Irish Tax Institute

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Contents

2021 Number 3

Messages from Irish Tax Institute

Regular Features

Feature Articles

Irish Tax Institute News

Editor's Pages

Julie Burke
Editor

Feature Articles

Preparing for Pay and File 2021

» **Lauren Clabby** provides an overview of matters to consider before preparing 2020 personal tax returns.

Corporation Tax Returns for 2020: Key Considerations

» **Brendan Murphy** and **Kevin Donovan** discuss the key changes and considerations to be kept in mind when filing corporation tax returns for accounting periods ending in 2020.

Contemporaneous Transfer Pricing Documentation: Key Compliance Considerations

» **Ronan Finn**, **Ashita Popat** and **George Thompson** summarise the key issues that taxpayers need to be aware of when considering their transfer pricing documentation obligations for FY2020 and future years.

Accounting for Tax Transactions: Adjustments to Accounts Due to the Covid-19 Pandemic

» **Aidan Clifford** explains some of the accounting issues faced by businesses as a result of the pandemic, including impairments, provisions, revenue recognition and onerous contracts.

Finance (Covid-19 and Miscellaneous Provisions) Bill 2021: Overview of Covid-19 Support Schemes

» **Michelle Dunne** provides a summary of the provisions contained in the Finance (Covid-19 and Miscellaneous Provisions) Act 2021, with the exception of the stamp duty measures.

New Stamp Duty Charge on Bulk Acquisitions of Residential Units

» **Lynn Cramer** and **Grainne O'Loughlin** discuss the recent Finance (Covid-19 and Miscellaneous Provisions) Act 2021 provisions that introduced an increase in the stamp duty rate on acquisitions of more than ten residential units and set out some of the challenges for taxpayers in navigating the new rules.

Tax Implications of Insolvency Procedures

» **Emer Dowling** provides an overview of the direct tax implications of examinership, Small Company Administrative Rescue Process (SCARP), receivership and liquidation.

DAC 6: Recent Revenue Guidance Updates

» **Fiona Carney** explains the important updates made to Revenue's Tax and Duty Manual on DAC 6, including new guidance on the hallmarks in Category C.

Relevant UK Budget and Finance Act 2021 Measures: Sowing the Seeds for Reform?

» **Patrick Duggan** summarises the key measures in the UK Budget announced on 3 March 2021 and reflects on what may lie ahead as we move towards the 2021 Autumn Statement.

Irish Capital Gains Tax Treatment of Foreign Taxpayers Can Be Such a Toll

» **Shane Wallace**, **Jessica Hayes** and **Brian Mullane** discuss the Irish CGT charge for non-residents in light of the recent Tax Appeals Commission determination 75TACD2021.

Reflections on the First Year as Inaugural Chairperson of the Tax Appeals Commission

» **Marie-Claire Maney** outlines the positive developments of the TAC over the past year and explains the plans for the future.

Digital Gaming Tax Credits/Incentives: It's All in the Game

» **Ken Hardy**, **Damien Flanagan** and **Stephen Brennan** examine digital gaming tax incentives in other jurisdictions and explore Ireland's options as an up-and-coming hub, given the new digital gaming tax credit that is likely to be effective from 2022.

The Reform of the Irish Investment Limited Partnership

» **Anna Holohan** and **Séamus Kennedy** discuss the recent reforms to the investment limited partnership fund vehicle and related tax considerations.

An Update on Revenue's Co-operative Compliance Framework

» **Aileen Daly** and **Joanne O'Sullivan** summarise the key aspects of the framework, which was updated in December 2020, and outline how it operates in practice.

Revenue Highlights the Importance of Data Quality in Payroll Reporting

» This update from Revenue highlights the importance of data quality in payroll reporting.

Regular Articles

Legislation & Policy Monitor

- **Lorraine Sheegar** details the Acts passed and Revenue eBriefs issued, as well as selected Bills presented, Acts passed and Statutory Instruments made in the period 24 April to 6 August 2021, providing a comprehensive overview of key developments and policy news. A summary of recent TAC determinations is also included.

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

Fiona Carney

Irish High Court Case

- The High Court delivered its judgment in the case of *Louis Fitzgerald v Revenue Commissioners* [2021] IEHC 487 which concerned the decision by the Tax Appeals Commission in 176TACD2020 about a "relevant individual" and application of the domicile levy.
- The High Court delivered its judgment in the case of *Yesreb Holding Ltd v Revenue Commissioners* [2021] IEHC 317 where an appellant challenged the Tax Appeal Commission determination in 67TACD2020 concerning the sub-sale relief under s46(1) SDCA 1999 in relation to purchase of a property.

Tax Appeals Commission Determinations

- **68TACD2021** considered whether a loan advanced to a company was a "debt on a security" and, hence, whether a capital loss was available for a negligible-value claim made on that loan.
- **75TACD2021** concerned whether a charge to CGT arose under s29 TCA 1997 for a non-resident company on its disposal of shares in an Irish company operating a motorway.
- **67TACD2021** concerned the timing of the disposal of land that was subject to a compulsory purchase order (CPO). This was relevant because the CGT rates were subject to several changes in the period from 2008 to 2012.
- **76TACD2021** concerned the close company surcharge on undistributed income of service companies contained in s441 TCA 1997.
- **70TACD2021** considered the question of whether a land development trade had commenced, thereby giving an entitlement to loss relief.
- **66TACD2021** concerned whether the appellant was a "relevant individual" within the meaning of s531AA TCA 1997 for the purposes of the domicile levy.

Direct Tax Cases: Decisions from the UK Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

- In *West Burton Property Ltd v HMRC* [2021] UKFTT 160 (TC) the First-tier Tribunal determined that a company was entitled in principle to a deduction in computing its rental profits for capitalised revenue expenditure that remained unamortised when the asset to which it related was sold.
- In *GE Financial Investments v HMRC* [2021] UKFTT 210 (TC) the First-tier Tribunal held that a UK-resident company was not also US resident for the purposes of the UK–US double taxation treaty.
- In *Messrs Elliot Balnakeil v HMRC* [2021] UKFTT 193 (TC) the First-tier Tribunal held that farmhouse renovation costs were capital in nature and disallowable for income tax purposes.
- In *Tenconi v HMRC* [2021] UKFTT 107 (TC) the First-tier Tribunal found that a disposal of guarantee rights was the disposal of a capital gains tax asset, which did not qualify for UK entrepreneurs' relief, as the guarantee rights did not constitute "ordinary share capital.
- The issue of share buy-backs was considered in the England and Wales Court of Appeal decision in *Boston Khan v HMRC* [2021] EWCA Civ. 624.

Compliance Deadlines

» **Helen Byrne** details key tax-filing deadlines for October to December 2021.

International Tax Update

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

» US tax developments

- The White House's 2022 Budget Blueprint contains more details in a "Green Book" from the Treasury Department on how tax proposals would operate, including effective dates and impact on federal reserves.

» Developments relating to the OECD/BEPS project

- As a result of the recent progress made in terms of political agreement, it is expected that a global tax agreement on tax reform is forthcoming; however, the exact detail of the agreement is not yet finalised.
- Ireland is one of the countries that did not sign up to the Inclusive Framework Agreement in its current form. Minister Donohoe launched a public consultation to assist in identifying the challenges and opportunities of the proposals in respect of Ireland's corporate tax code and broader industrial policy

» European Union tax developments

- The EU has announced that it is putting on hold a proposed EU digital levy.
- The European Commission has adopted the "Fit for 55" package of proposals to upgrade existing legislation in line with the EU's 2030 climate target
- The European Commission has released a roadmap for drafting a Directive debt–equity bias reduction allowance (DEBRA), expected in the first half of 2022
- EU legislators reach agreement on public country-by-country reporting

» India's Central Board of Direct Taxes has prescribed the thresholds for constitution of a significant economic presence in India

» Greece has announced reduced 22% Corporate Income Tax Rate from 2022

» In Germany, the Upper House of Parliament has approved law to implement EU Anti-Tax-Avoidance Directive

» German Ministry of Finance (MOF) has extended the deadline for certain filings that are required in connection with the German extraterritorial taxation of royalty payments derived by non-residents

» The Polish Ministry of Finance has announced its plan to revise the country's transfer pricing regulations, with a series of amendments that clarify the definition of related parties and ease taxpayers' documentation and compliance obligations

» Jersey and Guernsey are extending the substance requirement to partnerships, in line with commitments given to the EU Code of Conduct Group.

» The UK published draft legislation intended for the next year's Finance Bill

VAT Cases & VAT News

Gabrielle Dillon gives us the latest VAT news and reviews the following VAT cases and determinations from the Tax Appeals Commission:

» *Rádio Popular – Electrodomésticos SA v Autoridade Tributária e Aduaneira* C-695/19 regarding the entitlement of Rádio Populare (RP) to reclaim input VAT incurred on costs associated with the sale of extended warranties.

