- either directly or indirectly is involved in the ordering or delivery of the goods.

Only one of these conditions needs to be met for a taxable person operating an electronic interface to be considered as facilitating the supply of goods.

A taxable person operating an electronic interface will not necessarily be the deemed supplier of all supplies of goods which it facilitates. A taxable person will only be the deemed supplier and will be liable for the VAT due where the following supplies are facilitated through the use of an electronic interface:

- distance sales of goods imported from third territories or third countries[5] in consignments of an intrinsic value not exceeding €150, regardless of where the underlying supplier is established, and
- the supply of goods within the Community to a non-taxable person where the underlying supplier is not established within the Community, regardless of the value of the supply.

The deeming provision will not apply in cases where the taxable person provides only payment processing services, listing or advertising services, or redirecting services where the customer is redirected to another electronic interface and the supply is concluded through that latter electronic interface. It should be noted that the application of the deeming provision is on a transactional basis, and that the deeming provision will apply to transactions only where the conditions for its application are met.

The application of this provision is not optional for traders, unlike the application of the OSS or IOSS.

The new Import One Stop Shop

A new Import One Stop Shop (IOSS) will be introduced for the declaration of VAT due on distance sales of goods imported from outside the EU. With effect from 1 July, the current low-value consignment VAT relief of €22 will be abolished and all goods imported into the EU will be subject to VAT. The current customs duty exemption for goods imported into the EU up to an intrinsic value of €150 remains unchanged.

The IOSS will allow traders to register and declare import VAT due in all Member States through a monthly IOSS return in the Member State where they have registered for the scheme. Where the IOSS applies, the customer will be charged the VAT due on the supply at the time of purchase and the importation of the goods will not be subject to VAT. The VAT collected by the supplier will instead be remitted through their monthly IOSS return. This scheme will only apply to imported goods, excluding goods subject to excise duty, where the intrinsic value of the consignment does not exceed €150.

The use of this scheme is not mandatory, and it is open to both suppliers established in the EU and suppliers established outside of the EU. EU established suppliers can register directly for the IOSS in the Member State where their business is established.

If a non-EU established supplier wishes to register for the IOSS, they can only do so directly if they are established in a third country with which the EU has a VAT mutual assistance agreement in place and the goods are supplied from that third country to the EU. In those cases, the supplier can register directly in the Member State of their choosing.

In all other cases, a non-EU established supplier must register for the IOSS indirectly through the appointment of an EU established intermediary. The registration of the supplier will be done through the intermediary they have appointed to represent them, and the Member State of registration will be the Member State where the intermediary has established their business.

After registration in the IOSS, a supplier will be issued an IOSS identification number. It is important that this number is kept confidential.

Role of the intermediary

An intermediary is a person that has their business establishment or a fixed establishment in the EU and represents a taxable person for the purpose of the IOSS. If a person has no establishment in the EU, they cannot act as an intermediary.

5 Distance sales of goods imported from third territories or third countries are supplies of goods from a third territory or a third country made by or on behalf of the supplier (taxable person selling the goods) to a non-taxable person or a person treated as such. The goods have to be dispatched/transported from a third territory/third country to fall under this definition. Goods already stored in a warehouse in the EU are not covered and do not qualify as distance sales of imported goods. New means of transport and goods supplied after assembly or installation are excluded.

To act as an intermediary, that person will first need to register as an intermediary for the purpose of the scheme. The Member State of registration will be the Member State where the intermediary is established. If the intermediary has not established their business in the EU but has multiple fixed establishments in the EU, the Member State of registration will be the Member State with a fixed establishment where the intermediary indicates that they will make use of the scheme. The intermediary will be bound by this decision for the calendar year concerned and the two calendar years following.

Upon registration, the intermediary will be allocated an intermediary identification number. It is only once the intermediary is registered as such for the IOSS that they may register taxable persons that they have been appointed to represent. The intermediary will receive a separate IOSS identification number for each person they represent under the scheme.

The intermediary will have responsibility for the payment of the VAT due and the fulfilment of the VAT obligations of the supplier under the IOSS. Such obligations include the filing of returns and record-keeping obligations, but the VAT liability will remain the liability of the taxpayer. Section 109A of the Value-Added Tax Consolidation Act 2010 provides for the application of joint and several liability but this will not apply automatically. It is intended that this provision will be used in exceptional cases where compliance issues have been identified.

A taxable person cannot appoint more than one intermediary to represent them at the same time. EU established suppliers may also choose to appoint an intermediary to represent them for the purpose of the IOSS, however, this is not mandatory.

To register as an intermediary in Ireland, a person will first need to apply for a Tax Advisory Identification Number (TAIN). Where an intermediary is registered here and wants to register a taxable person for the IOSS, the intermediary and their client will be required to complete and submit an IOSS intermediary link notification.

Special arrangements for declaration and payment of import VAT

Special arrangements for the declaration and payment of import VAT will also be introduced. These arrangements can apply to the importation of goods, excluding goods subject to excise duty, in a consignment where the intrinsic value does not exceed €150.

These arrangements can only apply where the IOSS has not been availed of and where the final destination of the goods is the Member State of importation. The special arrangements are designed in particular for postal operators, express carriers, or other customs agents in the EU. Where the special arrangements are used, the operator will collect the VAT due from the customer and remit this to Revenue. These arrangements are aligned to customs provisions on deferred payment and allow for a deferred payment of the VAT. The operator will only be required to remit the VAT actually collected from the customer and will remit this at the same time as submitting a monthly return indicating the total amount of VAT collected under the period covered by the return.

All goods imported under the special arrangements will be subject to the standard rate of VAT.

Distance selling thresholds

The current distance selling thresholds of €35,000 and €100,000 in the EU will also be abolished from 1 July. The current place of supply threshold of €10,000 for TBE services, which has applied since 1 January 2019, will be extended to include intra-Community distances sales of goods.

From 1 July, this €10,000 threshold will cover both cross-border supplies of TBE services and intra-Community distance sales of goods. It does not apply to other supplies of services. Under this threshold, cross-border supplies of TBE services and intra-Community distance sales of goods will have the same VAT treatment as domestic supplies.

This measure is designed to support micro-businesses in the EU by allowing them to avoid the need to register in multiple Member States and only applies where a supplier has an establishment in only one Member State. The €10,000 threshold is calculated taking into account the total value of both TBE services and intra-Community distance sales of goods. It does not apply separately to each income stream.

A supplier may opt not to avail of the threshold and to instead apply the general place of supply rules. Where a supplier decides to apply the general place of supply rules, they will be bound by that decision for two calendar years. In such cases, the supplier may instead avail of the OSS and register for the Union scheme in their Member State of establishment.

Registration

Pre-registration for the OSS and IOSS went live on 1 April 2021, in advance of the entry into force of the new schemes from 1 July. Further information on how to register for these schemes is available on Revenue's website. Traders who are already registered for MOSS for the supply of TBE services do not need to re-register for the extended OSS. Their registrations will automatically migrate to the OSS. However, where a trader is registered for MOSS and is making other supplies now eligible under the OSS, they should contact Revenue in respect of their registration.

The IOSS is separate to the OSS, and all eligible traders wishing to register for the IOSS will need to register through the relevant registration portal. This includes traders with existing MOSS registrations.

Further information about these new rules can be found on Revenue's website, www.revenue.ie, as well as detailed guidelines on the operation of both the OSS and the IOSS.

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VAT Rates: How Are They Determined and How Can They Change?

Introduction

> "Beyond the everyday world...lies the world of VAT, a kind of fiscal theme park in which factual and legal realities are suspended or inverted" – Lord Justice Sedley, *Royal and Sun Alliance Insurance Group Plc Commissioners of Customs & Excise* [2001] EWCA Civ. 1476, para. 54.

This is certainly true when one considers the dizzying rules applicable to VAT rates. Every so often decisions are made by the tax authority or by the courts that highlight the complexities surrounding the simple question "what VAT rate applies" to a particular product or service? This article outlines the legislation that forms the basis of the VAT rates applicable here and highlights recent case law and legislative changes.

Scope of VAT

For a supply to come within the charge to VAT and have a VAT rate applied, it must fall within the scope of s3 of the Value-Added Tax Consolidation Act 2010 (VATCA 2010), i.e. VAT is chargeable, leviable and payable on "the supply for consideration of goods and of services by a taxable person acting in that capacity when the place of supply is the State" ". The scope of VAT relies on there being a "supply" of goods or services. A supply can therefore comprise goods and/or services. A supply of goods is defined in s19 VATCA 2010, and what constitutes a supply of goods is quite extensive, covering a multitude of scenarios that arise in practice. The supply of services can perhaps be a little more complex, as "service" is not defined for VAT purposes; rather, "supply, in relation to a service" is defined. S25 VATCA 2010 provides that this means "the performance or omission of any act or the toleration of any situation other than the supply of goods". This broad definition makes every business activity a "service" for VAT purposes except where the activity is a supply of goods. Once it is determined that there is a supply of goods or services (and the other conditions of s3 are met), the rate of VAT applicable to the supply has to be determined. Exemptions are not covered by this article, as that is another article in its own right!

EU Legislative Position

As VAT is an EU tax, the EU legislative provisions have to be considered to understand the rules and constraints applicable to VAT rates and the scope for changing these rates. VAT rate harmonisation/ simplification has been on the EU agenda for some time, and with the advent of the definitive VAT system edging closer, it will continue to be an important issue. Domestically, VAT as a tax and, consequently, its rates are very important to the Exchequer: the report by the VAT Tax Strategy Group 20/07 (published by the Department of Finance in September 2020) indicates that in 2019 VAT accounted for approximately 25% of the tax yield to the Exchequer.

Originally, the aim of the Treaty of Rome was to remove economic barriers between the Member States with a view to forming a single common market. This forms the reasoned basis for harmonised taxes, particularly VAT. In a VAT context, a number of EU Directives have played a key role in the development of somewhat "harmonised" VAT rates: VAT was implemented by the original Member States via the First and Second Directives, and the Sixth Directive was subsequently implemented to harmonise the VAT system of the Member States (this is now the EU VAT Directive since consolidation of the Sixth Directive in 2006). In 1991 it was agreed at EU level that a transitional VAT system would apply until 1997, with a view to moving to a definitive VAT system thereafter. The various changes introduced to the place-of-supply rules in 2010, 2015, 2019, 2020 and 2021 are moving us towards that definitive VAT regime.

The EU VAT Directive ("the Directive") provides in Articles 93–130 and Annexes III and IV a legal framework for the application of VAT rates in all Member States. Article 96 of the Directive states that "Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services". Under Article 97 "the standard rate shall not be lower than 15%". Our current standard rate is 23%.

Article 98 allows Member States to apply either one or two reduced rates to the goods and services set out in Annex III, and under Article 99 the reduced rate applicable to Annex III activities may not be less than 5%. Article 118 provides that Member States which, at 1 January 1991, were applying a reduced rate to the supply of goods or services that are not specified in Annex III may continue to apply a reduced rate provided that it is not less than 12%. Member States have discretion in the application of certain reduced rates.

Under Article 110, Member States which, at 1 January 1991, applied a reduced rate of VAT lower than 5% could continue to do so provided certain conditions were met: the reduced rates were in accordance with Community law and they were adopted for clearly defined social reasons and were for the benefit of the final consumer. Article 110 thus provides a basis for applying the 0% VAT rate to some of the items listed in Annex III, e.g. "foodstuffs".

Article 395 allowed Member States to introduce new derogating national provisions after the Directive came into force in their jurisdiction, subject to certain conditions. Article 394 allowed Member States to retain certain special measures that they were applying on 1 January 1977 to simplify the procedure for collection of VAT or to prevent certain forms of tax evasion or avoidance.

Irish Legislative Provisions

The VAT rates applicable to various goods and services and activities are set out in s46 VATCA 2010, and the Schedules specify the goods and services to which those rates apply. Our current rates are 0%, 4.8%, 9%, 13.5% and 23%.

Section 46(4) of VATCA 2010 deals with the powers of the Minister for Finance in this area. In s46(4)(a) it is provided that the Minister:

> *"........may by order vary Schedule 2 or 3 by adding to or deleting therefrom descriptions of goods or services of any kind or by varying any description of goods or services for the time being specified therein, but no order shall be made under this Chapter for the purpose of increasing any of the rates of tax or extending the classes of activities or goods in respect of which tax is for the time being chargeable".*

Schedule 2 and 3 referred to above relate to zero-rate and reduced-rate supplies. The Minister can only add to or delete descriptions of the activities that are already taxable at the zero rate or the reduced rate, rather than provide for the zero rate or the reduced rate to apply to a "new" activity.

Section 46(3) provides that:

> *"Goods or services which are specifically excluded from any paragraph of a Schedule shall, unless the contrary intention is expressed, be regarded as excluded from every other paragraph of that Schedule, and shall not be regarded as specified in that Schedule".*

These provisions allow some scope for applying reduced rates of VAT to certain categories of supply, as demonstrated by the changes in 2011, 2014 and 2019 to the 9% and 13.5% rate categories. The impact of VAT rates on the wider economy cannot be overstated. For example, the VAT Tax Strategy Group 20/07 report states that "[t]he main finding of the Department's Review is that expenditure on goods and services subject to the 9% VAT rate is particularly sensitive to income growth and to the economic cycle, more so than to price changes".

Recent Case Law

Businesses can face challenges in ascertaining the VAT rate applicable to their supplies where the supply does not fit exactly with the wording in the legislation. This is evident by a recent Tax Appeals Commission (TAC) determination in relation to the VAT rate applicable to certain candles.

The appeal in determination 119TACD2020 concerned whether certain church candles produced by the appellant company are to be zero rated for VAT purposes. Under para. 13(4) of Schedule 2 VATCA 2010, candles and night-lights are zero rated for VAT purposes if they are white and cylindrical. However, para.13(4) excludes candles and night-lights that are "decorated, spiralled, tapered or perfumed". Revenue assessed the appellant company to VAT at the standard rate in respect of certain candles that it produced on the basis that they were tapered and thus excluded by the provisions of para. 13(4) of Schedule 2. The appellant submitted that the church candles were not "tapered" but were frustoconical, i.e. the shape of the candle resembled the truncated frustum of a cone) but it was also part-cylindrical. Based on the wording in para. 13(4) of Schedule 2 VATCA 2010, in particular the express exclusion from the zero rate of candles that are "tapered", the TAC determined that the assessments to VAT should stand. The matter has been referred to the High Court, but in the intervening period the legislation has been changed to remove candles from the zero-rating provision with effect from 1 January 2022. Once removed from Schedule 2 or Schedule 3, the supply automatically becomes liable to VAT at the standard rate. Therefore, all candles – irrespective of shape, colour or fragrance – will be liable to VAT at the standard rate from 1 January 2022.

Statutory interpretation was certainly to the fore in the recent decision of the Supreme

Court in the case of *Bookfinders Ltd v The Revenue Commissioners* [2020] IESC 60. The court rejected arguments by an Irish Subway franchisee that it is not liable for VAT on certain of its takeaway products, including teas, coffees and heated filled sandwiches. It had sought VAT refunds on the grounds that the rate of VAT applicable to some of its products should be 0%. The appeal by Bookfinders included consideration of whether the bread used in Subway sandwiches fell outside the statutory definition of bread intended by the Value-Added Tax Act 1972, as amended, to attract a zero rate of VAT. The court ruled that the bread falls outside that statutory definition because it has a sugar content of 10% of the weight of the flour included in the dough (under the bread definition that applied at the time). A significant portion of the judgment dealt with statutory interpretation – namely, whether the general principles of interpretation applied or the principles of conforming interpretation. See the article by Eoin Clifford "Where is Statutory Interpretation of Tax Legislation after Bookfinders?", Irish Tax Review, 34/1 (2021).

The VAT rate applicable to food supplements has been topical over the last few years. When VAT was introduced in Ireland in 1972, the zero rate of VAT applied to certain food supplements, namely, vitamins, minerals and fish oils. As products developed, the application of the zero rate broadened, and this invariably led to uncertainty, as some food supplements were zero rated whereas others were subject to the standard rate. Following reviews, expert reports and a public consultation, Finance Act 2019 introduced changes to the rate so that the reduced rate of 13.5% applies to all food supplement products with effect from 1 January 2020. There are some very specific exceptions such as infant follow-on formulae that continue to qualify for the zero rate.

Mixed Supplies

It is important to be able to determine the composition and nature of supplies, as this will have a direct bearing on the VAT rate applicable. This is where the rules surrounding composite and multiple supplies have to be considered in situations where there is more than one supply for a single consideration.

A composite supply is defined as a supply that comprises a principal supply (i.e. the predominant element of the composite supply) and one or more ancillary supplies (i.e. a supply that forms part of the composite supply but is not physically dissociable from the principal supply but capable of being supplied in order that the principal can be better enjoyed). The VAT rate applicable to the entire consideration will be that pertaining to the principal supply. An example is a customer purchasing an airline ticket (being an exempt principal supply) that includes an in-flight meal (being a taxable ancillary supply). As the meal is included in the price paid by the customer, the entire amount will be exempt from VAT as the meal is merely ancillary to the provision of transport and so adopts the appropriate rate of VAT attracting to the principal supply, which is exempt in this case (UK case of *British Airways plc v Customs & Excise Commissioners* [1990] 5 BVC 97).

A "multiple supply" is defined as two or more individual supplies (an individual supply being defined as a supply that is a constituent part of a multiple supply and is physically and economically dissociable from the other goods/services and capable of being supplied as a good/service in its own right) that are made in conjunction with each other for a total consideration and do not constitute a composite supply. The consideration received will be apportioned between the various individual supplies, and each supply will be taxed at the appropriate VAT rate.

The Court of Justice of the European Union case of *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* C-231/94 laid down the principle that, when considering a number of supplies, regard must be had to all of the circumstances. This case dealt with the supply of restaurant facilities onboard ferries between ports in Denmark and Germany. The question was whether restaurant transactions constituted supplies of goods or supplies of services. The court stated that:

> "In order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which

> the transaction in question takes place in order to identify its characteristic features".

This is an important principle and can be overlooked in determining the nature of the transaction where only the words/terms used to describe a particular supply are considered. In this case, reviewing the circumstances led to the conclusion that the restaurant transactions were characterised by a cluster of features and acts "of which the provision of foods is only one component and in which services largely predominate".

The decision in *Card Protection Plan v Commissioners of Customs and Excise* C-349/96 addressed a key question: what is the proper test to be applied in deciding whether a transaction consists for VAT purposes of a single composite supply or of two or more independent supplies? The court in its judgment held that:

> "taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with a single service".

The court went on to state that:

> "[T]here is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied… In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service."

VAT Rate Reform

As noted above, VAT rate reform has been on the EU agenda for quite some time. Back in 2003 the European Commission proposed that the rules on reduced VAT rates be simplified by abolishing all reduced rates that were applied to supplies outside the Annex III list. Agreement could not be reached at that time on the abolition of derogations, so no further action was taken. In 2016 the Commission launched its VAT Action Plan and indicated that taxation at destination would provide more flexibility for Member States in setting VAT rates. The Commission's Work Programme for 2017 included a legislative proposal on VAT rates, and this is to be carried out by way of a Directive to amend the EU VAT Directive. However, discussions are continuing at Council level, and the Proposal for the Directive (COM (2018) 20 final) states that:

> "The Council welcomed the intention of the Commission to present a proposal for increased flexibility, so that Member States could benefit from reduced and zero rates as they existed in other Member States. It however stressed that a sufficient level of harmonisation in the EU remains required and that the adopted solution has to be carefully balanced to avoid distortions of competition, rise in business costs, and negative impact on the functioning of the single market".

It may be some time yet before the proposal comes to fruition!


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European Union: Update on Tax Reform Landscape

Introduction

The European Union (EU) will play a significant role in the support and recovery of its Member States – their businesses and citizens – from the unprecedented Covid-19 crisis. The recovery efforts will take place during the era of digital revolution and climate change challenges.

The purpose of this article is to summarise recent EU tax policy objectives and how they interact with the changes in the global tax environment. The article will also consider Irish tax policy in the context of these EU initiatives and the measures that Ireland is expected to introduce to reflect the above.

EU Tax Policy Objectives

European Commission

Before looking at any tax specific measures, it is useful to recall the European Commission's overall objectives for its current term in office (2019–2024). The vision of the Commission is to build a fairer, healthier, greener and more digital society, one that recovers quickly from the impact of the Covid-19 pandemic.[1] The promotion of EU values, EU leadership at a global level and the protection of EU democracy are also aspirations of the President of the Commission, Ursula von der Leyen.[2] Via the Commission Work Programme

1 Commission Work Programme 2021, published 19 October 2020, available at https://ec.europa.eu/info/sites/info/files/2021_commission_work_programme_en.pdf.