- The joined cases *K* **C**58/20, *DBKAG* C59/20 *v Finanzamt Österreich, formerly Finanzamt Linz* examined fund management exemption out outsourced services
- *Titanium Ltd v Finanzamt Österreich, formerly Finanzamt Wien* C-931/19 considered the issues around fixed establishment for property letting and management

- *BE, DT v Administrația Județeană a Finanțelor Publice Suceava, Direcția Generală Regională a Finanțelor Publice Iași, Accer Ipurl Suceava, acting as court-appointed liquidator of BE, EP* C-182/20 dealt with the interpretation of Articles 184 to 186 of the EU VAT Directive in the context of adjustments to input VAT by the tax authority after BE was declared insolvent but in respect of input VAT incurred before the insolvency.
- 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.

Accounting Developments of Interest

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

Revenue Commissioner's Update

This update from Revenue outlines VAT Postponed Accounting and VAT Returns.

Interview with New Irish Tax Institute President, Karen Frawley

Karen Frawley was inaugurated as the 46th President of the Institute at the AGM on 9 September. Karen is a tax partner in Deloitte and a member of the firm's international tax group. Before taking up her role, she spoke to *Sunday Independent* Business Editor, and host of Tax Talk, our podcast series, Samantha McCaughren about her background in tax and the challenges for the profession in the year ahead

Congratulations on your appointment as the new President of the Irish Tax Institute, Karen. Tell us a little bit about your involvement with the Institute and your working life.

I joined the Council of the Institute in 2013, and in recent years I have chaired the Policy and Technical Committee and the International Tax Working Group. It's been an interesting time. I've really enjoyed seeing first-hand all the great work that everyone in the Institute does on a day-to-day basis.

And, of course, the Institute relies heavily on the members who so generously contribute their time and expertise to the different areas of its work – as members or chairs of our committees, as lecturers for our courses, or as writers. Julie Burke, the editor of *Irish Tax Review*, is a shining example: this issue marks Julie's 20th anniversary in her role, and the Institute is incredibly lucky to have a person of her experience and expertise at the helm of our flagship publication. Julie's dedication to the highest standards has ensured that *ITR* continues to be essential reading for members.

And you're based in Limerick, Karen. Were you always based there?

I'm based in Limerick now, and I suppose you could say I was an early mover on remote working! I did do a couple of stints for a number of years in Dublin, but I moved back down to Limerick over six years ago, around the time I was appointed as a partner with Deloitte. At that time, the practice had decided that it was less concerned about where someone was based, but more with the work itself. We see ourselves as a national tax practice, which has actually benefited us from a talent perspective, and equally, when working remotely became a necessity as the pandemic hit us, our people were well set up to comply with the public health guidelines and work remotely.

It remains to be seen how long many employers will actually stick with the remote working, but you've seen first-hand that it can be pretty successful. Are you optimistic that it will be something that can prevail post-pandemic?

There's for and against: I think everyone misses the social side of working in an office and interacting with colleagues. I know from internal surveys we have done in Deloitte that there seems to be a sense that a lot of people would like a hybrid approach, where they are in the office for a few days a week but equally have the flexibility to work from home when they need to.

But everyone has different circumstances; different people need different things. Some people are quite happy being in the office all day every day. Others are happy working at home all day, every day – or the length of their commute means that's what makes sense practically. But the majority want a mix of both. I think we'll need to be patient while everyone finds out what balance works for them.

You're starting your role as President just as we're really opening up the economy again. Over the last 18 months, we have seen a lot of support schemes from the Government and forbearance from Revenue, as well. That's been very positive, but it's also brought with it a lot of paperwork, new deadlines and new criteria to work through for the schemes themselves. How do you think the profession and its clients have fared during the pandemic?

I think tax practitioners have worked extremely hard, both within their own practices and on behalf of clients. I can see that across the board, whether it's people working in the Big 4, industry or smaller practices. The requirements and paperwork have been a feature of the work, and many of the supports and schemes were developed quite quickly. And then, in turn, practitioners have had to decipher the rules and requirements, and translate them to their clients quickly.

Equally, we have members within Revenue who developed some of those schemes, which have stood up in a really impressive way. There has been a lot of collaboration between Revenue and practitioners, but equally a lot of hard work with practitioners working on behalf of their clients to make sure things have gone smoothly.

We all welcome the fact that the economy is reopening. But we're entering a new phase now: the Government has been very clear that many of the schemes will have to be wound down, including debt warehousing. Do you have any concerns about how that's going to play out over the next couple of years?

Last July I was shocked to see that €15 billion had been spent on the various schemes over the course of the pandemic, which is just an eye-watering amount in any language. But having said that, it was equally positive to see a contingency fund of another €2.8 billion set aside in Budget 2022 to continue some of those schemes or develop them further.

With regard to debt warehousing, the Institute would accept that Revenue and the Department of Finance have worked really well with taxpayers up until now to show a level of forbearance. Revenue has been quite vocal that it will work with taxpayers as best it can and try to agree fair and reasonable payment terms where needed, so we would be hopeful that would continue. It stands to reason that the longer debt warehousing can continue, the better.

With that said, it's going to be very challenging to weed out the companies that inevitably will fail versus those that have a very strong chance of prospering in the short to medium term. Will tax practitioners have some role in the assessment of which companies survive and which companies may not have future supports?

I don't think practitioners will have a direct role, but certainly a supporting role in making sure that their clients understand what their options are, where there are potential supports, and certainly where engagement is needed with Revenue around flexible terms.

Past-President, Sandra Clarke handing over the Chain of Office to ITI President, Karen Frawley

Irish Tax Institute Chief Executive, Martin Lambe; ITI President, Karen Frawley and Past-President, Sandra Clarke

Another big international story hanging over us to some extent is tax reform. The OECD is progressing quite quickly with its proposed tax rate of 15%, and the US is also keen to see change. Does Ireland have a lot to fear at this point?

It's already been signalled by the Minister for Finance that the impact of this on Ireland would be in the order of €2 billion a year. The problem for most taxpayers now is that there's so much uncertainty around what's going to happen. I think many people will accept that global reform is needed in some shape or form, but not everyone agrees on what that global reform should look like.

There are still an awful lot of moving parts, such as what happens in the OECD work stream, but equally, what happens in the US, which could potentially be more damaging for Ireland than the OECD decisions. And we have to consider the possibility of the EU going it alone and driving ahead with some of those proposals, as well.

It's a challenging time, particularly as taxpayers and multinational groups are trying to predict how things might play out over the coming years. There's no doubt there's going to be an impact, but at this point it's hard to assess exactly what that will look like.

There's been a huge amount of focus on what that rate change might mean for multinationals. Would they still commit to Ireland longer term? Would this make us a less attractive location? Is there going to be an impact on indigenous companies as well if there is a seismic change in international corporate tax?

Firstly, tax isn't the be-all and end-all when it comes to attracting multinationals. There are obviously other factors, particularly around talent, that are very much at play. The Government should be considering how we can make ourselves more attractive, both within and outside of our tax regime. Our hands may be tied on some of the tax issues, but then you can look at other factors, such as how easy it is to do business in Ireland; how easy it is to interact with Revenue; and how easy it is to access certain reliefs and supports.

For example, take interest limitation rules, which are potentially coming into play next year. Do we need to make them very complex, or is there benefit in making them as simple as possible? Also, rather than layering them on top of some of our existing interest limitation rules and interest restrictions, is there an opportunity to make that whole regime and how we deal with interest deductions easier?

There is a huge reliance in Ireland on foreign direct investment and global corporates that's been part of our strategy for many, many years. Is there now an opportunity to shift that balance a bit, or do they represent too big a piece of our economy? Can we do anything to try to ease our reliance on those large firms that have accounted for so much of the tax returns for the last number of years?

Of course, it's not great to be over-reliant on any one tax stream, and there are probably a couple of areas where we need to widen our tax base in the income tax regime. But equally, we need to ensure that we have a thriving domestic economy as we come out of the pandemic.

That means supporting our larger, indigenous companies to become even larger but also encouraging an environment of innovation and entrepreneurship. Unfortunately, in the past many entrepreneurs have had to go abroad to make it because there hasn't been the right infrastructure here to help them. We need to create that environment, and tax can be a feature of that.

For a number of years, the Institute has advocated for this support of entrepreneurs to help domestic companies. One area that could be addressed is our capital gains tax rate. At 33%, it's far higher than a lot of our peers and potentially puts us as at a competitive disadvantage for investment. There is obviously the 10% entrepreneurs' relief, but that is capped and of limited benefit, particularly for angel investors.

After all, receipts went up when the capital gains tax rate was reduced to as low as 20% in the past, because it encouraged people to dispose of properties and investments, and it fostered a more active market. We would hope to see that environment once again.

How much of a factor is the corporate tax rate for large indigenous firms now? Is it one of their top priorities, or has it been somewhat overshadowed by the pandemic?

It's not front of mind because there's no imminent legal changes at this point, but there are a few quirks for domestic companies. When you consider that we have two rates of tax – 12.5% and 25% (three, when you consider the CGT rate of 33%) – this could cause difficulty with new transfer pricing rules potentially coming into play.

In such a scenario, you could see one company getting a deduction of 12.5% but another company being taxed at 25% on that income. At this point there may be merit in removing the 25% rate and having the one rate of tax, similar to other regimes.

How has the Institute performed in our new virtual world?

Almost all of our work streams have moved into the virtual environment as a result of the pandemic. I think the Institute did a phenomenal job in moving both exams and seminars online really quickly and seamlessly – this wasn't an easy task, particularly given that people went into lockdown in March 2020, which was quite close to exam season.

I know from talking to people on my own team doing exams during lockdown that it worked really well. Given the success, I wonder whether we will ever go back to written exams again, and I suspect not! But I also think that everyone has missed events like the Meet the Members Tour and the in-person Finance Bill Roadshow. Going forward, it is likely that the Institute will showcase a hybrid mix of events – some things will be in-person, some things will be virtual, but I'm sure we'll find the right balance for members.

What would your view be on women in STEM and facilitating the rise of women to higher levels in organisations and tax practices?

Looking at Deloitte or, indeed, the membership of the Institute, it's fairly 50–50 in terms of male–female split. So I don't think we necessarily have an issue with getting women into tax in the first place. The issue probably presents itself as people progress with their careers – you do see a drop-off in female representation in the senior levels, where people choose to look at more flexible working arrangements, do something different entirely or exit the workplace.

So the flexibility around remote working as a result of the pandemic should help that but, equally, there is work to be done to support women to stay in tax and to move into those senior roles where they can push the agenda.

Another thing that was overshadowed by the pandemic was Brexit. A couple of years ago, this conversation would have been dominated by Brexit. Has it happened reasonably seamlessly in the end?

It's been mixed. There's obviously much more work required in the customs and excise space, and there have been difficulties. I'm aware of many people who got panicked phone calls last December and January, in particular, asking "Why can't we move goods? Why isn't this all working?".

But I think most of those difficult moments have passed at this point. A lot of the creases have been ironed out, and we're getting to a good place.

But it is hard to see what the long-term impact of Brexit might be. In some areas, it will serve Ireland well; in others, not so well. But I suppose, at this point, at least there's a level of certainty as to how to do business going forward.

The economy has really had a very rough time as a result of Brexit and the pandemic. Is there cause to be optimistic in your year as President of the Institute?

It's positive to see things beginning to open up, and to have clarity on when a lot of the restrictions will be lifted. All around, there's a level of optimism. Obviously, there are questions around booster vaccines and how the winter season will go, but I think people are generally in a good space. Hopefully, we'll all get to see some sun on foreign holidays next year!

I'm certainly looking forward to being able to engage with people on a face-to-face basis rather than over Zoom in the future. I think no one will miss the days when you have nothing but video calls from one end of the day to the next, sometimes from one end of the week to the next!

One issue that's becoming really central to all of our lives is sustainability. A few years ago this might have been seen as a box-ticking exercise, but it's definitely moved centre-stage now.

Absolutely, I've seen this both within Deloitte and, equally, with clients. It's becoming a standing item on boardroom agendas and is something that investors are asking about. A lot of graduates going through the interview process ask us what our own policies are and what we're doing to move forward on our own agenda. So it's just becoming more and more important.

You could be forgiven for thinking that during the pandemic this focus would have dampened down, when people had other things to concentrate on. But, actually, it hasn't. I can certainly see that, as the issues around the pandemic begin to fade, the whole area of sustainability will become even more important.

Digital transformation is a reality in the workplace now, and tax is no different. Do you think that's going to have many implications for how you do your work and training? What skills are going to be important in the future?

It's a good point, as things change very quickly in this space. I can remember diligently filling out tax returns with pen and paper, which were then sent to the client for signing, sent back to us and then delivered into Revenue. And that wasn't that long ago! But, quite quickly, we had to start dealing with Revenue online, and practitioners transitioned to that really well.

More and more, we'll see some of our services becoming automated. You look at other countries, where a taxpayer effectively files their accounts every month or every quarter, and taxes are calculated automatically. That's the future we're looking at. And you'd wonder about the place of the tax practitioner in that world, which is why the Institute is about to kick off a campaign around the value of tax advisers to their clients.

I believe that, while we are moving away from the compliance side of things, we will become more strategic in future – asking questions like "Are you paying the right amount of tax? Are you doing things in the right way? Have you the right processes in place? And where is there value? What can you be doing differently across the board?"

That's where the value of the tax practitioner will lie in the future.

You can listen to Karen's Tax Talk podcast interview https://soundcloud.com/user-754410870/tax-talk-ep-6-new-irish-tax-institute-president.

Chief Executive’s Pages

Martin Lambe
Irish Tax Institute Chief Executive

New Institute President

We are delighted to welcome Karen Frawley as our 46th President after her inauguration at the Institute’s AGM on 9 September. Karen was first elected to the Council in 2013 and has chaired the Policy and Technical Committee and the International Tax Working Group. Her expertise in international tax, as a tax partner in Deloitte, will be a tremendous resource to the Institute as we reach a tipping point in the long-running negotiations on the OECD proposals on the taxation of large multinational businesses.

On the week of her appointment, Karen did an interview with Samantha McCaughren, host of our podcast series, Tax Talk. You can listen to the podcast https://soundcloud.com/user-754410870/tax-talk-ep-6-new-irish-tax-institute-president.

Thank You, Sandra

Karen takes over from Sandra Clarke, who was at the helm during an extraordinary year for the profession and for the entire country. I want to thank her for the commitment and expertise that she brought to the role of President. Throughout an exceptionally busy and stressful year for tax advisers, Sandra was always generous with her time. Her vast experience in tax administration was an invaluable resource for the Institute, and she was always on hand to offer guidance and wisdom. Sandra will, no doubt, bring the same characteristics to her role on the Commission on Taxation and Welfare, and we wish her the very best in the future.

Changes to Council

As Karen starts her role as President, and Sandra becomes Immediate Past President, there are several changes to Council. Our new Deputy President is Colm Browne, and Tom Reynolds is our Vice President. We are delighted to welcome Tommy Walsh of CDS Law and Tax, who was elected as a new member of the Council over the summer, while five existing members were re-elected.

Post-pandemic Working Arrangements

Since the Government announcement earlier in the month that offices can reopen from 22 October, we have begun to prepare for a return to Longboat Quay. We had already made the necessary changes last summer to ensure that our offices complied with the safety standards set out by the health and safety authorities.

We will be updating those changes to ensure that every precaution is taken to protect the wellbeing of our staff. We are planning the return to our offices in consultation with our staff, based on a hybrid approach to work from 1 November. In the meantime, we will continue to work effectively and efficiently from home on behalf of our members.

Education

At the end of July the Institute hosted a virtual conferring for students from Revenue who graduated from our courses over the previous 12 months. Sandra and Niall Cody, Revenue Chairman, were in attendance to congratulate all those graduating on their achievements and to pass on words of wisdom and inspiration.

Our summer courses came to an end with approximately 1,600 online exams being completed in August. Results will be out in the coming weeks for those students, and we wish them the very best.

Registration for our autumn courses is under way with healthy numbers already registered. Our Diploma in Tax kicks off at the end of September, and the CTA and Tax Technician courses start at the end of October. Registration details can be found on taxinstitute.ie.

Over the summer, the Education team has been working on new content for the promotion of the career to students and graduates. In that context, the Institute is hosting its first virtual Graduate Career in Tax Fair for all final-year students and recent graduates. It provides them with the opportunity to get insights into the career and the possibilities it offers. If you know any final-year students or graduates who would benefit from this event, they can find more information on our website.

Professional Services

The busy autumn CPD season is in full swing, developed to help our members meet their technical tax CPD needs for 2021. Including the Certificate in Employment Tax, the Tax Trainee Induction Programme – for those starting out in their tax careers – and the specialised topic of Transfer Pricing for Corporates, our offerings cater for all members. Our upcoming and on-demand CPD offerings can be found here.

The new edition of *Irish Taxation: Law and Practice*, our third-level textbook, was published in September and can be purchased in both print and e-book format from our website.

Thank you to all those who renewed their subscriptions to TaxFind, and if you are interested in subscribing, please contact Evelyn at edelehanty@taxinstitute.ie or 01 6631723, and she can arrange a free trial.

The second of our Global CTA Webinars, hosted by our colleagues in The Tax Institute of Australia, took place on 15 September, with an audience of more than 1,400 dialling in. The webinar, which focussed on the Digitalisation of Tax, was very informative and gave members a clear picture of how the tax landscape is changing due to the digitalisation of our economies and tax systems.

Tax Policy and Representations

The Policy and Representations team have been very busy with an unusually high number of submissions on various aspects of tax. By the end of July the Institute had delivered its Pre-Budget 2022 and Pre-Finance Bill 2021 submissions to the Department of Finance for consideration. These were swiftly followed by two submissions on ATAD, and our latest submission, on the OECD process, was submitted in early September. All of our submissions are published in the Tax Insight section on our website.

Earlier this year we surveyed our members about their experience of the appeals process since the start of 2020 and how it could be improved. The responses showed strong support for an alternative dispute resolution (ADR) mechanism, and positive feedback was received on the arrangements that the Tax Appeals Commission has put in place to allow case management conferences and appeal hearings to resume and on several recent procedural initiatives taken by the Commission, which were shared with Ms Maney, Commission Chairperson.

As the economy reopens and restrictions reduce, the schemes in place to support businesses are adapting too. When the Employment Wage Subsidy Scheme (EWSS) eligibility criteria were updated during the summer, the Institute contacted Revenue for further clarification on completing the Eligibility Review Form (ERF) and proposed a deadline extension for the June form because the original date was during a popular holiday period. There's a dedicated page for EWSS ERFs on our Covid-19 Hub.