2 Political Guidelines for the Next European Commission 2019–2024, published 16 July 2019, available at https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf.

2021,[3] the legislative arm of the EU maps out how these objectives will be met. The Work Programme declares that the EU should lead the green and digital transitions to make its societies and economies more resilient, and it is clear that these twin principles – green and digital – have been a beacon in guiding the Commission's action in the last 12 months, including in responding to the challenges of the Covid-19 pandemic.

The Commission's tax policy objectives are closely modelled on the above principles. "Green taxes" will become more numerous and targeted at key environmental concerns – carbon pricing, energy taxation and waste generation. Ensuring that this is "Europe's digital decade" will require new tax measures. This also links into the Commission's objective to ensure fair and effective taxation. The EU as a whole will continue to support and participate in the OECD's efforts to tackle the tax challenges of increasingly digitalised economies (aka BEPS 2.0), but it will also separately consider the introduction of an EU digital levy (on which work has begun).

The legal means by which the Commission will fund and deliver on its policies are the NextGenerationEU (Recovery and Resilience) plan and the long-term EU budget (2021–2027). These instruments are the chief response to the financial needs of EU Member States that were created by Covid-19. They are also strategic in that they will direct funding to and raise contributions (via taxes) from Member States in line with the green, digital, fairness and health promotion objectives.

NextGenerationEU

NextGenerationEU is a temporary instrument[4] designed to boost the recovery of EU Member States from the Covid-19 pandemic. Acknowledging that the measures needed for economic recovery will require substantial amounts of investment, it will facilitate this investment while also promoting a sustainable and resilient recovery, supporting the creation and restoration of high-quality jobs, providing assistance for small and medium size enterprises (SMEs) and other businesses affected by the pandemic, supporting social inclusion, repairing the immediate damage brought by the pandemic, and advancing green and digital priorities and development of rural areas. The funds available under the NextGenerationEU total €750bn (adjusted annually).[5] Support will be provided through loans, non-repayable supports ("external assigned revenues") and provisioning for budget guarantees. €360bn in loans to Member States will be made available for programmes financing recovery and economic and social resilience. €384.4bn in repayable and non-repayable supports will be made available, split as follows:

- €312.5bn for a programme financing recovery and economic and social resilience via support to reforms and investments (grants) (Ireland may be allocated up to €1bn of these grants in current prices);[6]
- €47.5bn for structural and cohesion programmes of the Multiannual Financial Framework 2014–2020 as reinforced until 2022, including support through financial instruments (Ireland can participate in €84m of these funds);[7]
- €1.9bn for programmes related to civil protection;
- €5bn for programmes related to research and innovation, including support through financial instruments;

3 See note 1 above.

4 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument To Support the Recovery in the Aftermath of the Covid-19 Crisis.

5 See note 4 above.

6 European Commission, Recovery and Resilience Facility: Maximum Grant Allocations (Current Prices), available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/recovery_and_resilience_facility_.pdf.

7 European Commission, Allocation Under REACT-EU for 2021 per Member State, available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/react-eu_allocations_2021_2.pdf.

- €10bn for programmes supporting territories in their transition towards a climate-neutral economy (Ireland can participate in €44m of these funds);[8]
- €7.5bn for development in rural areas (Ireland can participate in €56.1m of these funds).[9]

€5.6bn will also be available for provisioning for budgetary guarantees and related expenditure for programmes supporting investment operations in the field of Union internal policies.

The allocation of resources to Member States should reflect the extent to which programmes to be funded will contribute to the objectives of the instrument. This incentivises Member States to design their proposals for support so that they align with the political aspirations of the Commission in order to maximise disbursements. Member States were required to present a Recovery and Resilience plan, which will determine their access to the total funds of €750bn, no later than 30 April 2021.

The Irish Government submitted *Ireland's Stability Programme April 2021 Update*[10] to the Commission and Council on 30 April 2021. This report outlined the macroeconomic and fiscal forecasts from the Department of Finance for the period 2021 – 2025 in detail.

There were no tax reforms or investments required as part of the NRRP on a prima facie basis (notwithstanding that the proposals must be in keeping with EU State Aid rules). Indeed, many Member States did not address tax reform in their national NRRP. *Ireland's Stability Programme* did not address tax reform in detail. It noted that corporation tax is unlikely to be sustainable at current levels beyond the short-term position and that international reform may undermine this revenue stream "in the not-too-distant future"[11]. The report somewhat addressed the European Semester 2020 country-specific recommendation for Ireland[12] to broaden the tax base, by noting that the tax base is wider than prior to the financial crisis. It did not address the recommendation for Ireland to step up to address features of the tax system that may facilitate aggressive tax planning, including on outbound payments. The Department of Finance has already committed to taking action in this area in 2021[13] which seems timely given that a recent report from the EU Commission[14] found that Ireland had the highest ratio of outgoing royalty flows relative to GDP in 2019, across all EU Member States.

EU long-term budget for 2021–2027

The Multiannual Financial Framework (MFF)[15] came into force on 20 December 2020 and has been effective since 1 January 2021. It will run for seven years until the end of 2027. Its objective is to provide a long-term financial framework paving the way to a fair and inclusive transition to a green and digital future, supporting the EU's longer-term strategic autonomy and making it resilient to shocks in the future.

Payments under the MFF – or commitment appropriations, to use the terminology of the instrument – and ceilings on such payments are set out in the Regulation. In total, the MFF allows the EU to commit to €2 trillion[16] (€1.75

8 European Commission, Just Transition Fund – Allocations per Member State (2018 Prices), available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/just_transition_fund_allocations_05.11_v2_0.pdf.

9 European Commission, Breakdown of European Agricultural Fund for Rural Development per Member State (NextGenerationEU, Current Prices), available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/eafrd_-_ngeu.pdf.

10 Ireland's Stability Programme April 2021 Update Incorporating. the Department of Finance's Spring Forecasts, available at https://www.gov.ie/en/publication/d3e2f-stability-programme-update-2021/

11 See Page 4 of Ireland's Stability Programme April 2021.

12 Country Report Ireland 2020, published 26 February 2020, available at https://ec.europa.eu/info/sites/info/files/2020-european_semester_country-report-ireland_en.pdf.

13 Ireland's Corporation Tax Roadmap January 2021 Update, published 14 January 2021.

14 Annual Report on Taxation 2021, Review of taxation policies in the EU Member States, published 18 May 2021.

15 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 Laying Down the Multiannual Financial Framework for the Years 2021 to 2027.

16 European Commission, Multiannual Financial Framework 2021–2027 (in Commitments) – Current Prices, available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_2021-2027_breakdown_current_prices.pdf.

trillion in 2018 prices[17]) in expenditures over the course of the budget. Specific rules will be implemented for financing long-term projects beyond 2027.

The budget allows for flexibility in reacting financially to unforeseen events via the EU Globalisation Adjustment Fund, the Solidarity and Emergency Aid Reserve and the Brexit Adjustment Reserve – the three special instruments. These are additional funding sources for major disasters, emergency situations or unforeseen Brexit consequences. There are also non-themed special instruments – the Single Margin Instrument and the Flexibility Instrument. These instruments will assist in managing a timely drawdown of commitment appropriations and allow for flexibility in applying the ceilings.

New own resources

Paying for both the NextGenerationEU supports and the EU long-term budget will require new taxes to be introduced. The EU is financing this spending via new "corona bonds" and other debt instruments in the capital markets. There are a number of new taxes planned to service this debt, called "new own resources", which are planned to start raising funds from 2023. The tax initiatives to raise new own resources are set out below in more detail. The EU is also using the new own resources to implement its overall policy objectives. Whereas the recovery and resilience plans can be seen as a "carrot" in encouraging Member States to adopt "good" reforms and investments, the new own resources are the "stick" and will discourage "bad" taxpayer behaviour such as poor carbon pricing.

Portuguese Presidency

Before turning to the tax initiatives that will ultimately fund the repayment of the debt supporting the NextGenerationEU plan and the EU long-term budget, it is worthwhile reviewing the tax policy initiatives of the Portuguese Presidency of the Council of the European Union. The Portuguese Presidency's term began on 1 January 2021 and runs until 30 June 2021. Its tax policy objectives are generally aligned with the objectives of the European Commission[18] – green taxation, development and taxation of a digital economy, fair taxation and tax efficiency – however, it is more focused on tax transparency and fair tax competition than the Commission.

It has recently been taking action to progress a Directive proposal on public country-by-country reporting (pCbCR)[19] – see below for further details – and we understand that it aims to conclude on trilogue negotiations with the Commission and the Parliament to agree a Directive by the end of its tenure on 30 June 2021. This will be the cornerstone tax initiative of the Portuguese Presidency, and it is expected that it will find the political middle-ground to reach agreement on the text of a Directive.

Slovenia will hold the Council Presidency from 1 July 2021 for a six-month term. At the time of writing, the Slovenian Presidency priorities[20] are not yet known. It was recently stated[21] that the French Presidency of the Council (from 1 January 2022 to 30 June 2022) will focus on agreeing an EU Directive to implement a global agreement on a minimum corporate tax rate, reflecting the recent speculation that an

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17 European Commission, Multiannual Financial Framework 2021–2027 (in Commitments) – 2018 Prices, available at https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_2021-2027_breakdown_2018_prices.pdf.

18 Programme for the Portuguese Presidency of the Council of the European Union (1 January 2021 to 30 June 2021), available at https://www.2021portugal.eu/media/rohpisqf/portuguese-presidency-en.pdf.

19 Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches – Consolidated Compromise Proposal, published 13 January 2021, available at https://data.consilium.europa.eu/doc/document/ST-5183-2021-INIT/en/pdf.

20 However, the 18-month programme (1 July 2020 - 31 December 2021) of the current "Trio Presidency", consisting of Germany, Portugal and Slovenia, notes that the three Presidencies intend, inter alia, to further promote fair taxation in an ever more digitalised economy - in particular with respect to an effective minimum taxation - and to advance the initiatives set out in the Action Plan to fight tax evasion. They will also commit to build a climate-neutral and green Europe. General Secretariat of the Council, Taking Forward the Strategic Agenda 18-month Programme of the Council (1 July 2020 - 31 December 2021), available at https://data.consilium.europa.eu/doc/document/ST-8086-2020-REV-1/en/pdf

21 Bruno Le Maire, 8 April 2021, available at https://www.france24.com/en/business/20210406-imf-and-france-hail-us-push-for-a-global-minimum-corporate-tax.

agreement on the BEPS 2.0 process is due to happen in mid/late 2021 and the EU will move to effect this quickly in the EU (see also below comments regarding the recent Commission Business Taxation Communication).

EU Tax Initiatives

In July 2020 the Commission adopted a new Tax Package for Fair and Simple Taxation[22] aimed at making taxation within the EU "fairer, greener and fit for the modern economy".[23] The Tax Package aims to ensure that EU tax policy supports Europe's economic recovery and long-term growth. It consists of three separate but complementary proposals:

- Action Plan for Fair and Simple Taxation, designed to support the recovery from the Covid-19 crisis ("the Action Plan").[24] The Annex to the Action Plan outlines 25 measures that the Commission plans to implement by 2024 in both the indirect tax and direct tax areas, including initiatives on digital taxation, the global fight against tax evasion and avoidance, and the EU's green transition.
- Revision of the Directive on Administrative Cooperation (termed "DAC7") to extend the EU tax transparency rules to digital platforms.[25]
- Communication on Tax Good Governance, which focuses on promoting fair taxation and good governance within the EU and beyond.[26] In this context, action will be taken on reform of the Code of Conduct on Business Taxation, the review of the EU list of non-cooperative jurisdictions for tax purposes ("the EU blacklist") and the EU's approach to assisting developing countries in the area of taxation.

In the Work Programme for 2021, adopted in October 2020, the Commission set out the list of actions that it would take in the following 12 months.[27] The Commission noted in the Work Programme that it will propose a digital levy absent global agreement through the so-called BEPS 2.0 process. Other priority pending proposals presented in the Work Programme are DAC7, the Common Consolidated Corporate Tax Base (CCCTB), public country-by-country reporting and EU financial transactions tax.[28]

In March 2021 the Commission published a roadmap on business taxation ("the Business Taxation Roadmap").[29] It complements the Action Plan and the Communication on Tax Good Governance and summarises the Commission's thinking as regards the EU corporate tax framework for the 21st century. In this context, the Commission notes that it will take stock of the BEPS 2.0 discussions and facilitate this with action at EU level, as well as considering pending proposals, such as the CCCTB.

The Commission subsequently released a "Communication on Business Taxation for the 21st Century", setting out its long-term vision and short-term legislative agenda ("the Business Taxation Communication").[30] It aims to align the EU business tax framework with the new realities of the globalised and digitalised economy that supports the post-Covid-19

22 European Commission, Package for Fair and Simple Taxation, available at https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en.

23 European Commission, press release IP/20/1334, Fair and Simple Taxation: Commission Proposes New Package of Measures To Contribute to Europe's Recovery and Growth.

24 Communication from the Commission to the European Parliament and the Council, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020) 312 final.

25 Proposal for a Council Directive Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, COM(2020) 314 final.

26 Communication from the Commission to the European Parliament and the Council on Tax Good Governance in the EU and Beyond, COM(2020) 313 final.

27 See note 1 above.

28 See note 1 above, Annexes 1–4, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:690:FIN.

29 European Commission, A Modern EU Business Taxation Framework, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12930-Business-taxation-for-the-21st-century.

30 Communication from the Commission to the European Parliament and the Council on Business Taxation for the 21st Century, COM(2021) 251 final.

recovery, and to ensure that Member States' tax systems are fit for purpose.

The communication sets an EU tax agenda for the next two years with five key actions:

- Action 1: Table a legislative proposal for the publication of effective tax rates paid by large companies, based on the methodology under discussion in Pillar 2 of the OECD BEPS 2.0 negotiations (by 2022);
- Action 2: Table a legislative proposal setting out union rules to neutralise the misuse of shell entities for tax purposes ("ATAD 3") (by Q4 2021)[31];
- Action 3: Adopt a recommendation on the domestic treatment of losses to better support businesses, and particularly SMEs (alongside Communication);
- Action 4: Make a legislative proposal creating a Debt Equity Bias Reduction Allowance (DEBRA) (by Q1 2022)
- Action 5: Table a proposal for Business in Europe: Framework for Income Taxation (BEFIT), moving towards a common tax rulebook and providing for fairer allocation of taxing rights between Member States (by 2023).[32]

The Communication formally repeals the CCCTB proposal and confirms that the EU will seek to implement the OECD Model Rules by way of Directve.

EU digital levy

A fair and competitive digital economy is one of three strategic priority areas on the agenda in Shaping Europe's Digital Future.[33] This includes ensuring that EU rules – including in the area of taxation – are fit for purpose in the digital economy and that companies compete in the EU on fair terms. According to the agenda, key to ensuring tax fairness, while also generating revenues as a new own resource, is the introduction of the EU digital levy.

After the request from the European Council,[34] and the Work Programme, the Commission began its work on designing an EU digital levy through two public consultations ("the Digital Levy Roadmap").[35] [36] The roadmap sets out the context, objectives, preliminary impacts and evidence base for an EU digital levy. It indicates that the design of the levy will take into account developments in the BEPS 2.0 process, but the Commission will also consider additional policy options, such as a corporate income tax top-up to be applied to all companies conducting certain digital activities in the EU, a tax on revenues created by certain digital activities conducted in the EU and a tax on digital transactions conducted business-to-business in the EU. The public consultation process closed on 12 April 2021.

The Commission is expected to put forward a legislative proposal in July 2021, with a view to introduction of the levy by 1 January 2023, at the latest.[37]

Revision of the Directive on Administrative Cooperation as regards digital platforms

In May 2020 the Council of the European Union ("the Council") requested the Commission to put forward a legislative proposal as regards the future evolution of administrative cooperation in the field of taxation in the

31 The Commission published an inception impact assessment on this initiative on 20 May 2021 for feedback which will be followed by a public consultation after 17 June 2021. The inception impact assessment is available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12999-Tax-avoidance-fighting-the-use-of-shell-entities-and-arrangements-for-tax-purposes_en

32 This new proposal will replace the pending proposals for a CCCTB, which will be withdrawn.

33 European Commission, Shaping Europe's Digital Future, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en.

34 European Council, Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20.

35 European Commission, A Fair & Competitive Digital Economy – Digital Levy, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-competitive-digital-economy-digital-levy.

36 See article by Anne Gunnell, Clare McGuinness & Lorraine Sheegar "Institute Responds to Four Tax Policy Consultations", in this issue.

37 European Council, Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20.

EU.[38] In this context, the Council invited the Commission to address the most urgent issues as a priority, such as challenges arising from the digital platform economy (with a phased process for other legislative proposals in this field). In response, the Commission proposed DAC7 as part of the Tax Package in July 2020.[39] The Council adopted DAC7 in March 2021.[40]

The new rules create an obligation for digital platform operators to report the income earned by sellers on their platforms and for Member States to automatically exchange this information.[41] The new reporting obligations will apply to operators of EU and non-EU digital platforms in relation to the following activities: the rental of immovable property; the provision of personal services; the sale of goods; and the rental of any mode of transport.

Member States must implement DAC7 by 31 December 2022 and apply the new rules as of 1 January 2023. The first information corresponding to reportable periods from 1 January 2023 will need to be reported by the platform operator by 31 January 2024.

DAC7 brings additional amendments:

- clarification of the standard of “foreseeable relevance” as a precondition for the exchange of information on request;
- extension of the scope of the mandatory automatic exchange of information to royalties; and
- a new legal framework for joint audits between the competent authorities of one or more Member States.

Meanwhile, the Commission has begun work on DAC8 to strengthen rules on administrative cooperation and expand the exchange of information in the area of e-money and crypto-assets. On 10 March 2021 the Commission launched a public consultation on the future revision of the DAC8, with the feedback period ending on 2 June 2021.[42] The Commission is expected to put forward a proposal for DAC8 in the third quarter of 2021.

Public country-by-country reporting

In 2016 the Commission put forward a proposal for a pCbCR framework as an amendment to the EU Accounting Directive[43] as it aims to establish financial reporting obligations as regards income tax information.[44] The pCbCR proposal[45] failed to achieve the required “qualified majority”[46] support in the Competitiveness Council (COMPET) in 2019. Before the COMPET meeting, ten Member States had issued a joint statement opposing it, arguing that the introduction of this legislation would require a unanimous vote from EU Member States as it should be considered a taxation proposal.

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38 Council of the European Union, Council Conclusions on the Future Evolution of Administrative Cooperation in the Field of Taxation in the EU, 8482/20.

39 See note 24 above. An updated draft DAC7 (13130/1/20 REV 1) was published in November 2020 by the Council of the European Union following the agreement reached by Member States at the technical level.

40 Council of the European Union, Council Directive Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, 12908/20.

41 See article by Philip McQueston and Gwen Lehane “Recent Developments Concerning Exchange of Information on Request”, in this issue.

42 European Commission, Tax Fraud & Evasion – Strengthening Rules on Administrative Cooperation and Expanding the Exchange of Information, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12632-Strengthening-existing-rules-and-expanding-exchange-of-information-framework-in-the-field-of-taxation-DAC8-.

43 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings.

44 Council of the European Union, Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches, 14038/19 ADD 1.

45 Council of the European Union, Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches – (Poss) General Approach, 14038/19.

46 When the Council votes on a Commission proposal a “qualified majority” is achieved if the following conditions are met: (1) 55% of Member States vote in favour (in practice, this means 15 out of 27); and (2) the proposal is supported by Member States representing at least 65% of the total EU population. The blocking minority must include at least four Council members representing more than 35% of the EU population.

The Portuguese Presidency issued a new, compromise text[47] and reintroduced the proposal for discussion during the 25 February 2021 COMPET meeting. The policy debate was held as a video conference, and each Member State was given the opportunity to express its views on the proposal. At the meeting, the Member States' negotiating mandate for qualified majority voting was agreed, and this was subsequently approved by Member State permanent representatives at the "Coreper" meeting in March 2021. The Irish representative outlined that Ireland's position was that the proposal should not be subject to a qualified majority vote and the instrument should be regarded as a tax matter.[48] The Portuguese Presidency is pushing for an agreement of the "trilogue negotiations" between the Council, the Parliament and the Commission by the end of its term in June 2021.