The next Institute/Revenue Branch Network webinar will be on Tuesday, 28 September, and is complimentary for members. Members will have the opportunity to hear about the latest developments in Revenue's operation of the Covid-19 support schemes and other topical issues from personnel in Revenue's Business, Collector-General's, Medium Enterprises and Personal Divisions.

The Challenges Ahead

Change is the new normal in tax, and the coming year promises quite radical and novel developments in international tax, with implications for our members in international tax practice. A challenge facing all members is the accelerating trend towards the digitalisation of tax. This will impact the way tax advisers work and individual practices. The Institute will continue to update you on developments in this area and to support members through our CPD programmes, representing you and your clients at TALC and the Branch Network and responding to public consultations.

Julie Burke's 20th Anniversary

Finally, this edition of *Irish Tax Review* marks Julie Burke's 20th anniversary as editor. Julie has been a guiding force behind *Irish Tax Review* for the past two decades, during which she has held this technical journal to the highest of standards. Her experience in tax has ensured that the content of *Irish Tax Review* is always relevant and accessible, which is no mean feat in the fast-changing world in which we work. A massive thank you to Julie from all of us at the Institute, and congratulations on a very impressive milestone.

Legislation & Policy Monitor

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

News Alert

Ireland reserves position on global minimum effective tax rate of "at least 15%"

On 1 July 130 member countries of the OECD/G20 Inclusive Framework on BEPS (currently 133[1]) reached agreement, but not unanimous consensus, on key aspects of the two-pillar solution to address tax challenges arising from the digitalisation of the economy. 130 of the 139 Inclusive Framework members joined in a "Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" ("the Statement"). A further three Inclusive Framework members subsequently joined in the Statement. More details on the key components agreed in the Statement are set out in Policy News, below.

Ireland did not sign the Statement and has reserved its position on a global minimum effective tax rate of "at least 15%". In a press release on 1 July, the Minster for Finance, Paschal Donohoe TD, stated that Ireland has fully supported the Pillar One proposals. This is in recognition that the way in which business is conducted has evolved and that the taxation system must evolve with it. There will be a cost to Ireland for this in terms of reduced corporation tax receipts, but overall Pillar One will bring stability and certainty to the international tax framework and will help to underpin economic growth from which all can benefit.

Ireland expressed broad support for the agreement on Pillar Two, but the Minister noted Ireland's reservation on the proposal for a global minimum effective tax rate of "at least 15%". As a result of this reservation, he confirmed that Ireland was not in a position to join the consensus and is one of the Inclusive Framework members that did not sign the Statement. However, Ireland will constructively engage in further discussions and technical work over the coming months before a comprehensive agreement is reached in October.

Minister Donohoe said:

> "I have consistently spoken of my desire for a comprehensive, sustainable and equitable agreement on the international tax rules at the OECD that meet the needs of all countries, large and small, developed and developing. I was not in a position to join the consensus on the agreement and specifically a global minimum effective tax rate of 'at least 15%' today. I have expressed Ireland's reservation, but remain committed to the process and aim to find an outcome that Ireland can yet support. Ireland will continue to play our part in reaching a comprehensive and, indeed, historic agreement."

Commenting on Ireland's position, the Secretary-General of the OECD, Mathias Cormann, said "we appreciate Ireland's commitment to remain engaged in this

1 As of the 12 August 2021 – Source: Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy – 1 July 2021 (oecd.org)

important process" and noted that the OECD will continue to engage positively and constructively with the Irish Government.

The OECD published the Secretary-General's tax report to G20 Finance Ministers and Central Bank Governors on 6 July, summarising the ongoing negotiations under both pillars and stating that the agreement, together with an implementation plan, will be finalised in October with a view to implementation in 2023. The G20 endorsed the key components of the two pillars on the reallocation of profits of multinational enterprises and an effective global minimum tax as set out in the Statement.

The European Commission has stated that successfully concluding the OECD/G20 process will require a final effort from all parties and that the Commission is committed to focusing on that effort. For this reason, the Commission has confirmed that it has put "on hold" its work on a proposal for a digital levy as a new EU own resource during this period.

On 20 July the Department of Finance launched a public consultation on the proposed changes to the international tax architecture currently being discussed at the OECD/G20 Inclusive Framework on BEPS. The consultation period runs until **Friday, 10 September 2021**.

Institute representations before Budget 2022/Finance Bill 2021

At the beginning of July the Institute submitted recommendations to the Minister for Finance setting out a number of legislative changes for consideration in the drafting of Finance Bill 2021. The submission contains 21 detailed recommendations on legislative technical amendments, identified in conjunction with members of the Institute's Policy & Technical Committee, that are needed to alleviate the impact of the Covid-19 restrictions on business, to support Irish SMEs in the recovery of the economy and to restore equity to our tax dispute resolution procedures, as well as several tax technical measures required to mitigate certain "unintended consequences" arising from recent legislative changes.

Following this, the Institute delivered its Pre-Budget 2022 Submission to the Minister for Finance, Paschal Donohoe TD, and the Minister for Public Expenditure and Reform, Michael McGrath TD, in July. Our submission concentrated on the immediate and short-term measures that could continue to support businesses as we emerge from the shadow of the pandemic, such as supporting jobs; keeping cash-flow in businesses; supporting innovation and the new way of working post-pandemic; and building resilience, productivity and innovation in our indigenous SMEs.

Both submissions are available on the Institute's website, www.taxinstitute.ie.

Other Institute tax policy submissions

On 7 May 2021 the Institute responded to the Department of Finance's public consultation on tax treaty policy. The Institute set out 12 recommendations in its response, highlighting the vital role of Ireland's tax treaty network in supporting trade and investment between Ireland and treaty partner countries by eliminating double taxation and providing tax certainty for taxpayers.

On 2 June 2021 the Institute responded to the European Commission's public consultation questionnaire on EU taxpayers' rights, "Improving the Situation of EU Citizens as Taxpayers for Direct and Indirect Tax". In our submission, we raised a range of issues, including:

- The administrative and cash-flow burden that can arise where a payroll withholding obligation arises simultaneously in two Member States.
- The differing approaches of Member States to the imposition of gift/inheritance taxes, which, together with the limited scope of

the gift/inheritance tax bilateral agreement network in the EU, can result in double taxation.

- The imbalance that exists between interest payable on tax overpaid and interest charged on tax underpaid.
- Issues relating to the process for claiming VAT bad-debt relief and claims for "no loss of revenue".

At the time of writing, the Institute is drafting its responses to the Department of Finance's Feedback Statements on "ATAD Implementation Article 4 Interest Limitation" and "ATAD Implementation Article 9a Reverse Hybrid Mismatches", which were launched in July, and the Department of Finance public consultation on "OECD International Tax Proposals", also launched in July.

Selected Acts

Finance (Covid-19 and Miscellaneous Provisions) Act 2021[2]

The Finance (Covid-19 and Miscellaneous Provisions) Act 2021 was signed by the President of Ireland, Michael D. Higgins, on 19 July 2021. The Act includes amendments to existing supports and new supports, outlined below, which were announced in the Economic Recovery Plan 2021.

- The **Employment Wage Subsidy Scheme (EWSS)** was extended to 31 December 2021. The current enhanced payment rates are maintained until 30 September 2021. The time period for assessment was expanded from 6 months to 12 months with effect from 1 July 2021.
- The **Covid Restrictions Support Scheme (CRSS)** was extended to 30 September 2021. The Minister for Finance continues to have the power to extend the scheme further, to 31 December 2021, by order. An enhanced restart payment was made available to eligible businesses to assist them with the additional costs of reopening, allowing those businesses to make a single claim for a payment in respect of a three-week period, with the weekly entitlement calculated at double the normal weekly CRSS rate.
- A new additional **Business Resumption Support Scheme (BRSS)** was introduced for businesses with reduced turnover because of public health restrictions. To qualify under the scheme, the turnover of the business during the period from 1 September 2020 to 31 August 2021 must be no more than 25% of its turnover when compared to the reference period. The reference period is dependent on the date that the business commenced its relevant business activity.
- The **debt warehousing scheme** was extended to the end of 2021 for all eligible taxpayers, with an interest-free period during 2022, and to include overpayments of EWSS in the scheme. Covid-19-related liabilities will then fall to be paid from 1 January 2023.
- The **reduced rate of VAT of 9%** that applies on a temporary basis to hospitality- and tourism-related goods and services was extended to 31 August 2022.

The Act also gives statutory effect to the Financial Resolution, passed by the Dáil on 19 May, that inserted a new s31E into the Stamp Duties Consolidation Act 1999. The measure is intended to disincentivise the purchase of multiple residential units by a single corporate entity or individual by imposing a stamp duty charge of 10% on the purchase of 10 or more residential units. The provisions include measures that apply to shares or units of companies, IREFs and partnerships that derive their value, directly or indirectly, from a residential unit.