The preamble to the proposed pCbCR Directive indicates that it aims to:

- provide an essential element to further foster corporate transparency and responsibility, thereby contributing to the welfare of EU societies;
- promote a better-informed public debate regarding, in particular, the level of tax compliance of certain multinational enterprises (MNEs) active in the EU and the impact of this on the real economy; and
- serve the general economic interest by providing for equivalent safeguards throughout the EU for the protection of investors, creditors and other third parties generally.

Broadly, the new rules would require groups operating in the EU with a consolidated annual global revenue of at least €750m over a two-year period to publish certain financial information, including revenue, profit before tax, tax paid and accrued, average number of employees and total accumulated earnings.

If adopted, Member States would generally have two years to transpose the Directive into their domestic law (expected mid-2023 but could be sooner if Member States decide to do so). The pCbCR is expected to be effective for financial years beginning on or after 1 January 2025 (again, this could be sooner if Member States decide to do so). The affected MNEs (or their EU-based subsidiaries or branches) would then have 12 months from the balance sheet date to publish the report on their website, or on a free-of-charge publicly available corporate register of the relevant Member State (provided that the relevant website references that location).

Some MNEs will already be taking steps to make their tax information more transparent as part of their environmental, social and governance (ESG) objectives. Moreover, as noted above in the context of the Business Taxation Communication, the Commission is expecting to put forward a legislative proposal for the publication of effective tax rates paid by large companies with operations in the European Union by 2022. It remains to be seen whether affected taxpayers in Ireland will wait until such time as they are legally required to start sharing this information or will begin publishing similar tax information before the reporting deadline.

Review of the EU list of non-cooperative jurisdictions for tax purposes

The EU list of non-cooperative jurisdictions for tax purposes ("blacklist") was established in December 2017. It forms part of the EU's external strategy on taxation and aims to contribute to ongoing efforts to promote tax good governance globally. Jurisdictions are assessed based on criteria laid down by the Council in 2016,[49] to include tax transparency,

47 Council of the European Union, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches – Consolidated Compromise Proposal, 5183/21, available at https://data.consilium.europa.eu/doc/document/ST-5183-2021-INIT/en/pdf.

48 Position delivered by Robert Troy, 25 February 2021, available at https://video.consilium.europa.eu/event/en/24389.

49 Council of the European Union, Commission Communication on an External Strategy for Effective Taxation and Commission Recommendation on the Implementation of Measures Against Tax Treaty Abuse – Council Conclusions (25 May 2016), 9452/16, available at https://data.consilium.europa.eu/doc/document/ST-9452-2016-INIT/en/pdf.

fair taxation and implementation of international standards designed to prevent tax base erosion and profit shifting. As of 2020, it is being updated twice a year.[50]

The most recent update to the EU blacklist[51] was published in February 2021.[52] The list includes jurisdictions that, in the Council's view, either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the reforms necessary to comply with a set of objective tax good governance criteria.[53]

After the publication of the updated EU blacklist, the European Parliament Subcommittee on Tax Matters (FISC) noted that the list is being prevented from achieving its full potential.[54] In this context, the Chair of the FISC, Paul Tang, noted that the updated list reaffirms the concerns raised in the Parliament's resolution on reforming an EU blacklist adopted in January this year.[55] In the resolution the Parliament had noted that the existence of non-cooperative jurisdictions for tax purposes and harmful tax schemes, including in EU Member States, results in dramatic financial losses to EU Member States. Although the Parliament recognises in the resolution the positive impact that the EU blacklist has already had, it regrets that it does not live up to its full potential, as jurisdictions currently on the list cover less than 2% of worldwide tax revenue losses, making the list confusing and ineffective. The Parliament considers, *inter alia*, that the EU blacklist needs to be reformed and calls on the Commission to put forward a legislative proposal for coordinated defensive measures against tax avoidance and evasion. It considers that this reform should be carried out by the end of 2021 to protect the EU from any further revenue losses in the post-Covid-19 recovery period.

Green measures

Part of the new own resources taxes will be new green taxes, including a carbon border adjustment mechanism, changes to the EU emissions trading scheme and the introduction of a national contribution based on non-recycled plastic packaging waste.[56] The first of these measures to be introduced is the non-recyclable plastic packaging waste tax, which was due to be implemented in Ireland by 1 January 2021. It is expected that legislation will be proposed on reforming the EU emissions trading scheme and the carbon border adjustment mechanism in mid-2021, with a view to having these measures in effect by 1 January 2023.[57] In total, the green measures are expected to raise in the region of €22–€31bn per annum.

Implications for Irish Tax Policy

The Irish tax landscape has undergone significant changes – considerably influenced by the actions taken at EU and global level – in the last few years.[58] As explained above, recent work at EU level has focused on building

50 Council of the European Union, Taxation: Council Adds Dominica to the EU List of Non-cooperative Jurisdictions and Removes Barbados, available at https://www.consilium.europa.eu/en/press/press-releases/2021/02/22/taxation-council-adds-dominica-to-the-eu-list-of-non-cooperative-jurisdictions-and-removes-barbados/.

51 There are currently nine jurisdictions that remain on the EU "grey list". These jurisdictions do not yet comply with all international tax standards but have committed to implement tax good governance principles within the set deadlines. Once a jurisdiction meets all of its commitments, it is removed from the grey list. Council Conclusions on the Revised EU List of Non-cooperative Jurisdictions for Tax Purposes (2021/C 66/10), Annex II.

52 Council Conclusions on the Revised EU List of Non-cooperative Jurisdictions for Tax Purposes (2021/C 66/10), Annex I.

53 See note 52 above.

54 European Parliament, press release on 17 February 2021, available at https://www.europarl.europa.eu/news/en/press-room/20210216IPR97916/eu-list-of-tax-havens-not-living-up-to-its-potential-says-tax-subcommittee-chair.

55 European Parliament, European Parliament Resolution of 21 January 2021 on Reforming the EU List of Tax Havens (2020/2863(RSP)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0022_EN.pdf

56 Questions and Answers on the Adoption of the EU's Long-Term Budget for 2021–2027, published 17 December 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2465.

57 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom.

58 See note 14 above.

a fairer, greener and more digital society and recovering from the Covid-19 crisis. The Commission has a busy agenda in delivering on its tax policy initiatives outlined in the Tax Package within the set deadlines. Some of the Commission's proposals – such as the DAC7 – have already been adopted by Member States, whereas others – such as the EU digital levy and pCbCR – are on their way. The "green" own resources are also progressing, with a Commission Green Taxation Event held on 20 April 2021[59], where participants argued that green taxation can contribute to the recovery, but insisted that the transition should be fair, and that the EU should work with its international partners. As always, Ireland will constructively engage with any tax reform proposals. The Commission's success in pushing through with its initiatives will undoubtedly shape the Irish tax policy landscape in following years.

In the context of the Action Plan, the Commission notes that all existing policy levers will be activated to deliver fully on its agenda for fair and simple taxation. The Commission will explore how to make full use of the provisions of the Treaty on the Functioning of the European Union (TFEU) that allow proposals on taxation to be adopted by ordinary legislative procedure, including Article 116 TFEU (i.e. not by unanimous vote). However, EU law is clear that, as far as direct taxes are concerned, Article 116 TFEU can be used only in a very targeted way to eliminate distortions in the EU – it is not a *carte blanche* for the Commission. The Commission has previously considered Article 116 TFEU not to be an appropriate legislative tool for tax harmonisation in the EU, including any actions concerning digital taxes[60] and the CCCTB.[61] The use of Article 116 TFEU is a key issue for Member States such as Ireland with small open economies who are concerned to ensure that their tax sovereignty is not diminished through the use of the ordinary legislative procedure. The ability to "veto" a proposed tax measure in a unanimous vote situation is an important right for those Member States, particularly for issues where their taxpayers may be disproportionately impacted.

As regards tax transparency, the Department of Finance has committed to considering further defensive measures in respect of countries on the EU blacklist.[62] These measures would be in addition to the existing measures, such as the CFC rules introduced in 2018. The measures being considered may include, *inter alia*, non-deductibility of costs and withholding tax on payments to taxpayers resident in a territory listed on the EU blacklist.[63] The Department of Finance is expected to launch a public consultation in 2021, with the objective of considering the introduction of appropriate measures in Finance Bill 2021.[64]

On a related note, the Department of Finance has committed to considering actions that may be needed in respect of outbound payments, such as interest, dividends and royalties. This commitment will consider the concerns raised by the EU in recent years in the European Semester process and in the country-specific

59 European Commission, Green Taxation, available at https://ec.europa.eu/taxation_customs/green-taxation_en?_cldee=Y2hsb2Uub2hhcmFAcHdjLmNvbQ%3d%3d&recipientid=contact-c009fe59fff9e71180fd3863bb3600d8-8763f3f763f04827934b4491eda085f1&esid=0bc94cf2-4f99-eb11-b1ac-000d3aae02f2.

60 See e.g. Forbes, Tax Notes Talk, "The European Commission's Year Ahead In Tax", available at https://www.forbes.com/sites/taxnotes/2021/03/30/the-european-commissions-year-ahead-in-tax/?sh=70255776d653.

61 European Parliament, Parliamentary Questions E-001797/2019, available at https://www.europarl.europa.eu/doceo/document/E-8-2019-001797-ASW_EN.pdf.

62 See note 14 above.

63 On 5 December 2019 the Council endorsed guidance for further coordination regarding defensive tax measures. Member States also committed, as of 1 January 2021, to use the EU blacklist in the application of at least one of four specific legislative measures: (1) non-deductibility of costs incurred in a listed jurisdiction; (2) controlled foreign company (CFC) rules, to limit artificial deferral of tax to offshore, low-taxed entities; (3) withholding tax measures to tackle improper exemptions or refunds; and (4) limitation of the participation exemption on shareholder dividends. European Council,

Council of the European Union, Taxation: EU List of Non-cooperative Jurisdictions, available at https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.

64 See note 14 above.

recommendations given to Ireland, being that the proportion of outbound royalty and dividend payments made is comparatively high.[65]

The remaining action points in the Corporation Tax Roadmap, which originated from EU tax reform measures, include the introduction of the reverse anti-hybrid rules and interest limitation rules by 31 December 2021, with the effect from 1 January 2022, as required by the EU Anti-Tax-Avoidance Directive.[66]

Conclusions

The status of an EU Member State confers on Ireland an equal footing when it comes to EU tax policy-making with other EU Member States. As a result, for several years now, Ireland has been reacting to EU tax reform with changes to its domestic tax code and practice, by means of either transposing EU law into Irish tax law or introducing other measures in line with the policy objectives agreed at EU level. Concurrently, Ireland has also made changes to the tax regime and tax policy to account for the OECD developments in recent years. This period of change looks set to continue for the foreseeable future, as outlined in the updated Corporation Tax Roadmap. The proposed US Made in America Tax Plan will also have an impact on Irish tax policy.

We are now starting to see how all three of these external forces – the EU, US and OECD – are coming together to drive global tax reform. It is vital to consider Ireland's role in, and response to, all of this change. Ireland's ability to retain the 12.5% headline corporate tax rate, attract foreign direct investment and maintain current corporate tax receipt levels in a post-Covid-19 environment will continue to be key considerations as it assess the impact of the proposed global tax reform measures.

65 Recommendation for a Council Recommendation on the 2020 National Reform Programme of Ireland and Delivering a Council Opinion on the 2020 Stability Programme of Ireland, COM/2020/507 final.

66 Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market as Regards Interest Limitation Rules; and Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries as Regards Reverse Hybrids.

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Institute Responds to Four Tax Policy Consultations

Introduction

Since the beginning of the year, the Institute has been gathering feedback from members and responding to a number of public consultations on important tax policy matters.

At the end of December 2020, the Department of Finance launched a public consultation on the Employment Investment Incentive and a Feedback Statement on the implementation of the final measure of the Anti-Tax-Avoidance Directive (ATAD): Article 4, on the Interest Limitation Rule.

After this, on 14 January 2021, the Minister for Finance, Paschal Donohoe TD, published *Ireland's Corporation Tax Roadmap: January 2021 Update*.

The updated Roadmap considered the continuing global tax reform work and set out the next steps in the ongoing process of modernising and strengthening Ireland's corporation tax system. It outlined further actions that Ireland will take as part of international tax reform efforts, which included commitments to:

- adopt the "Authorised OECD Approach" for transfer pricing of branches and legislate for it in Finance Bill 2021;
- publish a new tax treaty policy statement, having particular regard to treaty policy for developing countries; and
- implement the Interest Limitation Rule in Finance Bill 2021.

In line with the commitments in the updated Roadmap, the Department of Finance launched a public consultation on the proposed application of the Authorised OECD Approach to the attribution of profits to branches of non-resident companies on 16 March and a further public consultation on Ireland's Tax Treaty Policy on 7 April.

We summarise below the Institute's responses to the consultations on the Employment Investment Incentive, the ATAD Interest Limitation Rule and the Authorised OECD Approach. At the time of writing, the Institute is drafting a response to the consultation on Ireland's Tax Treaty Policy. Further information on this public consultation is outlined in "Legislation & Policy Monitor", *Irish Tax Review*, 35/2 (2021).

In April, the Institute also responded to the European Commission's public consultation on the introduction of a digital levy to address the issue of fair taxation of the digital economy, and our response is outlined below. At the time of writing, the Institute is drafting a response to the Commission's public consultation titled "EU taxpayers' rights – simplified procedures for better tax compliance (Recommendation)".

Institute Responds to Department of Finance Consultations

Employment Investment Incentive (EII)

On 12 February the Institute responded to the Department of Finance's public consultation on the EII. The EII scheme is a vital source of finance for early-stage and small businesses. Rather than relying solely on the Government to inject cash into the economy, the EII could be used, by the private sector, to support the return to business after the Covid-19 pandemic and to boost the creation of new jobs.

Although EII relief is very valuable for companies and investors, the complexities of availing of the scheme can act as a barrier to expansion. The Institute's submission set out 15 tax policy and administration recommendations for the EII scheme (including SURE, Start-up Relief for Entrepreneurs) that we believe are necessary enhancements to address these difficulties and improve the overall effectiveness of the scheme. The Institute's recommendations are:

- **Streamline the administrative process with non-mandatory template forms.** Introducing a streamlined administrative process for small/micro companies would ease the considerable burden for them. Adopting non-mandatory template forms (for business plans, cash-flows etc.) will help them to avail of the much-needed EII finance.
- **Introduce a carve-out from the connected-party rule linked with a control test.** This will prevent shares/share options granted to non-executive directors or other key employees from automatically disqualifying them from being a qualifying investor.
- **Broaden the rules governing the EII schemeto attract institutional investors.** Expanding the rules governing the EII scheme to cater for investors pooled in vehicles that mirror the operation of an alternative investment fund that was established to invest in "qualifying companies" of the scheme.
- **Permit the use of the capital redemption window for fund investments.** Allowing Designated Investment Funds (and other fund investments) to utilise the capital redemption window provided under the rules of the scheme would facilitate more follow-on investment.
- **Expand the definition of financial intermediary for the seven-year window for firms in difficulty beyond regulated bodies.** Otherwise, companies that are deemed financially viable by a regulated body cannot extend the benefit of the positive outcome of that due diligence of the scheme to investors who invest directly in the company or via another, non-regulated fund, notwithstanding that the due diligence may have been shared and collectively relied on.
- **Make a technical amendment to s490(3)(a)(ii) TCA 1997.** This would ensure that a "qualifying company" for the purposes of the EII scheme includes a "Renewable

Energy Community" ("the Relevant REC") for "Community-Led Projects" under the Renewable Energy Support Scheme.

- **Amend s490 TCA 1997 to address the exclusion of holding company structures.** The exclusion of holding company structures is causing genuine businesses to be precluded from raising EII finance. In our view, this is in stark contrast to other Government funding sources. Amending s490 TCA 1997 would address this issue, specifically for holding companies established by founders.
- **Establish a carve-out in "qualifying trading activities" for green/energy-efficient specific projects.** This would permit companies that would not normally qualify for the EII to raise EII finance for investment in products that help their business to become energy-neutral.
- **Commit appropriate and adequate resourcing to processing EII applications.** This could be achieved by establishing a dedicated single point of contact/team in Revenue for all EII-related queries. This is in addition to applying an appropriate Revenue customer service standard to EII applications.
- **Impose a monetary penalty as a sanction for administrative error or late filing.** We believe that it would be more proportionate to impose a monetary penalty as a sanction for an administrative error or the late filing of a return. This is favourable when compared to a clawback of the entire EII relief.
- **Recognise exit strategies for investors beyond share redemption or trade sale.** Given the high commercial risk that investors assume, we believe that the EII schemeshould recognise exit strategies for investors beyond what is provided by way of a share redemption under s508R(9) TCA 1997 or a trade sale.
- **Consider having a four-year holding period for all EII investments.** If the seven-year rule for investments up to €500,000 is retained, we believe that only a partial clawback should occur between years 5 and 7. At the very least, the first €250,000 beyond year 4 should not suffer a clawback.
- **Enable the Statement of Qualification to be issued once an investment has been made.** This would reduce the administrative burden for early-stage qualifying companies.
- **Allow capital losses, net of tax relief already received, incurred on EII investments.** This would be in line with the recommendation made by Indecon in its 2018 evaluation of the scheme.
- **Extend the SURE scheme to include new business founders and increase awareness.** The scheme should extend to founders who were previously self-employed and are starting up another business (as well as those coming from employment). Increasing awareness of the SURE scheme should also be prioritised.

At the end of March the Institute participated in the stakeholder consultation event on the EII scheme hosted by the Department of Finance. Over the two days, the Institute highlighted the difficulties that exist and the changes necessary to enhance the scheme. Feedback provided by stakeholders at the event will be reviewed by officials in the Department of Finance to develop proposals for consideration by the Minister for Finance in the context of the legislative agenda.

ATAD Implementation: Article 4, Interest Limitation

On 8 March the Institute responded to the Department of Finance's Feedback Statement on the implementation of the final measure of the ATAD, Article 4, on the Interest Limitation Rule (ILR). The ILR, which will introduce a fixed-based ratio rule to limit a company's allowable tax deduction for net interest cost in a tax period to 30% of earnings before interest, tax, depreciation and amortisation (EBITDA), will be transposed into Irish law in Finance Bill 2021.

In our submission we urged policy-makers to ensure, when implementing the ILR, that the legislation is aligned with the ATAD and that the transposition of the measure should not impose additional, overly complex rules on top of the existing comprehensive provisions. Otherwise, it will likely increase the cost of borrowings, significantly add to the administrative burden for companies and put Ireland and Irish groups at a competitive disadvantage.

The Government's stated position from the outset has been that Ireland's existing interest deductibility rules are equally effective to those contained in the ATAD. We believe that a redesign of Ireland's corporation tax regime for deducting interest is necessary to rebalance the effect of the comprehensive protections already afforded by the existing regime. In our view, policy-makers should take the opportunity to consolidate the Irish interest regime to allow for a broad business-purpose test for interest and to maximise the optionality permitted by the ATAD.

In the submission, we made 28 recommendations and observations on the proposed legislative approach to the implementation of the ILR. :

The Institute's submission included recommendations on the:

- necessary modifications to existing tax legislation in Finance Bill 2021 to ensure that the ILR can be integrated into domestic legislation without imposing significant complex rules on businesses, while maintaining the necessary protections for the corporate tax base;
- the proposed definitions of "interest equivalent", "exceeding borrowing costs" and "EBITDA" for the purposes of the ILR;
- the operation of the carry-forward of non-deductible exceeding borrowing costs and excess interest capacity under the ILR provision;
- the adoption of the exemptions permitted under the ATAD in Irish law, including, a *de minimis* amount of up to €3m and exemptions for financial undertakings, stand-alone entities, legacy debt and long-term public infrastructure projects;
- the adoption of both group ratio rules in Irish law; and
- the operation of a notional local group as a single taxpayer for the purpose of the ILR provision.

In view of the very technical nature of this measure and its significant impact on most businesses, the Institute stressed how early and frequent engagement on this issue is crucial to securing a successful outcome that works for business and the Exchequer. We stated that this iterative consultative process should happen well before the summer and the signalled publication of a second Feedback Statement on the ILR.

The Department of Finance published all of the responses received to the December 2020 Feedback Statement on 6 April. Although there was consensus in many of the responses, there were some differences of opinion, and the Department of Finance and Revenue are engaging with stakeholders to understand these differences better. The Department has confirmed that work is continuing on publication of a second Feedback Statement in the summer and stated that stakeholders will be kept informed as the transposition process progresses.

Application of the Authorised OECD Approach to the Attribution of Profits to Branches of Non-Resident Companies

On 16 April the Institute responded to the Department of Finance's public consultation on Ireland's corporation tax rules relating to the application of the Authorised OECD Approach (AOA) to the attribution of profits to branches of non-resident companies. The AOA seeks to attribute to a permanent establishment, or branch, the profits that it would have earned at arm's length if it were a legally distinct and separate enterprise performing the same or similar functions under the same or similar conditions. It incorporates separate-entity and arm's-length principles. The proposed adoption of the AOA, which will extend transfer pricing principles to the taxation of branches in Ireland, is an important step in the modernisation of Ireland's transfer pricing rules. In our submission, we made nine key recommendations, including:

- Policy-makers should align the legislation as closely as possible with the OECD's 2010 *Report on the Attribution of Profits to Permanent Establishments* ("the AOA guidance"). Documentation requirements should be consistent with, and should not be any more onerous than, those that apply for Irish transfer pricing purposes.
- Simplified documentation requirements should apply for the purposes of the application of the AOA to branches of non-resident SMEs.
- Taxpayers should have the flexibility to choose the most appropriate methodology for their business that is permitted under the AOA guidance to determine the allocation of capital to a permanent establishment.
- As a number of Ireland's double taxation treaties pre-date the publication of the AOA guidance, in the event of a dispute with a treaty country regarding the application of the AOA to an Irish branch, the taxpayer should have access to the Mutual Agreement Procedure to assist in resolving that dispute.
- Comprehensive Revenue guidance on the application of the AOA in an Irish context will be required to provide certainty for business.

Institute Responds to European Commission Consultation on EU Digital Levy

On 18 January 2021 the European Commission launched a public consultation on the introduction of a digital levy. In its conclusions of 21 July 2020, the European Council had tasked the Commission with bringing forward proposals for additional Own Resources for the EU 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, but it is not intended to interfere with the ongoing work at G20/OECD level on the reform of the international corporate tax framework.

The Commission requested views on the main problems related to taxing the digital economy, for Member States and business. It also asked for feedback on possible solutions to these problems. The public consultation will feed into the work under way on the digital levy proposal for mid-2021.

Our response to the consultation reiterated the Institute's support for the continuing efforts at theG20/OECD level to reach a stable, global, consensus-based solution to address the tax challenges arising from the digitalisation of the worldwide economy. In our view, the focus should remain on this work and on minimising the vast administrative burdens that will inevitably go with any agreed solution. We highlighted that, in the absence of agreement at G20/OECD level, a proliferation of uncoordinated national digital tax measures could occur across Europe and beyond, leading to increased incidences of double taxation and more tax disputes, which could further fragment the EU Single Market.

Our submission also cautioned that introducing an additional EU digital levy at this time could not only undermine the renewed engagement by members of the Inclusive Framework to agree a solution internationally by mid-2021 but also increase the risk of double taxation for businesses operating in the EU and act as a disincentive to investment within the Single Market at a time when it is needed most to support the recovery of the economies of Member States.

Conclusion

In a letter to the Minister for Finance on 1 February, the Institute welcomed the commitment to establish a new framework for domestic stakeholder engagement in the January 2021 update to *Ireland's Corporation Tax Roadmap*. The Institute believes that early and frequent engagement by the Department of Finance on policy development and legislation is crucial to securing a successful outcome that works for business and the Exchequer. We suggested to the Minister that this process should allow for subgroups to undertake detailed, tax technical work in the case of complex issues of significant economic impact, such as interest limitation.

Given the timeframe for implementation of the ILR and in view of the very technical nature of this measure and its significant impact on Irish businesses, the Institute will continue to seek engagement between the Department of Finance and stakeholders on this important issue.

The Institute's responses to each of the consultations referred to in this article are based on extensive feedback received from members in practice and industry and are formulated in consultation with the Institute's Policy & Technical Committee. Copies of the Institute's full submissions can be found at www.taxinstitute.ie.

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Interest Limitations: How the UK Has implemented the Rules

Introduction

Since the "great recession" of the late 2000s there has been increasing focus from governments and their tax authorities on tax regimes that may provide companies the opportunity to realise profits in jurisdictions that have lower tax rates than those of larger economies. As a result of these concerns, the OECD engaged in the Base Erosion and Profit Shifting (BEPS) Project to examine the issues and provide solutions to governments to potentially move towards tax harmonisation and a level playing field.

Action 4 of the BEPS Project focused on "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments".

Action 4 identified risks in relation to interest costs that may arise in three basic scenarios:

- groups placing higher levels of third-party debt in high-tax countries;
- groups using intra-group loans to generate interest deductions in excess of the group's actual third-party interest expense; and
- groups using third-party or intra-group financing to fund the generation of tax-exempt income.

The UK corporation tax regime contains various general anti-avoidance provisions (e.g. transfer pricing rules code, anti-hybrid regime) and specific anti-avoidance rules with regard to financing (e.g. "loan for unallowable purpose"). When applied to funding structures, these provisions seek to ensure that tax relief obtained in the UK for finance costs represent arm's-length terms and do not comprise any form of abuse of the tax system. Nevertheless, in addition to these existing provisions and in response to BEPS Action 4, with effect from 1 April 2017 the UK Government introduced the corporate interest restriction (CIR) regime.

The CIR regime applies after all of the aforementioned rules and is the UK Government's last line of defence in its objective to restrict UK corporation tax deductions for financing charges to an amount that is commensurate with the activities carried on in the UK. It is fair to say that, in terms of complexity, the CIR regime is one of the most challenging pieces of legislation in the UK tax code. Indeed, when the legislation was published, it was accompanied by more than 500 pages of HMRC guidance, which sought to elaborate on the myriad of definitions, calculations and acronyms in the primary legislation. Undoubtedly, the CIR regime has significantly impacted the ability of groups both to determine and to secure a UK tax deduction for financing costs.

Basic Concepts

The UK CIR regime restricts tax relief for finance charges to the extent that finance charges taken from the UK tax computations exceed the "interest capacity" in a given 12-month period. Interest capacity is subject to a *de minimus* of £2m for every 12-month period. In other words, there is no restriction of finance charges for UK tax purposes under the CIR regime if such charges in a group are £2m or less in each 12-month period. Thereafter, the rules apply in a mechanistic way.

Where a group's finance charges exceed the *de minimus* of £2m, the default fixed ratio rule (FRR) seeks to limit a group's UK tax deductions to the lower of:

- 30% of the group's UK tax EBITDA; and
- the net financing charges of the group reflected in the consolidated accounts of the parent (known as the FRR debt cap).

UK tax EBITDA for these purposes equates to UK taxable earnings of the worldwide group before tax interest, tax depreciation and tax amortisation.

Under FRR, tax relief is restricted to the finance charges incurred by the worldwide group with related and unrelated parties.

As an alternative to the FRR, the group ratio rule (GRR) may be applied. Under the GRR, the finance charge deduction is limited to the lower of:

- the group ratio (broadly, the ratio of net group interest to group EBITDA, based on the group's consolidated accounts) applied to UK tax EBITDA; and
- the adjusted net interest expense of the group reflected in the consolidated accounts of the parent (known as the GRR debt cap).

In practice, the GRR will be elected by a taxpayer only when it results in tax relief for financing costs that are higher than would be the case under the FRR.

Under the GRR, tax relief is restricted to the finance charges incurred by the worldwide group with unrelated parties only. This is in contrast to the FRR, which reflects finance charges with related and unrelated parties. Further details on this point are provided below.

It is to be noted that the CIR regime **restricts** but does not specifically **deny** a tax deduction for financing costs in a given period. This restriction is in contrast to the UK transfer pricing provisions, which simply deny tax relief for financing costs that are not commensurate with arm's-length terms. Therefore, under the CIR regime, there is the ability to potentially reactivate such "restricted" financing costs in later periods.

In 2017, when the CIR regime was introduced, the terms FRR, GRR, restricted interest and the like were entirely unfamiliar to many UK tax advisers. However, from 2017 these terms have become somewhat ubiquitous when considering tax relief for financing charges for international groups that have significant UK operations or UK-centric groups, or indeed assessing the tax position for standalone infrastructure projects that have heavy capital expenditure backed by similar levels of financing.

It is likely that as the concepts of BEPS Action 4 are introduced to the Irish tax regime, their application to specific projects and companies will prove challenging, especially when considered alongside the significant anti-avoidance provisions already enshrined in the Irish tax code.

Four years since the CIR regime came into force in the UK, we now consider its operation and elaborate on some of the practical issues that have faced UK advisers.

The Worldwide Group

The first step of the CIR regime is to determine the worldwide group and the financial statements that will be used by the worldwide group for CIR purposes. For CIR purposes, the worldwide group consists, broadly, of the ultimate parent of the group as defined for international accounting standards, including the parent and its subsidiary companies. It is to be noted that a group for CIR purposes is defined not by tax legislation and those concepts that are familiar to all tax advisers but by international accounting standards (IAS).

In addition, where investments in subsidiaries are measured at fair value under IAS, they do not form part of the worldwide group for CIR purposes. This is intended as relaxation of the rules for the funds industry, which can hold many subsidiaries under a common holding company that qualifies as an investment entity under IFRS 10 and does not prepare consolidated accounts. In such circumstances, each of the subsidiaries may be regarded as a separate CIR group.

In practical terms, the identification of the worldwide group can prove difficult. In certain jurisdictions, visibility of ultimate ownership structures and access to the level of information required under the CIR regime can be problematic. For example, does a company in a non-UK jurisdiction hold shares in other entities, or is the "capital" of the company not analogous to share capital? If share capital is held, is the holder the beneficial owner or a bare trustee? If there are non-corporate entities in a structure (e.g. a partnership or equivalent), how are they to be reflected for CIR purposes? In addition, are consolidated accounts prepared and, if so, are these accounts in accordance with IAS?

UK Finance Charges

The second step is to calculate the group's UK finance charges for the period of account. In CIR parlance, UK finance charges has the snappy acronym ANTIE (aggregate net tax interest expense). As mentioned above, ANTIE is calculated after all other tax rules have been considered, e.g. transfer pricing, anti-hybrid. Interest for these purposes includes interest on debt and/or deposits, interest on finance leases, debt factoring and guarantee fees. It also includes interest that has been capitalised. However, the definition of ANTIE excludes foreign exchange movements and certain impairments recognised in respect of loan balances.

In theory the CIR rules can apply to financial institutions such as banks and finance leasing companies. However, if a group has an aggregate net tax interest income rather than an ANTIE, no interest restriction will apply. Therefore, as financial institutions are likely to be in a net interest income position, there may be limited practical application of the CIR regime to their annual tax filings.

To a large extent, whether an item in the profit and loss account falls within the definition of ANTIE can be driven by whether it is regarded as "interest" for GAAP purposes. Therefore, changes in accounting standards can create practical challenges in the calculation of ANTIE. For example, the introduction of IFRS 16 means that, from 1 January 2019, companies preparing accounts under IFRS/FRS 101 are required to bring assets held under operating leases onto the balance sheet, thus effectively aligning the accounting treatment of finance leases and of operating leases. As noted above, the finance expense on finance leases is, in the first instance, regarded as an interest expense item for CIR purposes. However, where leases were previously classified as operating leases, any finance element of the lease payments recognised in the profit and loss account is disregarded for CIR purposes. Companies adopting IFRS 16 therefore face an additional compliance burden as they will be required to identify whether the underlying leases would historically have been operating leases or finance leases and prepare the CIR calculations accordingly.

Debt Cap

There are two measurements to determine the debt cap for CIR purposes. The FRR debt cap, defined as the ANGIE (adjusted net group interest expense), is calculated by taking the items that would be regarded as finance charges/income for UK CIR purposes recognised in the consolidated profit and loss account of the worldwide group and adjusting them to align, broadly, with UK tax principles. As noted above, the FRR debt cap reflects finance charges from both related and unrelated parties.

The adjustment to align with UK tax principles can be problematic. It requires an understanding of all the items reflected in the profit and loss account as finance matters, as well as consideration of all other items that may not initially be reflected as falling within a finance classification but could do so under UK tax principles. Thereafter, these matters must be adjusted to align, broadly, with UK tax principles. Given the complexities associated with the preparation of consolidated accounts for an international group, together with consideration of real-world transactions, the required alignment can be a time-consuming and difficult task.

Alternatively, when considering the interest capacity for a period, an election can be made to apply the GRR. If the GRR is applied in a given period, then, in effect, the FRR debt cap is further adjusted to remove finance income/expenses with related parties to produce the GRR debt cap. In essence, if a UK group elects to apply the GRR, then tax relief for finance charges will be capped at the net finance cost reflected in the consolidated accounts that are with unrelated parties. Therefore, whether a "lender" is a related or an unrelated party is key. However, the definition of a related party is wider than would have historically been the case under UK tax principles and requires an understanding of the key terms of any financing. As there may be a myriad of different financing structures entered into in any given year by an international group, the consideration of each of these and whether the terms are such that they are regarded as with related parties can prove to be very challenging.

Under either the FRR debt cap or the GRR debt cap, it is important to note that for international groups the ability to claim UK tax relief for what are arm's-length interest costs can, to a greater or lesser degree, be driven by the commercial circumstances of non-UK group companies.

Example 1

Parent Co. Ltd is a non-UK company with one UK subsidiary company (UK Co. Ltd) and two non-UK subsidiary companies.

The worldwide group has EBITDA of £100m, and UK Co. generated a tax EBITDA of £40m.

Parent Co. borrowed from a third-party lender to fund its subsidiaries' operations. In the year ended 31 December 2020, Parent Co. paid interest of £37.5m on this loan, generating a debt cap of £37.5m.

UK Co. paid Parent Co. an arm's-length rate of interest of £15m in respect of its loan. Therefore UK Co. has an ANTIE of £15m.

Fixed ratio rule	
30% of aggregate tax EBITDA (30% x £40m)	£12.0m
FRR debt cap	£37.5m
Interest capacity	**£12.0m**
ANTIE	£15.0m
Restricted interest	**£3.0m**

Group ratio rule	
GRR % = £37.5m / £100m	37.5%
GRR % x aggregate tax EBITDA (37.5% x £40m)	£15.0m
GRR debt cap	£37.5m
Interest capacity	**£15.0m**
ANTIE	£15.0m
Restricted interest	**£nil**

In this example UK Co. would suffer an interest restriction of £3m under the FRR, but under the GRR no interest restriction would apply.

Allocation of Interest Disallowance Between Group Companies

If an interest restriction applies, the next step is to allocate the disallowance to the various UK taxpaying companies.

A key feature of the CIR regime is that the restricted interest is not lost. It is carried forward indefinitely and may be reactivated and relieved in the future if the group's interest allowance in a subsequent period exceeds its ANTIE in that period. The purpose of this rule is to potentially smooth timing issues in terms of economic volatility, group performance etc., which may result in large interest restrictions in one period and none in another period.

In practice, the ability to reactivate interest depends on various external factors such as market conditions and performance of the overall group. From experience, the best way to determine whether there will be opportunities to reactivate interest in future periods is to prepare a financial model that reflects expected economic performance and the associated tax position over a defined period. In practice, relatively small changes to commercial circumstances can have a significant impact on the ability to reactivate interest.

Another key consideration is where any disallowance should be allocated. For example, a company could suffer a disallowance but could negate the impact by claiming other tax attributes (e.g. capital allowances, tax losses).

Elections

The CIR rules can cause practical issues and result in material interest cost restrictions. In recognition of this, a number of elections are available that can mitigate the risk of companies' incurring interest restrictions that would not be within the spirit of the legislation. There are quite a number of potential elections, but two that are considered frequently are the "Alternative Calculation Election" and the "PublicBenefit Infrastructure Exemption election".

Alternative Calculation Election

Typically, property developers borrow money to finance ongoing projects, and the interest costs in relation to those loans are capitalised as part of trading stock under accounting standards. This means that the interest on the loans does not form part of the net tax interest expense until stock is charged to the profit and loss account on disposal. However, under the CIR regime the default position is that capitalised financing costs are included in the modified debt cap figure for the period of capitalisation (and not the period of sale), and therefore a mismatch arises between the tax interest expense and ANGIE in both the period of capitalisation and the period of sale. This mismatch could result in tax relief not being obtained in respect of capitalised finance costs recognised in stock. Therefore, an irrevocable election (the "Alternative Calculation Election") can be made to exclude capitalised finance costs from the modified debt cap figure for the period in which the finance costs are actually capitalised and instead include it in the modified debt cap figure for the period in which the stock is sold.

Public Benefit Infrastructure Exemption election

The aim of the Public Benefit Infrastructure Exemption election (PBIE) is to enable companies operating "qualifying infrastructure assets" in the UK to achieve certainty on the tax deductibility of debt on long-term contracts that may impact funding decisions and ultimately the viability of the projects. Broadly, the PBIE allows a qualifying company effectively to obtain full tax relief for interest on non-related-party debt by excluding this interest from the CIR calculations.

There are various conditions to be met for a company to be regarded as a qualifying company. However, although the title of the PBIE would imply that it is focused on those companies that are engaged in infrastructure activities, it is to be noted that certain property investment activities are considered to be an infrastructure activity for these purposes.

Companies that engage in property investment often have high financing costs and modest rental profits, therefore the CIR regime could be regarded as a deterrent to property companies investing in the UK. The impact of the PBIE is that, for such companies, amounts that would otherwise be considered tax interest expenses are considered exempt amounts in that period. This means that there may be limited adverse impact of the CIR rules for qualifying infrastructure companies on the deductibility of interest on third-party loans.

Once the PBIE election is made by the company, it applies for five years. In practice, unless there is significant certainty over a company's activities and, in particular, its financing structure, a taxpayer may find it difficult to elect for the PBIE to apply in any given year and for the five years hence.

Administration

The UK CIR rules not only are complex in terms of quantifying tax relief but also introduced a host of additional administration requirements for companies and groups to consider.

Groups will need to appoint a "reporting company", which will be responsible for filing an interest restriction return (IRR) for each period of account, calculating the overall disallowance (or reactivation) of finance charges and allocating this between the UK taxpaying companies.

The appointment of an entity as the reporting company must be authorised by at least 50% of the other UK taxable companies in the worldwide group, and notice must be given to HMRC. Where no reporting company nomination has been made, HMRC has the authority to appoint a reporting company and allocate any interest restriction as it sees fit.

Where the group has a UK interest restriction, the reporting company must file a full IRR within 12 months of the end of the accounting period. Under UK tax rules, companies generally have one year to amend a tax return. However, in recognition of the complexity of the CIR regime and to grant taxpayers additional flexibility, the CIR legislation provides that reporting companies that have reported a restriction may be able to amend a CIR return for up to three years from the end of the accounting period.

Where the worldwide group is not subject to interest restrictions in a period of account, the reporting company can opt to file an abbreviated IRR. The aim of the abbreviated return is to act as a placeholder and again provide much-needed flexibility. An abbreviated return does not include detailed calculations. However, if the group is subsequently faced with a restriction of tax relief for interest capacity in a later period, the reporting company may go back five years to file a full return calculating tax attributes in earlier periods, which may reduce any restriction arising in a later period.

Conclusion

The CIR legislation is extremely detailed and is one of the most – if not the most – complicated and challenging regimes in the UK corporate tax code. The matters referred to in this article reflect only a small number of areas that we have considered when advising our clients from 2017. In addition, other common areas of concern include intra-group transactions between UK and non-UK parties and potential further restrictions on tax relief when a company joins or leaves a particular group. The CIR regime also poses questions when considering restructuring options, M&A transactions and due diligence engagements.

It was HMRC's intention (in line with BEPS Action 4) that the CIR regime restrict UK corporation tax relief on financing costs to an amount that is commensurate with the activities taxed in the UK and not simply what would be regarded as equivalent to arm's-length principles. To a large extent, the CIR regime has been successful in achieving this aim. However, that is not to say that all of the adjustments required under the CIR regime are such that a taxpayer would regard these adjustments as equitable. In particular, taxpayers who have only UK operations and who have been funded on arm's-length terms may still face a restriction if the profits in any given year would not support full tax relief. In addition, clients have struggled with the fact that decisions and operations carried out entirely on a commercial basis outside of the UK by other group members could have an impact on the quantum and/or timing of tax relief of finance charges in the UK.

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Wills: A Client Focus During the Pandemic but Remember to Consider a Broader Estate Plan

Introduction

The Covid-19 pandemic has given many people pause for thought in relation to the uncertainties in life and what they can do to mitigate these. As a result, reviewing or putting in place a will is something that has been at the forefront of many clients' minds over the past year and estate planning has been moved closer to the top of many "to do" lists.