2 See also articles by Michelle Dunne, "Finance (Covid-19 and Miscellaneous Provisions) Bill 2021: Overview of Covid-19 Support Schemes" and Lynn Cramer & Grainne O'Loughlin, "New Stamp Duty Charge on Bulk Acquisitions of Residential Units", in this issue.

Multiple purchases by local authorities, approved housing bodies and the Housing Agency are outside the scope of the higher stamp duty charge. The most significant exemption from the higher stamp duty charge is the multiple purchase of apartments. A three-month transition period is provided for the execution of contracts that were entered into but not completed before the commencement of the Financial Resolution.

The Finance (Covid-19 and Miscellaneous Provisions) Act 2021 also inserted a new s83E SDCA 1999, which provides for the repayment of the higher 10% stamp duty rate imposed by s31E SDCA 1999 where units acquired are leased to local authorities or an approved housing body for social housing for a term of not less than 10 years. This provision was proposed by the Minister for Finance during Committee Stage amendments to the Bill.

Finance (Local Property Tax) (Amendment) Act 2021

On 1 June the Minister for Finance, Paschal Donohoe TD, announced changes to the local property tax (LPT). The changes – which are contained in the Finance (Local Property Tax) (Amendment) Act 2021, which was signed by the President of Ireland, Michael D. Higgins, on 22 July 2021 – include a reduction in the rate of the tax, widening of the bands and the removal of the exemption for properties built since 2013. The changes are projected to deliver a yield of €560m. The legislation also provides for property valuations to be reviewed every four years, which will facilitate the regular addition of new properties to the LPT.

Policy News

Economic Recovery Plan 2021

On 1 June 2021 the Government launched the Economic Recovery Plan 2021, setting out a new phase of supports for the next stage of the economic recovery after the Covid-19 pandemic. The plan also aims to exceed the pre-crisis employment levels of 2.5m people in work by 2024.

The plan is broken down into four pillars:

- **Pillar 1:** Ensuring sustainable public finances refers to the objective of returning to sound public finances as the foundation of the recovery.
- **Pillar 2:** Helping people back into work by extending labour market supports and through intense activation and skills.
- **Pillar 3:** Rebuilding sustainable enterprises through targeted investments and policies to make enterprises more resilient, innovative and productive.
- **Pillar 4:** A balanced and inclusive recovery through strategic investment, balanced regional development and improving living standards.

As part of the measures announced in the Economic Recovery Plan, the Minister for Finance, Paschal Donohoe, TD, confirmed amendments to existing supports and announced new support measures for businesses as they reopen and resume normal trading. As outlined earlier in this article, these amendments were subsequently introduced into law in the Finance (Covid-19 and Miscellaneous Provisions) Act 2021.

In addition, the Covid-19 Pandemic Unemployment Payment (COVIDPUP) was extended in its current form for existing claimants from 30 June to 7 September 2021. The rates will be reduced by €50 increments from 14 September, mid-November 2021 and early February 2022. The scheme closed to new applicants from 8 July 2021 (due to the delay to the reopening of indoor dining).

In addition, the current commercial rates waiver was extended for an additional three months, covering July to September.

The Government also published Ireland's National Recovery and Resilience Plan, outlining how Ireland intends to utilise the initial allocation of grants received from the EU's Recovery and Resilience Facility (RRF). To avail of the grants, each Member State was required to prepare a National Recovery and Resilience Plan, and Ireland submitted its draft plan to the European Commission on 28 May.

Ireland's National Recovery and Resilience Plan proposes 16 investments and 9 reform commitments, arranged under three distinct priorities: Priority 1: Advancing the Green Transition; Priority 2: Accelerating and Expanding Digital Reforms and Transformation; and Priority 3: Social and Economic Recovery and Job Creation.

On 16 July the European Commission adopted the proposal for a Council Implementing Decision to provide €989m in grants to Ireland under the RRF. The Council has four weeks to adopt the Commission's proposal.

Commission adopts Communication on Business Taxation for the 21st century

On 18 May the European Commission adopted a Communication on Business Taxation for the 21st century, which is part of a wider EU tax reform agenda for the coming years. This Communication builds on the Tax Package for Fair and Simple Taxation, announced in July 2020. It also takes account of the progress made in the G20/OECD discussions on global tax reform.

The key measures set out in the Communication, including five actions for corporate tax reform that would go beyond any potential agreement at the G20/OECD level, are:

- A proposal for the annual publication of effective corporate tax rates of certain large companies with operations in the EU.
- New anti-tax-avoidance measures to tackle the misuse of shell companies.
- A Recommendation for Member States on the domestic tax treatment of losses.
- A proposal for a new debt–equity bias reduction allowance (DEBRA).
- A proposal for a new framework for the taxation of businesses in the EU, titled Business in Europe: Framework for Income Taxation (BEFIT), which would replace the existing proposal for a Common Consolidated Corporate Tax Base (CCCTB).

New VAT rules for e-commerce from 1 July 2021[3]

New VAT rules for e-commerce came into force across the EU from 1 July. The rules are intended to simplify procedures for businesses that sell goods online while ensuring a more level playing field with online companies from outside the EU.

Replacing the previous system, whereby online companies were obliged to register for VAT in each EU country before they could sell to consumers, the EU has developed new online tools where businesses can register and take care of their VAT obligations for all of their sales in the EU. The new platform for businesses and taxable persons, the VAT One-Stop Shop (OSS), can be used to account for the VAT due on goods and services sold online throughout the EU.

The Import One-Stop Shop (IOSS) facilitates the collection, declaration and payment of VAT for sellers that are supplying goods from outside the EU to customers in the EU. The VAT exemption for packages entering the EU with a value not exceeding €22 was abolished from 1 July, and now all goods imported to the EU are subject to VAT.

Commission presents new proposals to strengthen EU AML/CFT rules

On 20 July the European Commission presented a package of legislative proposals to strengthen the EU's anti-money-laundering and countering terrorism financing (AML/CFT) rules. The package consists of four legislative proposals:

3 See articles by Dermot Donegan & Denise Corrigan "Q&A: VAT and the eCommerce Package", Irish Tax Review, 34/1 (2021), and "VAT e-Commerce Package – 1 July 2021", Irish Tax Review, 34/2 (2021).

- Regulation establishing a new EU AML/CFT Authority.
- Regulation on AML/CFT, containing directly applicable rules, including in the areas of customer due diligence and beneficial ownership.
- Sixth Directive on AML/CFT ("AMLD6") – replacing the existing Directive 2015/849/EU (i.e. the fourth AML Directive, as amended by the fifth AML Directive), containing provisions that will be transposed into national law, such as rules on national supervisors and financial intelligence units (FIUs) in Member States.
- Revision of the 2015 Regulation on Transfers of Funds to trace transfers of crypto-assets (Regulation 2015/847/EU).

The Commission proposes to create a new EU authority that will transform AML/CFT supervision in the EU and enhance cooperation among FIUs. It is intended that this new EU-level anti-money-laundering authority (AMLA) will be the central authority coordinating national authorities, to ensure that the private sector correctly and consistently applies EU rules.

The legislative package will be discussed by the European Parliament and Council. The objective is for the future AMLA to be operational in 2024 and to start its work of direct supervision once the Directive has been transposed and the new regulatory framework starts to apply.

Provisional political agreement reached on public country-by-country reporting

On 1 June representatives of the Portuguese Presidency of the European Council reached a provisional political agreement with the European Parliament's negotiating team on the proposed Directive on the disclosure of income tax information by certain undertakings and branches, commonly referred to as the Public Country-by-Country Reporting (CbCR) Directive.

The agreed text requires multinational enterprises or standalone 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 income tax information in each Member State, as well as in each third country listed in Annex I of the Council conclusions on the EU list of non-cooperative jurisdictions for tax purposes or listed for two consecutive years in Annex II of these Council conclusions.

Member States will have 18 months to transpose the Directive into national law. Four years after the date of its transposition, the Commission shall report on the application of the Directive. The provisionally agreed text will now be submitted to the relevant bodies of the European Council and Parliament for political endorsement.

133 countries reach agreement on reform of international tax framework

As outlined above in News Alert, 133 member countries of the OECD/G20 Inclusive Framework on BEPS agreed a "Statement on the Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy" ("the Statement").

According to the key components agreed in the Statement, in-scope companies for the purposes of the new taxing right (Amount A) under **Pillar One** will be multinational enterprises (MNEs) with global turnover over €20bn and profitability above 10%. A review will be carried out after seven years, and contingent on successful implementation, the turnover threshold will be reduced to €10bn. Extractives[4] and regulated financial services are excluded from the scope of Pillar One.

Key elements of Amount A, as set out in the Statement, include:

- A new nexus rule that will permit allocation of Amount A to a market jurisdiction where an in-scope MNE derives at least

4 This includes enterprises involved in the exploration and extraction of oil, gas and minerals.

€1m revenue in that jurisdiction (this threshold will be set at €250,000 for smaller jurisdictions).

- For in-scope MNEs, between 20–30% of residual profit, which is defined as profit in excess of 10% of revenue, will be allocated to market jurisdictions.
- The relevant measure of profit or loss of the in-scope MNE will be determined by reference to financial accounting income, with a small number of adjustments.
- Losses will be carried forward.
- Dispute prevention and resolution mechanisms, operating in a mandatory and binding manner, will be available to avoid double taxation in relation to Amount A.