Although estate planning is often viewed as entailing only having a will in place, there are other planning documents that might also be important. A will, an enduring power of attorney and an advance healthcare directive (discussed below) will provide a basic level of protection in the event of unexpected illness, injury or sudden death and are of significant assistance to loved ones in dealing with these difficult situations. Failure to put these documents in place results in a loss of control in these decisions and will generally require legal intervention and costs to deal with matters.

Estate or succession planning covers both gifts and inheritances and is generally designed to achieve the orderly and efficient transfer of assets/wealth between individuals – most commonly to the next generation. The core elements of estate planning are legal effectiveness, efficiency and practicality.

The transfer of wealth and assets will arise as an integral part of estate planning – whether retirement planning, lifetime gifting or estate planning. Wealth preservation is often key, with clients wishing to protect the wealth that they have accumulated for the benefit of the family in the future. Tax implications of a lifetime gift or transfer or of estate planning need to be considered, and thought should be given to ensuring a smooth transition of the control, ownership and management to the next generation, identifying the successors to the business and protecting the relationships between members of the next generation.

For many individuals, estate planning can be very straightforward. In other cases, complexities can arise, including divorce, second marriages, non-marital relationships and children, difficult relationships with children, concerns about in-laws, children in marital difficulties, children with significant debt, children with special needs, complex asset structures, assets in foreign jurisdictions and the impact of cohabitants legislation. Regardless, in most cases, individuals wish to ensure that any possible reliefs or efficiencies in the application of capital acquisitions tax (gift or inheritance tax) are utilised where possible to maximise the value of assets passing to the next generation.

Making a Will

The first step in estate planning for most people is to make a will. In Ireland there is a presumption of testamentary freedom (meaning that a person is free to dispose of their assets as they see fit). However, this is qualified by the legal right share of a spouse (being one-third of the estate where there are children and one-half of the estate where there are no children) and the "moral duty" towards children. This "moral duty" to children is underpinned by s117 of the Succession Act 1965, pursuant to which a child may take an action against the estate of their deceased parent on the basis that they have not been properly provided for by their parent in accordance with the parent's means. The court, in considering whether to alter the terms of the deceased parent's will and to make provision for the claimant, will consider all of the circumstances of the case, to include any lifetime provision made for the claimant and the provision made for the testator's other children, both during the lifetime of the testator and under their will.

Lifetime Planning

It often makes sense to pass assets to the next generation by way of lifetime gift. This will depend on the financial security of the parents and the nature and value of assets proposed to be transferred.

An important factor of lifetime estate planning is the selection and value of assets to be transferred. Depending on the nature and value of the assets, lifetime transfers can give rise to capital gains tax and/or stamp duty. However, transfers of cash are -efficient in this context, and some capital gains tax reliefs – for example, retirement relief and capital gains tax/capital acquisitions tax "same event" offset – may be available.

The taxation treatment of the lifetime transfer of businesses to the next generation remain worthwhile for consideration. The main taxes that arise are capital acquisitions tax, capital gains tax and stamp duty. It is important to note that capital gains tax and stamp duty do not arise in an inheritance context. They are potentially relevant only in relation to lifetime estate planning.

There are variousreliefs from capital acquisitions tax and capital gains tax on the transfer of family businesses and farms. The legislation is complex, and it is important to examine carefully the accounts and activities of the business or farm to ensure that the conditions of the reliefs are satisfied. Stamp duty will arise, subject to any available reliefs (for example consanguinity relief may be available in some transactions involving farmland) with the current rates in relation to residential property low but having increased in recent years in relation to commercial property.

The financial security of a parent/founder of a company can be satisfied by share buy-backs, pension arrangements, deferred consideration or a combination these, and voting rights can be retained in certain circumstances.

Shareholders' agreements are an integral aspect of estate planning in a business context, to safeguard the business and protect the children/successors and the business through future generations. A shareholders' agreement will normally include pre-emption rights in the event of sale, death or marital breakdown of a shareholder.

Trusts

Trusts are one of the main ways to facilitate estate planning arrangements and can be established by way of an *inter vivos* (lifetime) trust or on death through the testator's will. Trusts are flexible vehicles that can be utilised to provide a robust protective mechanism, to retain control over and protect capital, and to protect individuals, by delaying the vesting of significant assets in an intended beneficiary until the time is right. Trusts are particularly relevant where there are minor children and incapacitated individuals.

Bare trusts

Simple or bare trusts consist of trustees holding property on trust for a person beneficially entitled absolutely to the assets in the trust, with the trustee having no active duties to perform and simply holding the legal title to the property. The beneficial owner can call for the property to be transferred to him/her absolutely at any time. This type of trust is often used where minor beneficiaries are entitled to assets but do not have the legal capacity to deal with the assets. If it is intended to benefit a minor beneficiary under a bare trust, particular care should be taken as there are taxation consequences. It should also be noted that a minor cannot give directions or provide indemnities.

Generally, for taxation purposes, all of the actions of the trustee are attributed directly to and treated as those of the beneficial owner. It is important that the trust is documented to avoid confusion at a later stage, particularly when dealing with taxation issues.

Fixed trusts

Under a fixed trust the beneficiary has a fixed share of the income or capital of the settlement. By way of example, a life interest gives the beneficiary a right to the income of the trust fund for a certain period. This can be for the duration of the life of the life tenant or some other individual or for a specific period. The interest of the life tenant is limited and not absolute and it does not extend to the capital value of the assets held in trust, although power can be given to the trustees to advance capital to a person who has a limited interest. The trust can provide for a succession of life interests until a person (the remainderman) becomes entitled on the termination of the life interests. The remainderman's interest is absolute. Where the life interest relates to land, the Land and Conveyancing Law Reform Act 2009 applies, and the relevant provisions should be reviewed in any such case. A life interest trust may be wound up with the consent of all of the beneficiaries (life tenant and remainderman).

A life interest may be appropriate where:

- A testator is married for a second time but has children from the first marriage. Consideration could be given to providing the second spouse with a life interest in the estate, with remainder passed to the children of the first marriage (subject to legal right share considerations, as a life interest will not satisfy a legal right share).
- A parent might give a child a life interest when, due to the disposition of the child, it might be considered appropriate to protect the capital during the lifetime of the child for that child's benefit.

In a fixed trust, each beneficiary may also have a fixed entitlement to a specific share or interest in the trust property. For example, the trustees might hold properties equally between children of the settlor or testator to be paid to them on reaching a specified age. Many parents when drafting wills wish to delay their children taking the capital of their estates and can do so where the clause in the will is drafted so that the interest is taken by the children who survive the testator "and reach the age of 18 (or 21) (or 25) years". The trustees may be given the power to advance capital before the specified age if considered appropriate, and the beneficiaries may be given the annual income of the trust (or the income could be applied for their benefit).

However, the tax implications of a fixed trust, which are beyond the scope of this article, are complex and should be carefully reviewed where a fixed trust is being considered.

Discretionary trusts

A discretionary trust is the most commonly used, and most flexible structure in estate planning to provide a framework for careful management of trust assets on behalf of the beneficiaries (who are generally minors or incapacitated individuals). Discretionary trusts arise where trust property is held by trustees on trust to apply the income or capital or both for the benefit of members of a class of beneficiaries specified in the trust deed in such proportions as the trustees in their absolute discretion think fit. The trustees may have power to accumulate income. The beneficiaries have no interest in the fund for legal or taxation purposes. They cannot compel the trustees to exercise their discretion to make distributions from the trust fund in their favour.

When discretion is given to trustees under the terms of a trust it is usually also appropriate to ensure that the settlor provides a letter of wishes, which is not binding on the trustees but indicates to them how the settlor/testator would wish the trust fund to be dealt with in given circumstances. The trustees generally take the wishes of the settlor into account and follow the letter of wishes unless there is good reason to depart from it.[1]

There can be a tax cost for the flexibility of a discretionary trust, in the form of discretionary trust tax. This arises only after the death of the parent and when the youngest child reaches 21 years. Discretionary trust tax is an initial charge of 6% on the value of the trust fund and an annual charge of 1% thereafter. The initial 6% charge reduces to 3% if the trust is wound up within five years.

Although discretionary trusts have a cost in taxation terms, they may be appropriate in a number of circumstances, depending on the disposition and age of beneficiaries, as the particular needs of each beneficiary can be considered by the trustees at any time during the trust period. A discretionary trust may be appropriate in the following circumstances:

- Parents of young children might provide for a discretionary trust in their wills on the death of the survivor. Once the youngest child reaches the age of 21, discretionary trust tax may apply (as outlined above). The discretionary trust may continue, if required, after the age of 20, and whether this is recommended can depend on the value of the estate and the disposition of the child/children. For testators with second families, this trust structure can facilitate providing for minor children of a second marriage, with the balance of the trust fund being divided equally between all of the children at the end of the trust period.
- Parents of a child with a disability, or where any intended beneficiary has a disability, may provide for a discretionary trust. Discretionary

1 A letter of wishes is also not binding on executors, guardians or beneficiaries but acts as a useful guide after death and therefore could also deal with the following types of issues:
- general wishes in relation to a testator's estate, for example timing of sales of assets or how assets might be distributed between various beneficiaries;
- funeral wishes, if not contained in the testator's will; and
- wishes in relation to personal effects, for example, watches, jewellery, books, papers, memorabilia etc.

trust tax may not apply under the provisions of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003); however, it should be ensured that all of the potential beneficiaries of the trust are entitled to relief.

- Parents of children whom they consider cannot manage their own affairs for other reasons besides a disability may consider it appropriate to provide for a discretionary trust in their will, and this may also be exempt from discretionary trust tax, depending on the circumstances.
- Parents of children who are in financial difficulty – to protect the assets for future generations.
- Parents of children who are experiencing marital difficulties – to protect the assets from the matrimonial proceedings and to create flexibility for future inheritance.

Discretionary trusts can also be used to provide flexibility for the timing of inheritance tax payments by beneficiaries and to enable beneficiaries to arrange their affairs for the efficient vesting of assets, utilising reliefs and exemptions where available.

Dealing with Foreign Assets in Wills

Care should be taken when advising clients in relation to making a will to deal with property in another jurisdiction. It may be possible to dispose of the foreign property under an Irish will if that will would be recognised in the other jurisdiction, but clients should always be advised to seek appropriate advice regarding the succession regime and the taxation regime in any foreign jurisdiction in which they hold assets. Typically, it is preferable to make a will in the relevant jurisdiction dealing with foreign assets. In the case of real property, under the international conflict of law rules, the lex situs (law of the state in which the property is situate) will govern succession to the property. In the case of moveable property, the lex domicilii (law of the state in which the testator is domiciled) will govern succession.

The EU Regulation on Succession (No. 650/2012) ("the Regulation", also known as Brussels IV) came into force in August 2015 and is changing our approach to dealing with issues including jurisdiction and applicable law. Ireland, Denmark and the UK (before Brexit) opted out of the Regulation, but it still influences how Ireland deals with signatory states and how signatory states deal with Ireland.

The Regulation attempts to provide that in all signatory EU Member States habitual residence is to be the connecting factor to determine the jurisdiction to deal with wills and succession for all moveables and immoveables. Alternatively, the testator can designate the law of their nationality as applying to the whole of their estate.

From the perspective of advising an Irish-domiciled person/national, it appears clear that he/she can elect to apply Irish law to govern the succession of assets situate in signatory states, even though Ireland is not a signatory. The reverse does not hold true. Ireland will continue to apply the principles of Irish law to assets situate in Ireland. Obtaining local legal advice in the relevant foreign jurisdiction remains key.

It is important to note that the Regulation does not have any impact on tax.

Other Estate Planning Documents

Shareholders' agreements

The basic purpose of a shareholders' agreement is to provide for how the company is to be managed and, as far as possible, to address prospectively issues that might become divisive in the future if not agreed in advance. A shareholders' agreement should always be read and reviewed in conjunction with a company's constitution (governing document). However, a shareholder's agreement has the advantage of being private between the parties whereas the company's constitution is public and available for inspection by members of the public in the Companies Registration Office.

The overall intention behind the provisions of a shareholders' agreement is to create an environment whereby the shareholders can work together and regulate the affairs of the company. Any shareholders' agreement should be drafted specifically to meet the needs of the shareholders (often family members) and the company. Typical provisions include:

- Provisions in relation to permitted transferees, i.e. persons to whom a shareholder can transfer their shares at any time during their lifetime without obtaining the prior consent of the other shareholders. Because of its nature as a contract, a shareholders' agreement binds only the parties thereto and does not automatically bind all shareholders. Therefore, if a party transfers his/her shares, the transferee will not automatically be bound by the terms of the shareholders' agreement. To avoid this, it is normal to provide in a shareholders' agreement that an existing shareholder who is party to the agreement can transfer his/her shares only if he/she procures that the transferee enters what is known as a deed of adherence, which joins the transferee as a party to the shareholders' agreement.
- Provisions regarding the general commitments of the shareholders – for example, a shareholder commitment to use reasonable endeavours to prevent their shares passing to spouses or partners.
- Provisions in relation to the management of the company, including the appointment of the board.
- Details of restricted transactions of the company without the unanimous prior consent of all shareholders. The list of restricted transactions should enable certain important decisions to be brought back to shareholder level but should not overly restrict the operation of the business by the directors.
- Provisions regarding protection of goodwill and non-compete provisions.
- Provisions in relation to dividend policy.
- Provisions in relation to the transfer of shares, including, for example, a prohibition on shareholders selling, transferring or creating any charge or lien over their shares other than a lifetime transfer to a permitted transferee and including pre-emption rights if any shareholder holding shares wishes to transfer their shares to anyone other than a permitted transferee.
- Provisions regarding "drag-along" and "tag-along" rights, which would require shareholders who wish to sell their shares to oblige the other shareholders also to sell their shares to the prospective purchaser (the drag-along right) and require the selling shareholder to procure that it is a term of the share purchase agreement that the prospective purchaser would also have to purchase the shares of all other shareholders (the tag-along right).
- General provisions regarding confidentiality, disputes, termination of the agreement etc.

Family constitutions

Some families who have a business or businesses may also consider the value of a family constitution, in particular where there are two or more family members running the business(es). A family constitution may be prepared in conjunction with a shareholders' agreement.

Generally, a family constitution will set out the ethos of the business and may include provisions in relation to:

- dealing with family disputes regarding the business;
- whether in-laws may become involved in the business and what happens in the case of marital breakdown; and
- restrictions on the allotment or transfer of shares, often setting a minimum age at which the next generation can become shareholders and mechanisms to encourage the next generation to participate in the business.

Similarly to a shareholders' agreement, the process of agreeing the terms of a family constitution can help to identify and iron out potential difficulties and areas of conflict before they become problems. A family constitution should be reviewed from time to time to ensure that it reflects the views of current members.

Agreements in contemplation of marriage/ pre-nuptial agreements

Although there is nothing as a matter of Irish law to prevent a couple signing a pre-nuptial agreement, there is currently no legislative basis for the enforcement of pre-nuptial agreements in Ireland. Such agreements can serve as a guide for the courts in judicial separation and divorce cases, but the courts are not obliged to enforce them. The legal effectiveness of any pre-nuptial agreement would be likely to be determined based on the requirement of full disclosure of assets by both parties before the agreement is signed and both parties having received independent legal advice and executed the agreement well in advance of the marriage (four weeks is usually recommended). It is also advisable for pre-nuptial agreements to provide for periodic reviews in order for their relevance to be maintained, and considered by the courts, in the context of marital breakdown.

Planning for Incapacity

The best approach for any individual to set out their will and preferences in the event of loss of capacity is to do so when they have capacity, by either creating an enduring power of attorney or making an advance healthcare directive or both. Planning ahead enables a person to give thought to who is the most suitable person or persons to nominate to make decisions on their behalf in the event that they do not have capacity to make decisions personally and what authority they wish to give to the attorney or designated healthcare representative.

An enduring power of attorney enables a person to appoint an attorney(s) to manage their affairs and take decisions on their behalf if they should lose capacity to manage their own affairs. An enduring power of attorney is registered and becomes effective only when the donor is, or is becoming, mentally incapacitated, i.e. by reason of a mental condition they are unable to manage and administer their own property and affairs. The authority under an enduring power of attorney includes financial and property affairs and "personal care decisions". Different attorneys can be appointed to the different roles, including with regard to business/non-business assets.

The alternative to making an enduring power of attorney, in the event of mental incapacity, is wardship under the Lunacy Regulations (Ireland) Act 1871, which is an outdated, cumbersome and expensive system. The Assisted Decision-Making (Capacity) Act 2015 ("the 2015 Act") was enacted in December 2015 and reforms the legislation on decision-making capacity based on the Lunacy Regulations (Ireland) Act 1871.

The 2015 Act brings about a long-awaited modern legislative framework to facilitate decision making for those who lack capacity or whose capacity is in question. The system will replace the wards of court system, which has long proven to be unwieldy and expensive. The 2015 Act also reforms the Powers of Attorney Act 1996, including updating the law in line with best practice and extending the scope of an attorney's authority to include healthcare decisions. Although the 2015 Act was enacted on 30 December 2015, many of the sections of the Act have yet to be commenced, but it is hoped that this will be progressed shortly. The 2015 Act makes provision for assisted decision making, co-decision making and a court-appointed decision-making representative. The legislation also introduces a statutory framework for advance healthcare directives.

Advance healthcare directives

An enduring power of attorney cannot currently make provision for medical non-intervention wishes; however, this position will change once the provisions of the 2015 Act are commenced in full. Until the enactment of the 2015 Act, there was no statutory provision for advance healthcare directives, but we now have a detailed legislative framework set out in Part 8 of the Act, and there will be Regulations in due course regarding the form of advance healthcare directives. Until then, medical non-intervention wishes can be set out separately in a non-binding advance healthcare directive or "living will".

Estate Planning – Daunting but Necessary

Planning for succession can be a daunting prospect, particularly in the current climate, but with the help of professional advisers there are solutions. There is no "one size fits all" solution and rarely any "bulletproof" one. In devising a plan, the particular needs and circumstances of the family involved and the assets concerned must be paramount. The solution may involve a combination of several structures and should be tailored to suit the needs of the parties concerned, with thorough consideration of all possible reliefs from relevant taxes at the outset. In that way, potential problems and tax issues can be assessed and avoided before they arise.

 

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Recent Developments Concerning Exchange of Information on Request

Introduction

Transparency is a consistent theme in current international tax developments. It is certainly a focus of tax authorities and lawmakers, as can be seen from the introduction in recent years of automatic reporting of information, country-by-country reporting, the exchange of tax rulings and beneficial-ownership registers. More recently, the mandatory reporting of certain transactions under DAC6 has come into force.

The exchange of information on request between tax authorities is an important means to assist transparency and to allow tax authorities obtain information to aid the enforcement of their tax laws. Although data on exchange of information is scarce, European Commission statistics show a substantial increase in requests for information made between EU Member State tax authorities. Between 2013 and 2017 the number of requests ranged from 8,200 to 9,400 per year – a substantial increase compared to 2008–2012, when requests numbered 4,000 to 5,800 per year.[1]

The drive for transparency continues, and as mentioned in the relevant Revenue manual, information exchange on request is a key

1 European Commission Evaluation of Administrative Cooperation in Direct Taxation dated 24 April 2019, p. 17.

element of tax authority cooperation necessary to protect tax bases.[2] Even though there are other developments that allow tax authorities to obtain certain information, it is reasonable to expect that exchange of information on request by tax authorities will continue to a degree similar to its current use. If faced with having to consider the issues relevant to an exchange-of-information request, helpful analysis can be found in recent Irish and European court decisions on the matter.

The Legal Basis for an Information Request

Ireland is a party to various international legal instruments under which information may be provided by one country to another. Those instruments each include limits on the information that can be requested. Where a valid request is made by a foreign tax authority to Revenue, there is a mandatory obligation on Revenue to respond, unless it can rely on a particular ground for refusal provided for in the legal instrument under which the request is made. If Revenue does not have the requested information to hand, it may need to exercise a statutory power to compel the production of information from the person to whom the request is made ("the requested party").

Where Revenue seeks information from a requested party, it should be expected that the requested party will look to satisfy itself that the request is valid – that is, it is within the scope of both the legal instrument under which the foreign tax authority made the request to Revenue and the Irish statutory power invoked by Revenue seeking production of the information from the requested party. This should be the case, in particular, where third-party information is sought from the requested party. Generally, a person may have duties of confidentiality, privacy and data protection under statute and common law in respect of certain information that it holds relating to others. Disclosure of such information in circumstances other than where it is legally compelled to make the disclosure could result in severe consequences for it and/or its employees or officers, including potential criminal and/or civil law sanction.

There are different means by which the relevant international legal instruments are implemented in Irish law and by which the application of Irish statutory Revenue powers are extended so that they also apply in the case of matters relating to non-Irish tax liabilities. Identifying the precise legal basis for an information request order sought by Revenue was described in *O'Sullivan v A Company*[3] as having "the feel of fighting one's way through a statutory thicket". Nevertheless, when a requested party is faced with a request from Revenue for the production of information on foot of a request from a foreign tax authority, to properly consider whether the request is a valid one, the requested party needs to understand the legal basis of the request.

There are a number of means by which Revenue can request information from another tax authority and vice versa. In the case of a request for direct tax information, there are four main types of legal instruments under which a request may be made between tax authorities:

- The EU Directive on Administrative Cooperation in the Field of Taxation (Directive 2011/16/EU) (DAC) enables information relating to almost all taxes (excluding VAT, certain customs and excise duties, and social security contributions) to be exchanged with another EU Member State tax authority. It is implemented in Irish law by the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012, SI 549 of 2012.
- The OECD/Council of Europe Convention for Mutual Administrative Assistance in Tax Matters ("the OECD Convention") provides for the exchange of information between the contracting parties relevant to the administration or enforcement of their domestic tax law. There are currently 141

2 Revenue Tax and Duty Manual Part 35-01-01a.

3 [2020] IEHC 335.

signatories to the OECD Convention, 129 of which have fully ratified the convention. The OECD Convention is implemented in Irish law by the Mutual Assistance in Tax Matters Order 2013, SI 34 of 2013.

- Ireland's double taxation agreements (DTAs) each include an information exchange provision, typically based on Article 26 of the OECD Model Tax Convention on Income and Capital. Whereas older DTAs allow exchange of information relating to direct taxes only, more recent DTAs allow exchange of information relating to all taxes. Section 826 of the Taxes Consolidation Act 1997 (TCA 1997) provides that a DTA has the force of law in Ireland if the relevant statutory instrument is published and is listed in Schedule 24A TCA 1997.
- Ireland's tax information exchange agreements (TIEAs) are each based on the OECD Model Tax Information Exchange Agreement of 2002. They are typically concluded with jurisdictions that are neither EU/DTA countries. Section 826 of TCA 1997 also sets out the means by which a TIEA has the force of law in Ireland, which is similar to that in the case of DTAs.

Information may be exchanged with some countries under one or more of these legal instruments. For example, as Ireland has a DTA with all EU Member States, it is open to an EU Member State tax authority to make a request to Revenue for the same information under both the relevant DTA and the DAC.

Revenue Powers to Compel Production of Information

If Revenue does not have the requested information to hand, it may need to exercise its relevant statutory powers (provided for in Chapter 4, Part 38, TCA 1997) to obtain the information, as it would do when acting for its own purposes.

The provisions in TCA 1997 empowering Revenue to obtain or to seek a court order compelling production of information are couched by reference to Irish domestic tax and tax liability. Section 912A of TCA 1997 extends those provisions, when invoked with respect to an information request under the OECD Convention, a DTA or a TIEA, so that they apply also in the case of foreign tax and foreign tax liability. However, with respect to the exercise of those provisions on foot of a request under the DAC, it is the regulation implementing the DAC that extends the provisions accordingly. This difference in approach was criticised in *O'Sullivan*. Humphreys J suggested that it would be preferable if the extension of the powers was made by provision in TCA 1997, itself, rather than by way of regulation.

In the authors' experience, the powers most likely to be exercised by Revenue on foot of a foreign tax authority request are under s900 or s901 TCA 1997, in respect of information relevant to the requested party's own tax affairs, and s902 or s902A TCA 1997, in respect of information relating to a third party's tax affairs. Sections 901 and 902A allow Revenue to apply to the High Court for an order compelling the production of information.

The operation of s902A was considered by both the High Court and the Court of Appeal in two recent cases. In *Carey v A Company*[4], Murphy J criticised Revenue for serving notice to the requested party of the High Court application for an order compelling production of third-party information under s902A. She considered that the application should have been made *ex parte*. That approach would have put a requested party in a difficult position if it sought to challenge the application, as it could not do so by participating in the *in camera* s902A application. Instead it would have had to do so in public by way of judicial review or plenary action. However, last year, in *O'Sullivan*, Humphreys J in the High Court held that s902A does not allow the application to be made *ex parte*. Revenue must notify the requested party of the application to be made to the court, allowing the requested party to participate *in camera* in the application for the court order.

4 [2019] IEHC 90.

That approach was confirmed this year by the Court of Appeal in the *Carey*[5] case.

Limits to the Exchange of Information

The standard of foreseeable relevance

There are limits to the scope of the information that may be exchanged between tax authorities. Each of the international legal instruments mentioned requires that the information requested be "foreseeably relevant" to the administration and/or enforcement of the domestic tax laws of the requesting state. Older DTAs may refer to the concept of "necessary" as opposed to "foreseeably relevant", reflecting the wording used in Article 26 of the OECD Model Tax Convention before 2005. The OECD Commentary considers that there is no substantial difference between the two terms.

The concept of "foreseeable relevance" in the DAC is to be interpreted on the basis of EU law, autonomously from the concept as contained in the various DTAs, TIEAs and the OECD Convention. However, Advocate-General (AG) Kokott in her opinion in *Luxembourg v B & another; FC v A*[6], delivered on 2 July 2020, noted that the concept of foreseeable relevance in the DAC reflects that used in Article 26 of the OECD Model Tax Convention. She opined that if a court is convinced by the interpretation of Article 26, it may adopt the approach of the OECD and interpret the DAC in a similar way. Costello J did this in *Carey* when interpreting the term "foreseeably relevant" in the DAC.

The OECD Commentary states that "the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial". In *Berlioz Investment Fund SA*[7] the Court of Justice of the European Union (CJEU) held that the "foreseeable relevance" of the requested information is a substantive precondition for a valid request to be made under the DAC. However, the threshold that is required to be passed is a low one. The CJEU further held that a request for information may be refused by the requested authority only if it is "manifestly devoid" of any foreseeable relevance. This low threshold was again applied by the CJEU late last year in the *Luxembourg* joined cases.

In Ireland, this low threshold has been endorsed by both the High Court and the Court of Appeal in *Carey*. The Court of Appeal cited the CJEU decision in *Berlioz* and referred to the task of the requested authority as being that of verifying that the precondition of foreseeable relevance is met. Where a requested party challenges the request to produce information, there is no obligation on the requested authority to satisfy the court that the request is foreseeably relevant. The requested authority is required to show merely that the request is not devoid of foreseeable relevance, and that the formal conditions for a valid request have been met.

This approach of applying a low threshold for satisfying the standard of foreseeable relevance has also been taken by courts in other jurisdictions. In *Kotton v FTT & HMRC*[8] the English High Court considered the UK domestic law measure that authorises the issue of a demand for information from third parties if the information is "reasonably required" for "checking the tax position" of a person. The court held that it was not for the requested authority to investigate the merits of the underlying tax investigation in the requesting jurisdiction. The existence of a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith was sufficient to satisfy the requirement of the UK domestic law measure.

5 [2021] IECA 103.

6 Joined Cases C-245/19 and C-246/19, *Luxembourg v B & another; FC v A*, Opinion of AG Kokott.

7 Case C-682/15 *Berlioz Investment Fund SA.*

8 [2019] EWHC 1327.

The recent amendment this year to the DAC by DAC7 (Council Directive (EU) 2021/514 of 22 March 2021) further clarifies the meaning of the term "foreseeable relevance". The DAC is amended to include a definition of foreseeable relevance that reflects comments made in the OECD Commentary: "the requested information is foreseeably relevant where, at the time the request is made, the requesting authority considers that, in accordance with its national law, there is a reasonable possibility that the requested information will be relevant to the tax affairs of one or several taxpayers, whether identified by name or otherwise, and be justified for the purposes of the investigation".

Prohibition on "fishing expeditions"

The standard of foreseeable relevance will not be met where the requesting authority is engaging in a "fishing expedition". Broadly, this means that a requesting authority may not request information that is unlikely to be relevant to the tax affairs of a given taxpayer. The prohibition against "fishing expeditions" is set out in Recital 9 of the DAC and in the OECD Commentary. The latter describes the concept as referring to "speculative requests that have no apparent nexus to an open inquiry or investigation".

The matter of what constitutes a "fishing expedition" was considered in the *Luxembourg* joined cases last year. AG Kokott opined that, in order not to constitute a "fishing expedition", "the requesting authority must normally include in the request for information the facts which it wishes to investigate, or at least concrete suspicions surrounding those facts, and their relevance for tax purposes". She further opined that "[a] request for assistance therefore lacks foreseeable relevance if it is made with a view to obtaining evidence on a speculative basis, without having any concrete connection to ongoing tax proceedings".

However, the CJEU in its judgment on the joined cases on 6 October 2020 took an approach that Costello J described in *Carey* as one that "identified the applicable threshold in terms materially different to the approach that had been suggested by the Advocate General". The CJEU approach is more favourable to the requesting authority. It did not endorse the AG's view that it was necessary that the request for information provide "concrete evidence" of the facts or transactions that are relevant for tax purposes so as to rule out an impermissible fishing expedition. The court noted that the request was made "during the preliminary stage of the investigation, the purpose of which is to gather information of which the requesting authority does not, by definition, have full and precise knowledge". The fact that certain information requested may at the end of the investigation be irrelevant does not invalidate the request. This reflects the text in the OECD Commentary and the DAC7 amendment referenced above.

The issue of whether an information request constituted a "fishing expedition" was considered by the Court of Appeal in *Carey*. The case concerned a request made by the Austrian tax authority to Revenue under the DAC for the name, address and date of birth of 365 individuals who used the requested party's website for letting, on a short-term basis, properties in Austria in excess of a specified nightly rate. The information sought by the Austrian tax authority was precisely identified, but the individual identities of the taxpayers were unknown. They were identifiable only by reference to the requested party's host identification numbers attributed to them.

This situation was the reverse of that in the *Luxembourg* joined cases. There, the taxpayer was known and identified, but information sought was not. Costello J, nonetheless, considered that the CJEU decision was of assistance in the case before her, noting that the CJEU had emphasised the importance of the fact that the information was sought to assist with an investigation that may be in its preliminary stages. She followed the decision of the CJEU and held that it is not necessary for the request to assert, never mind establish, that the taxpayer under investigation has in fact been non-compliant.

The OECD Commentary provides several examples of valid requests that are not "fishing expeditions". Costello J referred to one of these: where the request was for the name, address and date of birth of persons identified only by reference to a particular credit card number. She noted that in this example there was no suggestion nor reason to believe that each and every card holder had failed to pay the relevant tax due. Costello J held that, in the case before her, there was similarly no requirement to establish that each and every host identified in the request for information had failed to pay the appropriate Austrian tax. In addition, the OECD example suggested that it was sufficient for the purposes of foreseeable relevance that the subjects of the request were identified solely by reference to cards issued by a bank in another state. Applying this to the facts of the case before her, Costello J found that the information provided by the Austrian tax authority to Revenue was sufficient to demonstrate foreseeable relevance.

Group requests

The *O'Sullivan* case involved a request for information concerning a group of taxpayers. Humphreys J emphasised what he described as an "important point" made in a Revenue official's affidavit in that case, that "[a] request for information does not constitute a fishing exercise solely because it is a group request, the members of the group are not individually identified and/or simply because a relatively large number of individuals might fall within such a group". He went on to say that "[t]he real issue is whether the request for information has an objective justification".

The Court of Appeal in *Carey* also considered the treatment of group requests. It noted the statement in the OECD Commentary that the standard of foreseeable relevance "can be met both in cases dealing with one taxpayer... or several taxpayers...However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition."

The judgment quoted and emphasised a statement in the OECD Commentary that in a group request it is necessary that the requesting authority provide a detailed description of the group and the specific facts and circumstances that have led to the request, together with an explanation of why there is reason to believe that the taxpayers in the group have been non-compliant, supported by a clear factual basis. DAC7 provides for similar information to be provided in the case of a group request.

Costello J held that the information supplied by the Austrian tax authority to Revenue met the requirement for an additional detailed description to be given to the requested authority in the case of a group request. She noted that the Austrian tax authority had clearly defined the group, with the individuals in the group identified by reference to the host ID numbers. The facts and circumstances that led to the request had been provided, as had information concerning an open, ongoing investigation by the Austrian tax authority, which had yielded settlements and clear findings of non-compliance with Austrian tax law by hosts on the requested party's website platform. The Court of Appeal held that "the requirement is not that it be established that each member of the group has, in fact, been non-compliant, this sets too high a threshold. In fact, non-compliance as such is not required to be established."

Requirement to exhaust domestic sources

The requirement to exhaust domestic sources is another limitation on the exchange of information between tax authorities. Article 17(1) of the DAC expressly provides that the requested authority shall provide the information requested "provided that the requesting authority has exhausted the usual sources of information which it could have had in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives". Ireland's TIEAs each provide that the requested authority shall be provided with a statement that the requesting authority has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties. Although Ireland's DTAs do not expressly include a statement to this effect, the OECD Commentary provides that the requesting authority should first resort to its usual sources of information before making the request, under the principle of subsidiarity.

The question of whether the requesting authority had exhausted its usual sources was another matter considered by the Court of Appeal in *Carey*. As with the matter of foreseeable relevance, the court held that the obligation on the requested authority was one of verification only – again, a low threshold. The court found that the relevant Revenue official had engaged with the Austrian tax authority on the matter over a number of months, had raised appropriate questions and had interrogated the answers provided. Where a requested party challenges the validity of a request on the basis that the requesting authority has not exhausted its usual sources, the burden lies on the requested party to establish this assertion. The court held that the requested party had not done so and that it was not for the Irish court to determine what constituted the usual sources to which the requesting state may have reference, nor the nature and extent of lawful enquiries permitted under the law of the requesting state.

Each of the four types of international legal instrument mentioned provides a number of other grounds on which the requested authority may refuse to provide information. These are where (1) the information is not obtainable under the laws or normal course of administration in the requesting state, (2) the carrying out of enquiries or the provision of information would be contrary to domestic law, (3) the provision of information would lead to the disclosure of a commercial, industrial or professional secret or a commercial process, or (4), likely relevant only in extreme cases, the disclosure would be contrary to public policy.

Conclusion

In *O'Sullivan* Humphreys J observed that "[g]iven the globalised nature of the modern world and the reciprocal nature of the international agreements, there is a strong public interest in cooperating with enquiries by foreign tax authorities. The ancestral adage has it that 'ar scáth a chéile a mhairimid'. That has significant relevance here." Revenue in its published manual describes exchange of information as a key element of the cooperation between tax authorities necessary to protect their tax bases. The Irish and European courts have applied a low threshold to be met for an information request to be valid.

Even with just these matters taken into consideration, it is reasonable to expect that the use by tax authorities of exchange of information on request will continue at a level similar to its current use. Additionally, tax authorities may be emboldened to make wider and more diverse requests for information. This could well lead to an increase in requested parties challenging requests and to more litigation in the future concerning exchange of information requests.


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IREFs: Where We Are Now...

Introduction

The Finance Act 2019 substantially amended Chapter 1B of Part 27 of the Taxes Consolidation Act 1997 (TCA 1997), which applies to Irish real estate funds (IREFs). In relation to IREFs, the story began in 2016. Amid rising awareness of the substantial increase in the value of Irish land and buildings held directly or indirectly by Irish authorised funds and the tax exemptions enjoyed by those funds and their non-resident investors, in summer 2016 political pressure mounted to ensure an Irish tax-take from those investments. Thus, the IREF was born through the addition by Finance Act 2016 of Chapter 1B to Part 27 TCA 1997.

IREF Background

An IREF is an investment undertaking for tax purposes (typically, an Irish Collective Asset-management Vehicle (ICAV) or an Irish authorised unit trust or, in either case, a sub-fund thereof), where, at the end of the immediately preceding accounting period, 25% or more of the market value of the assets of the fund or sub-fund, as the case may be, is derived directly or indirectly from IREF assets (or, if not, where one of the main purposes of the fund or sub-fund is to acquire IREF assets or carry on an IREF business).

For this purpose, IREF assets include the following (broadly, Irish real estate-derived assets):

(1) Irish land, minerals, or exploration or exploitation rights;
(2) shares in an Irish REIT (real estate investment trust);
(3) shares (other than shares quoted on a stock exchange that are actively and substantially traded on such stock exchange) deriving the greater part of their value directly or indirectly from the assets at (1) or (2) above;
(4) certain loans that are secured on and that derive the greater part of their value directly or indirectly from the assets at (1) above or certain agreements that so derive the greater part of their value; and
(5) units in an IREF.

An IREF business means activities involving IREF assets (for example, without prejudice to the generality thereof, a business of dealing in or developing land or a property rental business or both).

The Finance Act 2016 introduced an IREF withholding tax, applicable at a rate of 20% to IREF taxable amounts arising or deemed to arise in connection with IREF taxable events, unless otherwise exempt (i.e. exempt because of the status of the holder of the share or unit). Broadly, IREF taxable amounts were limited to amounts realised out of the accounting profits of the IREF over the period of the investment in the IREF by that investor (less any such profit represented by dividends received out of taxed profits, e.g. dividends on the shares described at (2) and (3) above).

Examples of IREF taxable events are:

- the making of a distribution (whether in cash or not) on shares or units in an IREF;
- the cancellation, redemption or repurchase of shares or units in an IREF, including on a liquidation;
- any exchange by a holder of shares or units in an IREF for shares or units in another IREF (even where it is another sub-fund of the same fund);
- the issuing of shares or units in an IREF as paid up otherwise than by the receipt of new consideration;
- the IREF ceasing to be an IREF;
- the disposal of a share or unit in an IREF; and
- the sale or transfer of the right to receive any of the accrued IREF profits without the sale or transfer of the share or unit to which the accrued IREF profit relates or where the accrued IREF profit in respect of the share or unit becomes receivable otherwise than by the holder.

Of utmost importance when comparing the IREF provisions as initially introduced with the morerecent changes to those provisions is the fact that in relation to IREF withholding tax on IREF taxable amounts in connection with IREF taxable events:

- the IREF shall be **entitled to withhold from the payment** arising on that IREF taxable event an amount equal to the IREF withholding tax and
- where no payment is made by the IREF on the happening of an IREF taxable event, the IREF shall be **entitled to cancel such number of shares or units held by the holder** as is required to meet the amount of IREF withholding tax due by the IREF.

Thus, in relation to IREF withholding tax, each holder of a unit or share bears the tax arising in connection with the shares or units it holds, so where no IREF withholding tax arises on account of the status of the holder, that holder does not bear a tax cost, and where no such exemption applies on account of the status of the holder, only that holder bears the related tax cost.

Finance Act 2019 Provisions

Four anti-avoidance provisions were introduced in Finance Act 2019 by the Minister for Finance to counteract “aggressive behaviour to avoid tax”. These provisions are wide-ranging and appear to go far beyond the stated objective of “anti-avoidance”.

The first of these measures seeks to address shortcomings in the calculation of the IREF taxable amount. The three other provisions deem income to arise to the IREF in certain circumstances. These provisions seek to discourage transactions where it was perceived that retained profits of the IREF (and thus the capacity for IREF taxable amounts to arise) were reduced through payments to investors or their associates where those payments were not within the scope of IREF withholding tax and were not underpinned by obvious commercial rationale.

The first amending provision that we consider relates to the calculation of the IREF taxable amount on the happening of an IREF taxable event. This amendment seeks to ensure that the IREF taxable amount is no longer limited with respect to a prescribed amount where the value realised is greater, and where that IREF taxable event is a disposal of a share or unit in the IREF or the IREF ceasing to be an IREF, it is no longer limited by the net asset value of the shares or units. This is achieved by introducing the concept of the "value of an IREF taxable event" and adding a component to the calculation of the IREF taxable amount, where applicable.

Where an IREF taxable event is a dividend (in cash or in kind) or a sale of accrued IREF profits, the value of the IREF taxable event is the value of the dividend (in cash or in kind) or the amount of the accrued IREF profits sold or transferred, as the case may be; and where an IREF taxable event is an event comprising the disposal of a share or unit in the IREF or the IREF ceasing to be an IREF, the value of that IREF taxable event is calculated with reference to the market value of the shares or units if higher than the net asset value of the shares or units.

Accordingly, in calculating the IREF taxable amount, the retained profits of the IREF business are attributed to that IREF taxable event based on the value of the IREF taxable event. Also, where that IREF taxable event is a disposal of shares or units in the IREF or the IREF ceasing to be an IREF, an amount must be added, such additional amount representing the amount by which the market value of the relevant shares or units exceeds the value of those shares or units based on the net asset value in the balance sheet, if applicable.