In respect of Amount B, the Statement notes that the application of the arm's-length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low-capacity countries.

The Pillar One package will provide for the removal of all digital service taxes and similar measures on all companies. Amount A will be implemented through a multilateral instrument that will be developed and opened for signature in 2022, with Amount A coming into effect in 2023.

Pillar Two consists of two interlocking domestic rules – an Income Inclusion Rule and an Undertaxed Payment Rule (together these are referred to as the Global Anti-Base Erosion, or GloBE, rules) and a treaty-based rule (i.e. the Subject to Tax Rule).

The GloBE rules will have the status of a common approach, meaning that Inclusive Framework members are not required to adopt the rules. It is proposed that the rules will apply to MNEs that meet the €750m country-by-country reporting threshold.

Government entities, international organisations, non-profit organisations, pension funds or investment funds that are ultimate parent entities of an MNE group or any holding vehicles used by such entities, organisations or funds will not be subject to the GloBE rules. There is also an exclusion for international shipping income.

Key elements of the GloBE rules include:

- The imposition of a top-up tax, using an effective tax rate test calculated on a jurisdictional basis, using a common definition of covered taxes and a tax base determined by reference to financial accounting income with agreed adjustments.
- The minimum tax rate for the purposes of the Income Inclusion Rule and the Undertaxed Payment Rule will be "at least 15%".
- The provision for a formulaic substance carve-out and for a *de minimus* exclusion.

Consideration will be given to the conditions under which the US global intangible low-taxed income (GILTI) regime will co-exist with the GloBE rules.

For the purposes of the Subject to Tax Rule, the taxing right will be limited to the difference between the minimum rate and the tax rate on the payment. The minimum rate for the Subject to Tax Rule will be from 7.5% to 9%. A detailed implementation plan will be published, and it is intended that Pillar Two will be brought into law in 2022, to be effective in 2023.

Revenue eBriefs Issued from 24 April to 6 August 2021

No. 88 Pay & File Extension Date – 2021

Revenue confirmed that the extended ROS pay and file deadline is Wednesday, 17 November 2021. This extended deadline will also apply to CAT returns and payments made through ROS for gifts or inheritances with valuation dates in the year ended 31 August 2021.

No. 89 Research and Development (R&D) Tax Credit

Revenue amended the "Research and Development (R&D) Tax Credit" manual to clarify its position on when rental costs will be deemed qualifying R&D expenditure.

The following has also been added:

- confirmation that EWSS and TWSS are considered assistance provided by the State;
- Covid-19 practice for 2020, in relation to the use of a building in a "specified relevant period"; and
- a further example of a sub-contractor who would not be eligible to claim the R&D tax credit.

No. 90 Excise Duty Rates on Energy Products and Electricity Taxes

Revenue has updated the "Excise Duty Rates on Energy Products and Electricity Taxes" manual to reflect increases in rates of Mineral Oil Tax on certain mineral oils, rates of Natural Gas Carbon Tax and rates of Solid Fuel Carbon Tax, introduced with effect from 1 May 2021.

No. 91 Horticultural Repayment Relief Guide

Revenue's "Horticultural Repayment Relief Guide" has been updated (in section 3.2) in line with the amendments to the "pre-determined rates" for this relief in Finance Act 2020. Appendix 1 has been added to show the Historical Net Rates of Repayment.

No. 92 Accounting for Mineral Oil Tax Manual

Appendix I of the "Accounting for Mineral Oil Tax" manual has been updated to reflect changes to the excise duty rates that apply from 1 May 2021. The historical rates of Mineral Oil Tax in Appendix XI have also been updated.

No. 93 Real Estate Investment Trusts (REITs)

Revenue's manual "Real Estate Investment Trusts (REITs)" has been updated to reflect changes made by Finance Act 2019. The changes are in respect of:

- applying the "wholly and exclusively" test when calculating profits available for distribution, as provided for by s705HA TCA 1997; and
- use of funds raised and disposal proceeds, as provided for by ss705I and 705IA TCA 1997.

The guidance also addresses the interaction of the Parent–Subsidiary Directive and the special REIT provisions in respect of the taxation of non-resident shareholders.

No. 94 Solid Fuel Carbon Tax Compliance Procedures Manual

The "Solid Fuel Carbon Tax Compliance Procedures Manual" has been updated, with the content restructured. Updated information includes:

- Definitions for coal and peat included (section 1.3).
- Solid fuel carbon tax rates updated to reflect changes to the excise duty rates that apply from 1 May 2021 (section 2).
- Rates applicable to biomass products updated to reflect changes to the excise duty rates that apply from 1 May 2021 (section 6.1.1).
- Appendices I and II added, with historical solid fuel carbon tax rates and historical rates for biomass products, respectively.

No. 95 Guidelines for Phased Payment Arrangements

Revenue's manual "Guidelines for Phased Payment Arrangements" has been updated.

- Section 5.13 has been amended to clarify that a customer's bank account must be SEPA-enabled to avail of direct debit.
- Section 16 has been added to detail phased payment arrangements for customers who are non e-enabled.

No. 96 VAT and Employer Income Tax/PRSI/USC/LPT Direct Debit Guidelines

Revenue's manual "VAT and Employer Income Tax PRSI USC LPT Direct Debit Guidelines" has been updated to reflect:

- that the UK is now categorised as a non-EU country for SEPA purposes (paragraph 4),
- that Local Property Tax (LPT) can be paid by direct debit (paragraph 5) and
- the treatment of fixed direct debit overpayments where they arise (paragraph 7).

Appendices 1 and 5 have also been updated to include a link to the terms and conditions of the variable direct debit scheme and to include screenshots for creating a variable direct debit.

No. 97 Payment of Temporary Wage Subsidy Scheme (TWSS) liabilities by employers for self-assessed employees and proprietary directors

Revenue confirmed that the relevant pages of its website have been updated to provide the following clarifications in relation to the concessional BIK treatment and TWSS debts:

- To facilitate employers who wish to make good their employees' liabilities and ensure they have the fullest information available following the TWSS reconciliation process, the concessional treatment is extended to run until end of September 2021.
- The concession also applies where an employer pays the tax and USC liabilities of an employee who is a self-assessed taxpayer or, in joint assessed cases, if the employee's spouse is self-assessed.
- The concession also applies where an employer pays the tax and USC liabilities of a proprietary director(s) in the company, provided that the employer pays the TWSS-related liabilities of all employees in the company.

Further information regarding offsets of direct temporary wage subsidy payments is also provided.

No. 98 Guidelines for Working Foreign Cases

Revenue has updated the manual titled "Guidelines for Caseworking: Foreign Cases including Mutual Assistance (Outgoing Cases)", to confirm that Service to Support Compliance Branch 2 in Business Division deals with RCT claims for foreign sub-contractors that are registered in Ireland for income tax or corporation tax.

No. 99 Movement of Excisable Products

Revenue's "Movement of Excisable Products" manual has been updated at section 3.7. It now includes the exemption from excise on consignments delivered to armed forces, or the civilian staff accompanying them, of another Member State operating in Ireland under the EU's Common Security Defence Policy.

No. 100 Euroclear Manual

Revenue has created a "Euroclear Manual" to explain how the Euroclear bank system settles the transfer of interest in Irish shares that are traded on certain exchanges and markets.

No. 101 ePSWT implementation

Revenue published a new manual titled "ePSWT implementation guidance", which addresses queries from accountable and specified persons, and their representatives, about the online electronic Professional Services Withholding Tax (ePSWT) system,
-in anticipation of the go live date1 July 2021.

No. 102 Agent's Guide to Collector-General's Division

Revenue made the following amendments and updates to the "Agent's Guide to the Collector-General's Division" manual:

- The manual has been amended to reflect changes to tax payments being made by debit or credit card in paragraph 5.3.
- Paragraph 6.2 has been renamed "ROS General", and a reference to pension levy has been removed as it is no longer relevant.
- Updated contact details and email address for the National TAIN unit have been included in paragraph 9.
- Information on Local Property Tax in Appendix 1 has been updated to reflect key dates for 2021.

No. 103 New Share Schemes Reporting Return

A new electronic form, the Employer's Share Awards (ESA) return, is in the final stages of development and is planned to be available for completion during June 2021. The filing deadline for the 2020 return using this new form is 31 August 2021.

For subsequent years, a reporting date of 31 March following the relevant tax year will apply. This is in line with the reporting date for the return of information for Share Options (Form RSS1), Approved Profit-Sharing Schemes (Form ESS1) and Key Employee Engagement Programme options (Form KEEP1).

Finance Act 2020 provided for the mandatory electronic reporting of certain share-based remuneration, including restricted stock units (RSUs), restricted shares, convertible shares, forfeitable shares, discounted shares and any other award with cash-equivalent of shares. The new ESA return will have a similar format to the existing RSS1, ESS1 and KEEP1 electronic returns (i.e. a pre-formatted Excel spreadsheet, which can be uploaded through ROS).

No. 104 Form P11D

Revenue has updated the "Form P11D" manual to confirm that share-based remuneration is not required to be included in this form. Share options and other forms of share-based remuneration provided to employees are covered by separate reporting obligations – for example, RSS1, ESS1, KEEP1 and the forthcoming ESA electronic return.