Separately, in relation to the deemed income provisions, the IREF will be deemed to have received an amount of income that is chargeable to income tax under Schedule D, Case IV, at a rate of 20%. The deemed income is treated as arising in the year of assessment in which the relevant accounting period ends, and there is no ability to offset the amount by any loss, deficit, expense or allowance. The deemed income arises in the following circumstances:

(1) Pursuant to the provisions of s739LB TCA 1997, where any amount is taken into account by an IREF in computing the profits of the IREF, in respect of any disbursement or expense, not wholly and exclusively incurred for the purposes of the IREF business, that amount is deemed to be income.
In that regard, although a fund that is authorised and regulated by the Central Bank of Ireland is not permitted to enter into transactions with "connected parties" otherwise than on an arm's-length basis, a holder of shares or units or an associate of that holder is typically not regarded a "connected party" for this purpose ("connected parties" for this purpose typically encompasses, where relevant, the fund's management company, general partner, depositary, Authorised Investment Fund Manager (AIFM), investment manager, or delegates or companies connected therewith, as applicable); and so a transaction entered into between the fund and such a holder or its associate is not required to be effected on an arm's-length basis, provided that this does not prejudice other holders of shares or units in the fund. It is for this reason, as well as the fact that, as the authors understand, payments wholly unrelated to the IREF business were made in certain cases that were reviewed by the Revenue Commissioners, that this deemed income provision was introduced – so as to, in substance, tax payments that are not wholly and exclusively incurred for the purpose of the IREF business (and that

otherwise might be made to holders of shares or units without IREF withholding tax arising).

It is important to note that, in certain specific circumstances, where an IREF has both an IREF business and a non-IREF business, and the expenses are incurred wholly and exclusively for the purposes of the non-IREF business, the guidance notes published by the Revenue Commissioners in relation to IREFs ("the Guidance", Tax and Duty Manual Part 27-01B-02) confirms that the deemed income provisions will not apply.

(2) Pursuant to the provisions of sub-section (2) of s739LA TCA 1997, where the aggregate of any debt incurred by the IREF in respect of monies borrowed by, or advanced to, the IREF ("specified debt") exceeds 50% of the aggregate of such costs of its assets as would have been allowable as base cost for capital gains tax purposes ("relevant costs"), such excess is "excess specified debt", while the aggregate of (a) interest, discount, premium, fees and hedging costs of debt finance and finance leases and (b) the costs and expenses of arranging same, in each case where taken into account in arriving at the profits of the IREF, are "property financing costs", and the portion of the property financing costs as relates to the excess specified debt when apportioned rateably across all specified debt is deemed to be income (subject to the adjustments described below).

(3) Pursuant to the provisions of sub-section (3) of s739LA TCA 1997, where for an accounting period the ratio of (a) the sum of (i) the property financing costs of the IREF (see (2) above) as reduced by any amount of income deemed to arise to the IREF under (2) above (the "adjusted property financing costs") plus (ii) the profits of the IREF to (b) the adjusted property financing costs of the IREF exceeds 1.25:1, such an amount by which the adjusted property financing costs must be reduced for the ratio not to exceed 1.25:1 is deemed to be income (subject to the adjustments described below). In other words, such a reduction as would be required so that the adjusted property financing costs are not more than four times the profits of the IREF is deemed to be income (subject to the adjustments described below).

The Adjustments

Pursuant to the provisions of s739LC of TCA 1997, where some or all of the specified debt relates to third-party debt (as defined for the purpose of these provisions), the amount of deemed income on which the IREF is charged to income tax shall be **reduced by** the amount of deemed income that would have been charged to income tax under the provisions had the specified debt consisted solely of the relevant third-party debt (the "third-party debt reduction"), i.e. the third-party debt reduction equals the amount of deemed income that would have been charged to income tax had the debt that is not third-party debt (and the interest thereon) not existed for the purpose of performing the calculations described at (2) and (3) above.

An example of the relevant calculations is contained in Appendix II to the Guidance.

Third-Party Debt

Third-party debt is not given its ordinary meaning – it means (a) a loan advanced to the IREF (including an amount advanced to, or payable by, a partnership in which the IREF is a partner) by an enterprise other than an enterprise associated with that IREF provided that (b) certain precluded financing arrangements are not in place and (c) the full amount advanced is employed in the purchase, development, improvement or repair of a premises or in refinancing a loan that met the conditions of (c) (such terms as interpreted in accordance with the provisions – see below).

For these purposes "enterprise" includes individuals, persons other than individuals, pension schemes, funds, agreements, undertakings, schemes or arrangements, whether Irish or not, and such enterprises can be associated with an IREF directly or indirectly through (1) connected persons; (2) control or the ability or entitlement thereto, as the case may be, whether direct or indirect, by virtue of any of ownership, equity-like economic entitlement or significant influence over the management of the entity; (3) commonality of promoter or manager; (4) the relationship of pension scheme and member or vice versa (employer, employee, contributor, beneficiary); or (5) accounting consolidation. In certain specific circumstances as set out in the Guidance, the Revenue Commissioners permit a loan from a third-party lender routed through an associate of the IREF to be treated as third-party debt where the loan is advanced to the associate, rather than directly to the IREF, solely because the third-party lender insists on having security over more assets than just the IREF assets.

Precluded financing arrangements include a variety of arrangements pursuant to which (1) the IREF faces an enterprise or enterprises not associated with the IREF with respect to loans advanced to the IREF or interest paid by the IREF and (2) an enterprise or enterprises not associated with the IREF face an enterprise or enterprises that are associated with the IREF, whereby amounts are paid indirectly by the IREF to associates, or loans are received indirectly by the IREF from associates.

Notably, where a loan meets (a) and (b) above and it refinances a loan that met (c) (a "new loan"), even where the refinanced loan did not meet (a) and (b), the new loan may be third-party debt. (This applies only to the refinancing of a loan and not to the repayment of equity.) The Guidance clarifies that any amount advanced in excess of the amount used to repay the principal of the previous loan does not qualify as third-party debt. The Guidance also confirms that funds advanced on a subsequent refinancing ("the subsequent loan") may be third-party debt where it satisfies conditions (a) and (c) and the financing costs over the life of the subsequent loan are lower than on the debt that is being refinanced, or the financing costs over the life of the subsequent loan are higher than on the debt that is being refinanced but the refinancing is of third-party debt and the increased financing costs arise from genuine market conditions out of the control of the IREF.

To qualify as third-party debt, (c) above requires that the **full** amount advanced must be employed in the purchase, development, improvement or repair of a premises or in refinancing a loan that met these conditions. Any amount paid towards costs that are directly associated with the purchase, development, improvement or repair of a premises of an IREF, e.g. stamp duty and legal fees, will be "employed" for this purpose; however, amounts used to pay any financing interest on the loan will not be so "employed". The Guidance also clarifies that where a portion of the loan is used for some other purpose, the test will be met with respect to the portion of the loan that meets the qualifying purpose, as set out above, on a pro rata basis.

In addition, for the purposes of (c), monies borrowed "at or about the time of the purchase of the premises" shall be treated as having been employed in the purchase of those premises. In the Guidance, the Revenue Commissioners note that, where for bona fide commercial reasons the IREF was temporarily fully equity funded at the time of acquisition of the property, with the third-party debt being introduced shortly thereafter, such monies will be regarded as having been employed in the purchase of the property. In this regard, the Guidance states that it must be clear from all sources, including the relevant documentary evidence, that the intention was always that the property would be partially financed by third-party debt.

It is important to note that amounts employed in purchasing a property from an associate of an IREF shall be treated as third-party debt only if immediately prior to the purchase that associate had carried out significant development work on the property, such that the development exceeds 30% of the market value of the property at the date of the commencement of the development, and the property is being acquired by the IREF for the purposes of property rental. This condition does not impact a situation, however, where the property is acquired from an associate otherwise than on a purchase, while it is worth considering if in such a situation, if related debt that met condition (c) is also acquired by the

IREF, e.g. by way of novation on a liquidation of the associate, such a refinancing may be capable of meeting the conditions to be third-party debt.

A loan that is third-party debt shall not cease to be so treated where the lender becomes an associate of the IREF solely on account of the enforcement of any security granted as a bona fide condition of, or in connection with, the third-party debt. The Guidance clarifies that this applies to situations where the lender takes ownership of the IREF through the actual enforcement of the debt, or where it is agreed with the lender to transfer ownership of the IREF to avoid having to proceed to enforcement.

These provisions apply to accounting periods commencing on or after 9 October 2019, and where an accounting period commences before 9 October 2019 and ends after that date, it shall be divided into two parts, one beginning on the date on which the accounting period begins and ending on 8 October 2019 and the other beginning on 9 October 2019 and ending on the date on which the accounting period ends, and both parts shall be treated as if they were separate accounting periods of the IREF.

From 1 January 2020

After consultation on the new legislation, a separate provision, s730LAA TCA 1997, was introduced to govern the calculations described at (2) and (3) above with effect from 1 January 2020. Helpfully, the Guidance clarifies that IREFs may choose to apply the rules set out in s730LAA from 9 October 2019. Pursuant to the provisions of s739LAA, the calculations at (2) and (3) above shall be performed as described above **but** subject to the following.

For the purpose of the calculation at (2) above, relevant costs shall include capitalised interest **only** where arising on third-party debt (as defined for the purpose of the provisions, as outlined above), and it is clarified that specified debt shall include a portion of any debt incurred by a partnership in which the IREF is a partner, in respect of monies borrowed by, or advanced to, the partnership (calculated as the higher of the portion of the capital of the partnership held by the IREF or the portion of the profits of the partnership to which the IREF is entitled).

For the purpose of the calculation at (3) above, “annual IREF profits”, being the profits of an IREF business as shown in the income statement **but excluding** gains and losses on assets, whether realised or not (where assets are assets that would be chargeable assets for the purposes of capital gains tax or corporation tax on chargeable gains save for the relevant exemptions for investment undertakings), is to be substituted at (3) above for “the profits of the IREF” for the purpose of calculating the property financing costs ratio, and it is clarified that where the annual IREF profits before adjusted property financing costs is zero or less, all of the adjusted property financing costs are deemed income.

Impact of the New Rules

The impact of the new rules is significant and far-reaching. In contrast to the previous provisions, where IREFs were not taxable in their own right (rather, they operate withholding tax at a rate of 20% on the happening of certain taxable events in respect of certain investors), under the new rules, IREFs are deemed to have income subject to an Irish income tax charge in certain circumstances.

As these new tax charges give rise to income tax for the IREF, they affect the value of all of the shares or units in the IREF, including shares or units held by investors that as a matter of policy are exempt from IREF withholding tax (e.g. Irish exempt pension funds and their European Economic Area counterparts). Accordingly, from the perspective of IREF exempt investors, they may now share a tax burden that arises on account of the behaviour of other market investors, a tax burden that should arguably be borne solely by those investors. Such IREF exempt investors will, in effect, bear tax if the tax charges apply to an IREF in which they invest, and it is possible that this may be the case even where all of the investors in the IREF are exempt from IREF withholding tax.

Separately, as these tax charges are levied with reference to costs, these taxes can apply where there is no income or gains arising and no cash or value from which to settle the tax.

Where IREFs are developing immovable property, loans from associated enterprises are a vital component of the capital structure. Funding needs to be prompt and agile to meet fluctuating working capital requirements and to facilitate draw-downs under senior development finance (i.e. genuine bank debt), because typically, when targets are reached, as a condition of draw-downs under senior development finance, contributions are required from equity or junior funding. In the author's view, it does not make commercial sense to hold excess cash for these purposes, and for regulatory reasons, a net asset valuation is required for the purpose of subscription for shares or units, so coupling pure equity with senior finance is not optimal. Procuring a net asset valuation incurs costs and takes time. There is no requirement for a net asset valuation to be undertaken for an IREF to make a draw-down on a loan (even where that loan is from an associated enterprise or a holder of shares or units). This is why these loans are suitable for this purpose. In many cases these loans are repaid annually when the fund issues shares or units to the holder to the value of the outstanding loan amount after the annual net asset valuation calculation is undertaken (such annual net asset valuation is required to be undertaken for regulatory reasons).

Separately, in relation to particular asset classes or sub-classes, market pressures can determine that certain minimum internal rates of return (IRR) are expected on the investor's investment in order to attract the investor base. For example, IREFs competing with property funds in other Euro jurisdictions holding comparable asset classes or sub-classes in that jurisdiction, where there is a demand for that asset class or sub-class to be developed in Ireland (e.g. student accommodation), can seek to achieve a particular IRR so as to attract the investor base and obtain the funding that will make the development viable. For the IREF to achieve that minimum IRR, given the forecast income and gains before leverage, it may be necessary to include flexible, subordinated debt at competitive market rates in the capital structure of the IREF. Often that debt is obtained from an associate enterprise within the meaning of the provisions. In such situations it is typical that (1) the investor invests solely by way of subscription for shares or units; (2) the rate of interest on the loans from associated enterprises is highly competitive and not in excess of a reasonable commercial rate on the principal advanced (the purpose of the loans is to increase the IRR on the shares or units); (3) the associated enterprise makes such loans in the ordinary course of its business; and (4) the IREF is associated with the associated enterprise through the promoter or manager of the IREF and not the investor (although if the associated enterprise is a widely held debt fund, it cannot necessarily be guaranteed that the investor is not also an investor in the debt fund).

Conclusion

The authors' note that this article was written prior to the Financial Resolution which introduced a new section 31E to the Stamp Duties Consolidation Act 1999 with effect from 20 May 2021, and accordingly, does not deal with these provisions. As with all new tax legislation, a collaborative multi-disciplinary approach would be welcomed, in order to ensure that the new legislation operates as intended.

Appendix II
Illustrative example of s739LA[A]

IREF ABC	**Before 3rd party debt carve out**	**3rd party carve out**	
IREF assets cost	1,000,000		
Long term debt[Note 1]	900,000		
Annual rent (assuming 7% yield)	70,000		
Rental costs (assuming rate of 2%)	1,400		
Profit before interest	68,600	Profit before interest	68,600
Interest expense[Note 1]	72,000	3rd party interest[Note 1]	30,000
Profits of the IREF	-3,400	Profit after interest	38,600
s.739LA[A]			
ss(1)			
Specified debt	900,000		600,000
Relevant cost	1,000,000		1,000,000
Property financing costs	72,000		30,000
Adjusted property financing costs: (72,000–32,000) (30,000–5,000)	40,000		25,000
Property financing costs ratio (-3,400+40,000):(40,000) (38,600+25,000):(25,000)	0.92:1		2.54:1
ss(2)			
Specified debt > 50% relevant costs?	Yes		Yes
A (property financing costs)	72,000		30,000
B (excess specified debt)	400,000		100,000
C (total specified debt)	900,000		600,000
Case IV amount (AxB/C)	**32,000**		**5,000**
Ss(3)			
Is the property financing costs ratio <1.25:1?	Yes		No
Adjust right hand side of property financing costs ratio to 80% of left hand side[1]	36,600:29,280		

1 This method of calculation should be adopted in all scenarios to ensure consistency of approach.

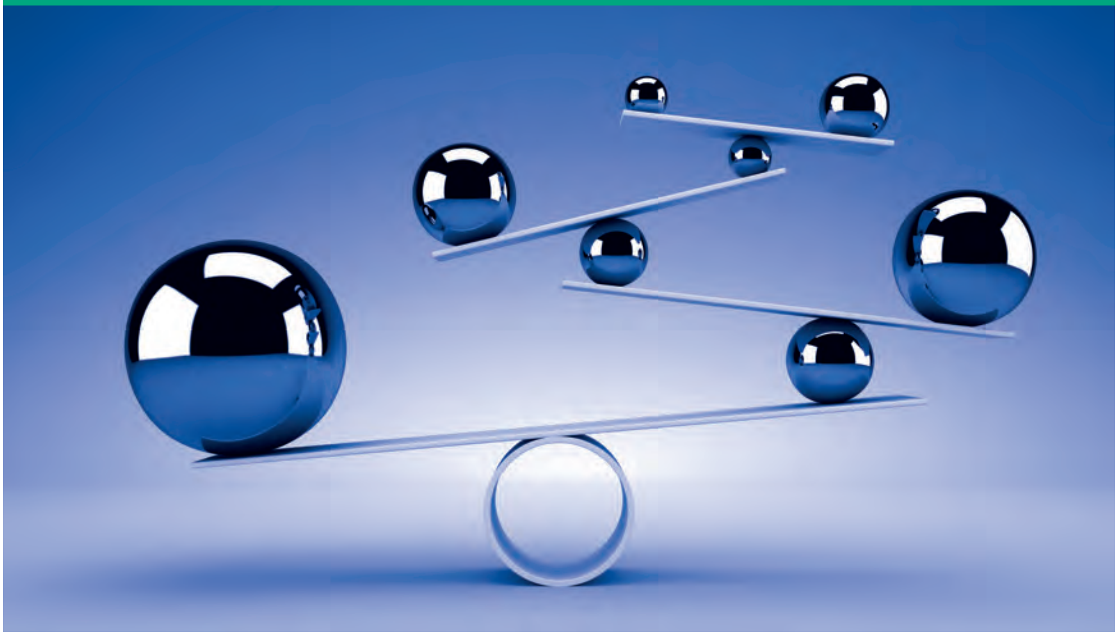
Case IV amount is difference between right hand side adjustment (40,000 – 29,280)	**10,720**	
Total Case IV amount (32,000 + 10,720)	**42,720**	**5,000**
(42,720–5,000)		**37,720**

Note 1: Debt split

3rd party	600,000	5%	30,000
Shareholder	300,000	14%	42,000
Total	900,000	8%	72,000

Nina E. Olson
Executive Director, Center for Taxpayer Rights, and former US National Taxpayer Advocate

Not All Tax Non-compliance Is Evasion: A Plea for a More Precise Nomenclature – The US Experience



With countries all over the world requiring increased revenue to cover expenditures related to the Covid-19 pandemic, and with increasing cross-border cooperation in sharing financial account and other data, we hear the phrase tax evasion liberally applied to all sorts of non-compliance with the tax laws. The ubiquitous usage of this phrase actually dilutes its meaning and impact. It also allows very different types of non-compliance attributable to very different causes to be lumped together. And framing non-compliance as tax evasion creates an environment in which tax agency personnel can undermine, or ignore, taxpayer rights and protections.

I have always viewed tax non-compliance as a continuum of behaviour and causes – i.e. factors that influence that behaviour. My colleague and good friend Professor Les Book described a typology of tax non-compliance based on the work of sociologists Robert Kidder and Craig McEwen.[1] This typology fits nicely with the "responsive regulation pyramid" that originated in Australia in the late 1990s and early 2000s.[2]

US Taxpayer Advocate Service Survey Results

In 2012 the US Taxpayer Advocate Service (TAS) published a nationwide survey and research study demonstrating that trust and customer service were principal factors in influencing compliance behaviour by sole proprietors.[3] All of this work leads to the conclusion that a tax agency's response to a taxpayer's non-compliance should be determined, in large part, by where the taxpayer falls on the continuum (or typology) of non-compliance.

Professor Book discusses eight types of tax non-compliance:[4]

1. *Procedural non-compliance*. This arises when a taxpayer fails to follow the tax agency's rules about which forms to file and when and where the forms must be filed. Underlying these rules is the assumption that taxpayers actually have the skills, time and resources to meet these requirements.
2. *"Lazy" non-compliance.* This occurs when the taxpayer is unable to provide the tax agency with information and documentation necessary to establish a tax liability or eligibility for deductions or credits claimed on a return. The non-compliance could result from the taxpayer's failure to maintain adequate books and records, but it could be the result of barriers such as poverty or literacy. Professor Book identifies the latter type as *characteristic non-compliance*.
3. *Unknowing non-compliance*. Here, the taxpayer's errors are the result of a failure to understand or ignorance of complicated, changing or unclear tax laws or rules.
4. *Asocial non-compliance*. This is the traditional tax evasion, where the taxpayer actively evades paying the taxpayer's fair share of tax. This category extends beyond illegal-source income and includes use of cash, cyber-currency or offshore accounts as a means to hide legally earned income.
5. *Brokered non-compliance*. This arises when the taxpayer relies on the advice of a tax professional such as a lawyer or accountant.
6. *Symbolic non-compliance*. Here, tax non-compliance is a means by which the taxpayer objects to perceived injustices or inequities in the tax laws, or to the government's use of tax revenue, or, more broadly, to the government's authority to tax.
7. *Social non-compliance*. This arises from social norms of a community or other group. For example, in the culture of certain groups of workers it may be acceptable to not report income from odd jobs because in general the government or society has not fostered economic security for that group.
8. *Habitual non-compliance*. Where a pattern of non-compliance over time goes undetected, it may become habitual, with the lack of detection reinforcing the non-compliant behaviour.