No. 105 SARP

Revenue has updated the "Special Assignee Relief Programme (SARP)" manual to improve readability, to include details of the Covid-19 concession extending the timeframe for submitting the SARP 1A and to include a link to the annual SARP reports.

No. 106 Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)

Revenue's "Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)" manual has been updated to provide guidance on the reporting of financial accounts that have no US Taxpayer Identification Number (TIN) for reporting periods from 2020 onwards (section 7.6).

In addition, a new section 7.12 has been included to give guidance on the correcting, voiding or amending of a FATCA XML filing, with links to sample XML files provided. A new section 7.13 has also been added to give guidance on reporting for a passive Non-Financial Foreign Entity (NFFE) that is not a US entity.

No. 107 Exemption from Income Tax in respect of certain payments made under Employment Law

Revenue has updated the manual titled "Exemption from Income Tax in respect of certain payments made under Employment Law" to include additional guidance on out-of-court settlements.

No. 108 Ship's Stores Manual

Revenue has updated the "Customs Staff Manual on Ship's Stores – Customs Legislation Branch Dublin" to provide further clarification, in light of Brexit, on the declarations required by Revenue from vessels arriving into the State and the required control measures for dutiable products delivered to vessels as ship's stores. Minor amendments have also been made to the text where necessary.

The significant changes include:

- updating legislative references,

- clarification on reporting arrangements for vessels and
- clarification on reporting arrangements for fishing vessels.

No. 109 Charities VAT Compensation Scheme – reminder of closing date for submission of claims

Revenue reminds charities that the closing date for submission of claims for the VAT Compensation Scheme is 30 June 2021. It is not possible for claims to be submitted after that date.

No. 110 Pensions Manual Updated

Revenue has updated Chapter 17 of the Pensions Manual, titled “Overseas Employers, Overseas Employees and Employees Seconded from Overseas”, following the enactment of the relevant parts of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, which came into operation on 31 December 2020 via SI 723 of 2020. The amendments to the manual maintain certain reliefs following the withdrawal of the UK from the EU, including relief for contributions to UK pension schemes and relief for migrant workers.

No. 111 Guide to Economic Operators Registration Identification registration in ROS (EORI Registration)

Revenue published a new manual titled “C&E Economic Operators Registration Identification (EORI) Number Registration on ROS”. It explains the online registration process for taxpayers or their agents where a Customs and Excise (C&E) and/or an Economic Operators Registration Identification (EORI) registration number is required in connection with an import or export activity.

No. 112 Recoupment of Overpayments of Salary by an Employer from an Employee

Revenue has updated the “Recoupment of Overpayments of Salary by an Employer from an Employee” manual at paragraph 6. The paragraph deals with the payment of emoluments after the death of an employee.

No. 113 Married Persons and Civil Partnerships

Revenue’s “Income tax treatment of married persons and civil partners” manual has been updated as follows:

- The “year of registration of civil partnership” relief can no longer be claimed. Any year for which such a claim could be made is outside the “four-year rule”, as no new civil partnerships can be entered into since the commencement of the Marriage Act 2015.
- Individuals who are civil partners who have not advised Revenue of a change in status can still amend their status and make claims within the four-year period.
- The earned income tax credit cannot be transferred between spouses or civil partners.
- Examples have also been updated.

No. 114 Surcharge on undistributed income of service companies

Revenue’s “Surcharge on undistributed income of service companies” manual has been updated in respect of Revenue’s view of the activity carried on by a “Management Consultant” in the context of s441 TCA 1997 (i.e. that the activity is generally not considered to constitute the carrying on of a profession).

No. 115 Capital Acquisitions Tax – Collection and Enforcement Guidelines

Revenue has amended the “Capital Acquisitions Tax Collection and Enforcement Guidelines” manual to reflect technical guidance provided in sections 1 to 3. The manual has also been updated to include a table of historical CAT thresholds in section 1.4, and a Request for Payment Template Letter has been added at appendix 1.

Revenue’s “Capital Acquisitions Tax Collection Issues” manual has been archived, as its content has been incorporated into section 2 of this manual.

No. 116 High-Income Individuals’ Restriction

Revenue’s manual titled “High-Income Individuals’ Restriction for Tax Year 2010

Onwards" has been updated to remove references to reliefs that were subject to the restriction ("specified reliefs") but that are no longer operative. A list of reliefs deleted in Finance Act 2020 is included at Appendix 3.

No. 117 Irish Real Estate Fund (IREF) July 2021 filings – updated Form IREF available

A new version of Form IREF is now available on the Revenue website. A new manual has been published to highlight updates and changes to the return. Irish Real Estate Funds (IREFs) with accounting periods ending on or after 1 July 2020 and on or before 31 December 2020 are required to file the updated Form IREF on or before 30 July 2021, as provided by s739R TCA 1997.

No. 118 ePSWT implementation

Revenue has updated the "ePSWT implementation guidance" manual before the introduction of electronic Professional Services Withholding Tax (ePSWT) on 1 July 2021.

The manual has been updated as follows:

- In paragraph 1 to reference that payments to a charity that is exempt from tax are excluded from PSWT.
- In paragraph 3.2 to advise that the ePSWT links are accessible in ROS from 24 June (in respect of Payment Notifications (PNs) from 1 July).
- In paragraphs 3.3 and 10 to include information on the planned update to myAccount.
- In paragraph 4.2.1 to include information on an issue with "old-style" VAT numbers and the inability to use CHY or T-numbers.
- In paragraph 5.1 to include information on valid symbols allowed in the CSV file and/or ROS.
- In paragraph 11 with regard to "PAYE-only" specified persons.

No. 119 Customs treatment of gifts and items of negligible value

Revenue has updated the manual "Customs Treatment of Gifts and Items of Negligible Value" to reflect that, from 1 July, import VAT will be payable on all goods entering the EU, irrespective of their value, and will always be collected, irrespective of the amount due. Until that date, consignments with a customs value below €22 do not attract VAT.

No. 120 Updated Share Schemes Manual and New Share Schemes Reporting Return (Form ESA)

Revenue updated six chapters of the Share Schemes Manual to include references to the reporting obligations on the new share schemes reporting return (Form ESA). Additionally, two new chapters have been included in the manual:

- Chapter 13 – Growth Shares and
- Chapter 14 – Cash-Settled Share Awards.

References to these two new chapters have been included in Chapter 01 – Introduction and Overview.

No. 121 Approved Profit Sharing Schemes (APSS)

Revenue has made a number of updates to Chapter 10 of the Share Schemes Manual on Approved Profit Sharing Schemes (APSS):

- Paragraph 10.3.7 has been inserted to request companies that have schemes that are no longer active and will not be active again in the future to notify Revenue so that the schemes can be de-registered.
- Paragraph 10.5.1 has been amended to highlight the fact that trust instruments submitted to Revenue for approval must be governed by Irish law.
- Paragraph 10.6.10 has been divided into three sub-paragraphs for clarity.
- Paragraph 10.6.10.1 has been amended as follows:
    - to update references to Chapter 13 of the consolidated Share Scheme Manual to Chapter 15;
    - to confirm that the filing deadline for the 2019 ESS1 was extended from 31 March 2020 to 31 October 2020;

  - to highlight that the tax registration number of the establishing company, or its Irish subsidiary in cases where the establishing company is a foreign parent company, is a mandatory field on the ESS1 return; and
  - to confirm that a nil ESS1 return must be filed where no activity has taken place for an approved scheme during a year of assessment.
- Paragraph 10.6.10.3 has been inserted to confirm that trusts established for the purpose of an APSS are considered excluded accounts for CRS DAC2 reporting requirements and an excluded product for FATCA purposes.
- Paragraph 10.12.2 has been amended to confirm an employer's obligation to return employee PRSI and USC due through payroll.
- Paragraph 10.12.12 has been inserted to set out the treatment that will apply where a scheme participant is accidentally omitted from an appropriation of shares.
- Paragraph 10.14.9 has been inserted to set out the tax treatment of a distribution *in specie* from a demerged company where shares have been appropriated to participants of an APSS and the release date for those shares has not been reached. This update incorporates content previously included in Revenue *Tax Briefing*, Issue 54 (December 2003).

No. 122 Vehicle Registration Tax (VRT) On-line Payments in ROS and MyAccount

Revenue has updated the "Vehicle Registration Tax (VRT) On-line Payments in ROS and MyAccount" manual to reflect changes to the payment screen allowing VRT Traders to input a customer registration number or a Trader Account Number (TAN) in the Tax Registration field. The manual has also been updated to reflect recent changes in Revenue policy regarding card payments.

No. 123 Form ESA now available for download from Revenue website

Revenue announced the release of the new electronic share schemes reporting return (Form ESA), which is available for download from the "Employing People" section of the Revenue website (see "Shares for employees and Company shares"). The instructions and explanatory notes on the completion and filing of the form are included in the form, and further information is available in the Share Schemes Manual, "Share Schemes – Chapter 15 – Share Scheme Reporting (SSR)" (previously Chapter 13). The electronic Form ESA will apply for the tax year 2020 onwards, with a filing deadline of 31 August 2021 for the 2020 return only.