Based on the above typology, it is clear that evasion is only one of several types of non-

1 Robert Kidder and Craig McEwen, "Taxpaying Behavior in Social Context: A Tentative Typology of Tax Compliance and Noncompliance", in Jeffrey A. Roth and John T. Scholz (eds), *Taxpayer Compliance*, vol. 2 (Philadelphia: University of Pennsylvania Press, 1989), 47–75.

2 Valerie Braithwaite, "A New Approach to Tax Compliance", in Valerie Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot: Ashgate, 2003), 1–11. In this chapter Braithwaite describes the proposals of the Australian Tax Office and its Cash Economy Task Force to manage, not just detect, non-compliance by "nudging" taxpayers toward compliance. The Task Force identified factors, beyond the business's tax profile, that might influence taxpayer behaviour toward non-compliance, including the nature of the business's industry, economic factors present in the industry and society, and psychological and sociological factors.

3 See National Taxpayer Advocate 2012 Annual Report to Congress, *Research Study: Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*, at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/11/Research-Studies-Factors-Influencing-Voluntary-Compliance-by-Small-Businesses-Preliminary-Survey-Results.pdf. See also National Taxpayer Advocate 2013 Annual Report to Congress, *Research Study: Small Business Compliance: Further Analysis of Influential Factors*, at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/11/Small-Business-Compliance-Further-Analysis-of-Influential-Factors.pdf.

4 Leslie M. Book, "The Poor and Tax Compliance: One Size Does Not Fit All", *Kansas Law Review*, 51 (2003), 1145–95.

compliance. In public discussions, however, the phrase is often treated as synonymous with the US tax gap.[5] For example, under the headline "IRS Chief: Cheats Cost U.S. $1 Trillion a Year," the *Washington Post* described the IRS Commissioner's guess, at a recent US Senate Finance Committee hearing, that the annual tax gap could be as much as US$1 trillion. The article stated: "The head of the IRS calculated [*sic*] that tax evasion in the United States may total $1 trillion a year, a figure that is multiples higher than previous estimates from the federal government".[6] The underlying point is valid – previous tax gap estimates have not captured underreporting of income associated with crypto-currency transactions, offshore tax evasion, pass-through entities and illegal-source income. Recall that the US tax gap estimate is comprised of three categories – non-filing, underreporting and underpayment, with underreporting being the largest. Although the Commissioner did not provide any data to back up his supposition that the annual US tax gap might "possibly" exceed US$1 trillion per year, it is reasonable to believe that there would be some increase in the underreporting gap.

But even within these new types of transactions, not all non-compliance can be categorised as "tax evasion". Take crypto-currency, for example. A wide variety of people use crypto-currency for a wide variety of reasons. Not all of that usage is on the dark web – some purchase it for novelty or for investment, some use it for everyday transactions. An article about the recent Coinbase initial public offering on Nasdaq notes that one-third of small and medium-sized US businesses accept crypto-currency as payment.[7] Not everyone understands which crypto-currency transactions constitute a realisable event, much less when that event generates taxable income. Indeed, the IRS only issued guidance on cyber-currency in 2014.[8] Yet the IRS has clearly adopted the view that mere ownership or acquisition of cyber-currency is an act worthy of closer scrutiny – in a prominent place on the 2020 Form 1040, Individual Income Tax Return, it asks **every taxpayer** the following question (under penalties of perjury): "At any time during 2020, did you receive, send, sell, exchange or otherwise acquire any financial interest in any virtual currency?". This question, apparently requiring the reporting of the mere acquisition of virtual currency, has brought almost universal condemnation as overreach.[9]

Leaving crypto-currency aside, of the current US$441bn tax gap estimate, some portion of the underreporting gap is attributable to errors as a result of tax law complexity (unknowing non-compliance) and others are attributable to procedural complexity and barriers – for example, where taxpayers are eligible for a deduction or credit but cannot navigate the bureaucracy on their own and cannot afford representation, so they just give up (lazy or characteristic non-compliance).

Classifying non-compliance as tax evasion paints everyone with the same brush. It can lead to initiatives that treat a taxpayer who has simply made a mistake in the same way as a taxpayer who has engaged in complex tax planning. For example, between 2009 and 2012 the US Internal Revenue Service offered a series of settlement programmes for US taxpayers with unreported foreign bank accounts and income.[10] The initiative came in the aftermath of

5 The US Internal Revenue Service defines the "gross tax gap" as the difference between the true tax liability for a given tax year and the amount paid on time; the "net tax gap" includes late payments and payments obtained through enforcement actions. The IRS periodically estimates the tax gap; for the years 2011 to 2013 it estimates the annual gross tax gap as US$414bn and the annual net tax gap as US$381bn. See https://www.irs.gov/newsroom/the-tax-gap.

6 *Washington Post*, 14 April 2021, p. A20.

7 "'It's More than Just Coinbase': Crypto Giant Snares $85.8 billion Valuation in Nasdaq Debut", *Washington Post*, 14 April 2021, at https://www.washingtonpost.com/business/2021/04/14/coinbase-ipo-crypto-bitcoin/?utm_source=rss&utm_medium=referral&utm_campaign=wp_business.

8 Internal Revenue Service, Notice 2014-21, at https://www.irs.gov/pub/irs-drop/n-14-21.pdf.

9 See National Taxpayer Advocate, *NTA Blog: Wait, When Did This Virtual Currency Question Appear on My 1040 Tax Form*, 3 March 2021, at https://www.taxpayeradvocate.irs.gov/news/nta-blog-wait-when-did-this-virtual-currency-question-appear-on-my-1040-tax-form2/. See also Guinevere Moore, "IRS Rules on Reporting Bitcoin and Other Crypto Just Got Even More Confusing", *Forbes*, 3 March 2021, at https://www.forbes.com/sites/irswatch/2021/03/03/irs-rules-on-crypto-reporting-just-got-even-more-confusing/?sh=2a393e487850.

10 For an extensive discussion of the IRS offshore settlement programmes between 2009 and 2018, see National Taxpayer Advocate, *NTA Blogs: An Analysis of Tax Settlement Programs as Amnesties: Part 1, Part 2, and Part 3* (14, 21 and 30 March 2018).

congressional hearings and a 2004 amendment to §31 USC 5321(a)(5), which strengthened the penalties for underreporting the existence of foreign financial accounts, including one of up to the greater of US$100,000 or 50% of maximum account balance for the period. Recognising that not every failure to report was not willful, however, the statutory scheme provided a flat US$10,000 penalty for non-wilful failures to report and the discretion to impose no penalty at all where the failure to report had reasonable cause.

Offshore Voluntary Disclosure Program

The 2009 Offshore Voluntary Disclosure Program (OVDP) provided for taxpayers to pay a flat 20% penalty of the highest account balance over a six-year period, as well as all other tax and interest on the unreported income, and a 20% accuracy-related penalty. The IRS simultaneously made clear that failure to enter into the OVDP could result in an extensive audit and lead to criminal investigation. The 2009 OVDP thus failed to differentiate between those taxpayers who had small offshore accounts for family reasons (e.g. providing support for a parent who lives overseas) or who, although being "accidental" US citizens, had lived their adult lives without any professional nexus with the IRS and were surprised to learn that they had an obligation to file returns with the US tax agency and those taxpayers who were actively seeking to shelter their assets and income offshore so as to escape (evade) US taxation. Although the IRS recovered US$9.9bn from these settlement programmes up to October 2016, the data for the 2009 OVDP paints a stark picture of a regressive penalty structure, whereby, in the author's view, the experience in the US is that the taxpayers with the lowest dollar accounts and the least amount of unreported income pay the highest percentage rate of penalty (as a percentage of tax due on the unreported income). In my view, the 2009 OVDP clearly violated the principle of proportionality, a fundamental taxpayer rights protection.

FIGURE 1. Comparison of Median Offshore Penalties to Unreported Tax by Median Account Size and Representation for the 2009 OVD Program

	Bottom 10%	Middle 80%	Top 10%
Offshore account(s) balance	$44,855	$607,875	$7,259,580
2009 OVD penalty	$8,540	$117,803	$1,410,517
Additional tax, tax years 2002-2011	$1,472	$30,894	$452,966
Offshore penalty as a percent of tax assessed	580%	381%	311%
Unrepresented percent	31%	11%	4%
Offshore penalty as a percent of tax assessed (unrepresented taxpayers only)	772%	474%	398%

Source: *NTA Blog*, 21 March 2018.

In light of these past experiences, how can the position of the taxpayer can be improved as Revenue collection becomes more prominent? First of all, tax authorities, commentators, and media reporting should be more precise in its characterisation of non-compliance. Use of the phrase 'tax evasion' should more accurately reflect the narrow circumstances where evasion applies. This approach gives a truer picture of the nature of intentional and non-intentional non-compliance.

Because words matter. They have consequences.

Hugh Owens
Formerly of O'Donovan Cuddy & MacCarthy, Stokes Kennedy Crowley (KPMG) and Revenue

The Fair Deal Scheme

Introduction

> "From each according to his ability, to each according to his needs" – Karl Marx

Possibly Marx's credo inspired Mary Harney, the then Minister for Health, to introduce the Nursing Homes Support Scheme Act 2009 ("the Act"), the so-called Fair Deal. All legislative references in this article are to the Act unless specified otherwise. In researching this article, I downloaded the Act (66 pages from www.oireachtas.ie) and got the Information Booklet (23 pages) and the application form NHSS1. I have personal experience of completing the process.

Within the HSE, the Nursing Homes Support Office (NHSO) administers the scheme from 17 offices nationwide. In October 2020 there were 22,826 people availing of the scheme, at a cost to the Exchequer of €1.063bn per annum. The Nursing Homes Support Scheme National Coordinating Unit is located in Central Business Park, Clonminch, Tullamore, Co. Offaly. Information on the scheme is available at www.hse.ie/nhss and from HSE Live at 1850 24 1850, 8am to 8pm from Monday to Friday and 10am to 5pm on Saturday. Queries or information requests in relation to individual cases should be addressed to local NHSOs, with contact details available on above website or in Form NHSS1 and in the Information Booklet.

Anyone who is ordinarily resident in the State may apply for the scheme. "Ordinarily resident" is different from its definition for tax purposes and is defined in the National Guidelines as living in the State for at least a year, or with the intention of so doing.

Care Needs Assessment

In the application form NHSS1 the applicant, or one of ten specified categories of persons on the applicant's behalf, applies for a Care Needs Assessment. This is carried out by such persons as doctors, nurses, occupational therapists and physiotherapists. Among other things, they assess the applicant's ability to carry out the basic daily activities of living. It is only if they determine that the applicant needs long-term care that the NHSO reviews the financial details.

Financial Assistance

Financial assistance under the scheme comes in two parts: State Support and Ancillary State Support. State Support means the amount of nursing home fees that the NHSO pays, having established the contribution due by the applicant (and spouse/partner, if applicable), based on their income and assets. In some cases no State Support is payable: if the applicant's contribution would equal or exceed the nursing home fees, the maximum contribution due by the applicant will be the nursing home fees. However, such applicants and any other applicants, whether or not they qualify for State Support, may apply for Ancillary State Support, which is a repayable loan (see below).

Reviews/Appeals

Applicants are entitled to appeal the Care Needs Assessment, the financial assessment or the amount of the Nursing Home Loan. These appeals are heard by persons within the HSE but outside the NHSO. Applicants can also take the case to the Ombudsman and make a further appeal to the High Court on a point of law. I was advised by a senior official in the HSE Appeals Office that there were around 500 appeals in 2020, of which approximately 30% were successful.

Applicant Categories: Singles and Couples

Single applicants include those who are widowed, separated or divorced and those living in house-sharing relationships with siblings or others.

A single applicant is assessed on 80% of his/her income, net of income tax, PRSI and USC, and on 7.5% of his/her assets. A couple where one is the applicant is assessed on 40% of the combined net income and on 3.75% of the combined assets.

The percentages above for assets (7.5% and 3.75%) are in force for all applications made from 25 July 2013 onwards, per the Health (Amendment) Act 2013. The previous respective percentages are 5% and 2.5% for applications made up to 24 July 2013, and these percentages continue to apply to any such persons who are still in nursing homes.

There is a safety net called the "minimum retained income threshold", as follows:

- You will keep a personal allowance of the greater of 20% of your net income and 20% of the maximum rate of the Non-Contributory State Pension. The current maximum of that pension is €247 per week.
- If there is a spouse/partner remaining at home, he/she will be left with 50% of the couple's net income or the maximum rate of the above pension, whichever is greater.

This safety net relates to income contributions only. Applicants must still pay an asset-related contribution.

What Is Income?

Income is defined in Schedule 1, Part 3, of the Act. It includes all forms of taxable income, plus a little bit more. For example, 32 non-taxable social welfare allowances are set out in TCA 1997, most of which would be assessable as income for Fair Deal purposes, as would items such as income qualifying for the Artists' Exemption and patent royalties. Clearly, each case will depend on the relevant facts, and a thorough check of all income received should be carried out for the purposes of the application.

Calculation of Net Weekly Income

"Net weekly income" is described under various categories in Form NHSS1, and allowable deductions are entered as yearly amounts. They include health expenses (but not medical insurance), local property tax, and interest and capital repayments on the principal residence. Rent is an allowable deduction if the applicant is a tenant but only if the spouse/partner or children under 21 continue to live in the home. Reasonable living expenses for children under 21 or in full-time education are allowed on a case-by-case basis.

What Are Assets?

Assets comprise Cash Assets and Non-Cash Assets. Cash Assets include amounts in banks, building societies, credit unions, An Post, stocks, shares, managed funds, ARFs (approved retirement funds) and monies lent to other persons that are repayable. They include any such assets outside the State. A deduction is allowed for any borrowings incurred to purchase Cash Assets, such as a loan to buy shares.

Non-Cash Assets generally comprise all other property and land, whether inside or outside the State, including farms and businesses. The most common of these is the principal residence, which has the same definition as in CGT legislation. Applicants must get a professional valuation of property and land by an auctioneer.

Asset Exemption

There is an exemption called the “General Assets Deductible Amount”, whereby the first €36,000 (single) or €72,000 (couple) is exempt. This is usually deducted from Cash Assets, but if there is an insufficiency thereof the balance can be deducted from Non-Cash Assets. Section 36(4)(a) of Schedule 1, Part 3, of the Act provides that the Minister can make regulations to increase these amounts. To my knowledge, no such regulations have been made to date.

Similarly, s46 of the Act provides that regulations can be made to provide for relief for undue hardship in the case of a couple, whereby the income or assets or part thereof of the person staying at home can be disregarded in exceptional circumstances. After enquiries, it is my understanding that no such regulations have been made to date.

Transferred Assets: Five-Year Timeframe

Both Cash and Non-Cash Assets may include Transferred Assets. Schedule 1, Part 3, of the Act defines these as assets that were sold or otherwise transferred (e.g. gifted) within the five-year period up to the date of first application for the scheme, where the consideration received (if any) is less than 75% of the market value of the asset. The amount of the Transferred Asset is deemed to be the market value thereof, less the consideration received (if any) – in effect, there is an add-back of the gift element of the asset.

Similarly, income from the Transferred Asset must be included as income. This seems to be confined to the five years up to the date of application. Schedule 1, Part 3, of the Act defines it as “income which the person would have received but for an action whereby other persons are receiving the income”. I would take it to be income arising from a shortfall from Transferred Assets that occurred in the previous five years, as well as such things as Deeds of Covenant.

Neither Transferred Assets nor Transferred Income includes payments under a separation or maintenance agreement for a spouse, former spouse or child.

However, s7 of the Health (General Practitioner Service) Act 2014 extended the five-year period forward to include any time on or after the date on which application for State Support was first made.

Three-Year Cap: Principal Residence

The part of the applicant’s (and spouse’s/partner’s, if applicable) contribution related to their principal residence is capped at three years’ contributions, starting from when they enter an approved nursing home, regardless of how long they stay there. Therefore, a single applicant pays a maximum of 22.5% (7.5% x 3) of the market value of their principal residence. This percentage was inserted by the Health (Amendment) Act 2013. In the case of a couple where one person remains in the home while the other enters nursing home care, the contribution related to the principal residence will be capped at 11.25% (3.75% p.a. x 3).

If the principal residence is sold in the lifetime of the applicant, the three-year cap ceases to apply and the proceeds are assessed as Cash Assets. The only exception is if the proceeds are used to buy another residence that is the principal residence of the applicant's spouse/partner, in which case the period of ownership of the two residences can be aggregated for the purposes of the three-year cap.

Three-Year Cap: Farms and Businesses – Sudden Illness/Disability

In general, farms and businesses do not qualify at present for the three-year cap. However, there is an exception where the applicant suffers a sudden illness or disability that necessitates long-term care, they or their partner were actively engaged in the farm or business up to then, and a family successor continues the farm or business. Where all three of these conditions are met, the three-year cap currently extends to such farms/businesses.

Ancillary State Support (Nursing Home Loan)

All property and land in the State that is owned directly by the applicant and their spouse/partner (if applicable) is eligible for the Loan. I understand that property or land owned indirectly, such as through a company, does not qualify for the Loan.

The Loan provides that the NHSO pays the applicant's (and spouse's/partner's, if applicable) share of the contribution related to land and property in the State that is owned directly by them. The Loan is usually repayable after the death of the applicant, but if a property is sold during their lifetime, the Loan or the proportion of it relating to that property becomes repayable.

However, where the loan is tied to the principal private residence and would otherwise be repayable on the applicant's death, a further deferral is allowed if certain conditions are met. These are that if the spouse/partner or child(ren) under 21, or certain dependent relatives or a carer who fulfils qualification criteria as set out in the Act continue to live in the home, then the Loan will not have to be repaid during their lifetime. Such persons must meet conditions similar to those who qualify for dwelling-house exemption for inheritance tax purposes, except that they are not necessarily inheriting the home and there is also an income or assets means test for them.

The Revenue Commissioners are responsible for collecting repayments due on these loans. The Consumer Price Index for inflation or deflation is applied over the life of the Loan. Repayments are due within 12 months of the death of the applicant, or within 6 months of sale or transfer during the applicant's lifetime. Otherwise, interest will apply from the date of death or sale/transfer. Under SI 436 of 2009 the interest rate is 0.0219% per day. There is an extra-statutory appeal mechanism against such interest, per s26(10) of the Act, and under Revenue's care and management provisions in s489 TCA 1997.

Enduring Power of Attorney

If the applicant does not have capacity to apply for Ancillary State Support, they will require a person with an enduring power of attorney, a Care Representative or a Committee for Ward of Court to apply for the loan on their behalf. The latter two are quite cumbersome procedures, so I would recommend all elderly and/or medically vulnerable persons to consider setting up an enduring power of attorney. Basically, it provides that in the event of incapacity of the person, a named other person(s), an attorney(s), takes over the running of their financial and potentially practical affairs. The attorney does not have to be a lawyer – the name is slightly misleading. The power of attorney has to be drawn up while the potential beneficiary is *compos mentis*.

Subsequent Occupation/Vacancy of Home

Rental income, whether arising before or after the applicant enters a nursing home, is assessable under the scheme and must be disclosed. If the main residence is left vacant after the applicant enters the nursing home, this gives rise to a claim for exemption from local property tax on that home.

Future Proposals

Per a phone call I made in February 2021 to the office of the Minister for State for Older People, Mary Butler, I understand that the Government is considering an extension of the Fair Deal scheme to home care packages, so that people could remain in their own homes and communities.

Per Irish Independent, 3 March 2021, increased home care support is included in the HSE's 2021–2024 corporate plan.

Per Irish Independent, 3 May 2021, the cabinet is considering a number of other changes to the Fair Deal scheme. These might include, *inter alia,* exempting patients' contributions in respect of rental income on the principal residence, and extension of the three year contribution cap to farms and businesses generally.

News and Moves

Cahill Taxation Services (CTS), based in Ennis, Promotes Sinead Dooley to Tax Director

CTS are delighted to announce the promotion of **Sinead Dooley** CTA, LLM to the position of Tax Director.

She is a dual qualified Chartered Tax Adviser (CTA) and solicitor (LLM). Sinead previously worked with J.M. Burke Tax Solicitors, Dublin, before joining CTS in 2010. Sinead has particular expertise in tax disputes and appeals, estate and succession planning, corporate restructuring and personal tax planning.