No. 124 Personal Importation of live animals and products of animal origin

Revenue's manual on the "Personal Importation of live animals and products of animal origin" contains updated advice on this topic, including an updated list of locations where live animals may be imported and legislative references.

No. 125 Guidelines for the Exchange of Information between the Office of the Director of Corporate Enforcement (ODCE) and the Revenue Commissioners

Revenue has amended the Collection Manual "Guidelines for the Exchange of Information between the Office of the Director of Corporate Enforcement (ODCE) and the Revenue Commissioners in accordance with the Companies Act, 2014" at paragraph 6.5. This paragraph relates to the exchange of ODCE requests related to qualifying disclosures.

The paragraph has been expanded to note that where information regarding a potentially serious offence under the Companies Acts comes to Revenue's attention (including through a qualifying disclosure), Revenue will refer this information to the ODCE.

No. 126 VAT eCommerce Rules – 1 July 2021

Revenue has published the following guidance on the new VAT e Commerce rules that will take effect on 1 July 2021[5]:

- Union Scheme – One Stop Shop (OSS),
- Non-Union Scheme – One Stop Shop (OSS),
- Import One Stop Shop (IOSS),
- Deemed Supplier and
- Special Arrangements.

No. 127 Mineral Oil Traders Excise Licences Manual

Revenue's "Mineral Oil Traders Excise Licences Manual (Auto Fuel & Marked Fuel Traders' Licences)" has been updated at section 2.1 in relation to the Marked Fuel Trader's Licence (MFTL) in line with legislation. A new section 4.6 has been inserted in the manual, dealing with a new condition on mineral oil licences in relation to the Dangerous Substances (Flammable Liquids and Fuel Retail Stores) Regulations 2019 (SI 630 of 2019). Furthermore, section 15 has been updated to include guidance on the making of an assessment of excise duty by authorised officers.

No. 128 Pensions Manual Updated

Revenue has updated the "Pensions Manual – Chapter 23 Approved Retirement Funds" to reflect new guidance for non-resident owners of Approved Retirement Funds (ARFs), vested Personal Retirement Savings Accounts or Approved Minimum Retirement Funds. The manual includes a link to the new Refund of Taxes paid on ARF Distributions Claim form to be completed by non-resident claimants seeking a repayment of Irish tax on an Irish pension. It also includes additional information for refund claims made by non-resident claimants with unit-linked ARFs.

No. 129 Euroclear Manual

Revenue has amended the "Euroclear Manual – Electronic Share Trading Rules, Procedures, Practices, Guidelines and Interpretations" after discussions with Euroclear Bank.

Adjustments have been made covering the following procedures:

- Intermediary relief in paragraph 2.7.
- Mark-Up in paragraph 4.1.
- Stock borrowing in paragraph 4.2.
- When duty is due in paragraph 5.2.
- How Stamp Duty is paid in paragraph 5.3.
- Refunds in paragraph 6.1.
- Processing of reclaims in paragraph 6.8.
- Payments in paragraph 7.1.

No. 130 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 to reflect the changes arising from the new e Commerce rules. The manual also includes links to further information and new AIS codes.

Additional paragraphs have been included on the following:

- E Commerce procedures from 1 July 2021 in paragraph 4.1,
- Traders importing merchandise in their baggage in paragraph 4.2 and
- Motor vehicles in paragraph 5.6.

No. 131 Growth Shares

Revenue has updated the "Shares Schemes Manual – Chapter 13: Growth Shares" to confirm that the filing deadline for the 2020 return is 31 August 2021 and to reflect the guidance included in the other share schemes manuals in relation to the valuation of shares.

No. 132 VAT Treatment of Intra-Community Distance Sales of Goods

Revenue has published two new manuals:

- "VAT and Intra-Community Distance Sales of Goods", to incorporate the new e Commerce rules effective from 1 July 2021; and

5 See article by Dermot Donegan & Denise Corrigan "VAT e-Commerce Package – 1 July 2021", Irish Tax Review, 34/2 (2021).

- "Telecommunications, Broadcasting and Electronic (TBE) Services", to consolidate and update information that was previously provided elsewhere on the Revenue website.

The "VAT Treatment of eGaming Services" manual has also been updated.

The manuals "VAT on Goods – Distance Sales" and "VAT eCommerce Registration for the One Stop Shop (OSS) and Import One Stop Shop (IOSS) from 1 April 2021" have been archived.

No. 133 Income tax return form 2020 – ROS Form 11[6]

Revenue has published the "Income tax return form 2020: ROS Form 11" manual, which provides information and guidance on the updates to nine panels on the ROS Form 11 for 2020.

Changes have been introduced to the Extracts From Accounts section to minimise unnecessary contact with compliant taxpayers in relation to incomplete or incorrect data. These changes include mandatory fields and the addition of two "calculate" buttons.

No. 134 Representative Church Body – Cost of Living Accommodation Allowance

Revenue has updated the "Representative Church Body: Cost of Living Accommodation Allowance" manual at paragraph 2 to include annual allowance amounts for the years 2019 and 2020. The examples at paragraph 3 have also been updated to reflect the new amounts.

No. 135 Part 38-04-06 – Statement of Affairs in audit and investigation

Revenue has updated the "Section 909 Taxes Consolidation Act 1997 Statement of Affairs in audit and investigation" manual at section 2 to reflect the information required, per the legislation and Form SA1, in cases where an asset was acquired other than a bargain at arm's length. In addition, paragraph 3.7.3 has been updated to clarify that a Statement of Affairs issued to a representative or a trustee is issued where the representative or trustee is acting for another person whose affairs are under review.

No. 136 Payments on Termination of an Office or Employment or Removal from an Office or Employment

Revenue has updated the "Payments on Termination of an Office or Employment or Removal from an Office or Employment" manual at paragraph 2.3 to provide additional clarification regarding the tax treatment of "fire and re-hire" scenarios.

The manual has also been updated at paragraph 4.3 to include details of the Covid-19 concessionary measure relating to retraining costs paid as part of a termination, which is currently set out in the Covid-19 hub of Revenue's website.

Examples have also been refreshed throughout the manual.

No. 137 Filing and Paying Stamp Duty on Instruments[7]

Revenue has updated section 4 of the "Filing and Paying Stamp Duty on Instruments – Chapter 4: Filing the Return" manual, in relation to using ROS Offline, to reflect the introduction of s31E SDCA 1999 on 20 May 2021. Section 31E increases the charge to Stamp Duty to 10% on the acquisition of relevant residential units (RRUs) where the cumulative number of RRUs acquired in a 12-month period amounts to ten or more.

No. 138 Tax and Duty Manual Part 33-03-04 – Filing Guidelines for DAC6 (EU Mandatory Disclosure of Reportable Cross-Border Arrangements)[8]

Revenue has updated the "Filing Guidelines for DAC6: EU Mandatory Disclosure of Reportable Cross-Border Arrangements" manual at section 7.4 to include the XML Schema Version 1.2 update and the applicable migration dates.

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6 See also article by Lauren Clabby, "Preparing for Pay and File 2021", in this issue.

7 See also article by Lynn Cramer & Grainne O'Loughlin, "New Stamp Duty Charge on Bulk Acquisitions of Residential Units", in this issue.

8 See also article by Fiona Carney "DAC 6: Recent Revenue Guidance Updates", in this issue.

The DAC6 Schema Version 1.2 will apply for all DAC6 reports from 1 August 2021 onwards. To facilitate the migration to Schema Version 1.2, the Revenue electronic filing system on ROS for DAC6 will be unavailable from 12.01am on 1 August 2021 and will reopen on 10 August 2021.

No. 139 Non-Routine Revenue Powers

Revenue has published a new manual titled “Non-Routine Revenue Powers”. This manual provides general guidance on the application and approval process for the powers set out in ss908A, 908C, 908D and 908E TCA 1997, which cover, respectively, Revenue’s powers to obtain information from financial institutions, search warrants, an order to produce evidential material and the power to obtain an order to produce documents or provide information.

No. 140 PAYE Exclusion Orders

Revenue has published an updated “PAYE Exclusion Orders” manual, which has been updated in relation to:

- Bonuses paid where a PAYE Exclusion Order is in place, together with examples.
- The removal of the concessionary treatment for freelance actors.
- An update to the PRSI contact details in the Department of Social Protection.
- The Covid-19 concessions for PAYE Exclusion Orders, which ceased on 31 December 2020.
- Appendix I has been inserted to show a sample PAYE Exclusion Order.

No. 141 Games and sports bodies exemptions

Revenue has amended paragraph 3 of the “Games and sports bodies exemptions” manual, which relates to applications for exemption from income tax or corporation tax. The links to the application process on the Revenue website have been updated.

In addition, the manual stresses that a copy of the sports body’s constitution or governing instrument is required as part of the application process. For reference and guidance purposes only, Revenue has provided templates of model constitutions for unincorporated or incorporated bodies. Applicants should obtain their own legal advice, as necessary, when adopting their constitution or governing instrument.

No. 142 Filing Guidelines for DAC6 (EU Mandatory Disclosure of Reportable Cross-Border Arrangements)[7]

Revenue’s manual titled “Filing Guidelines for DAC6 (EU Mandatory Disclosure of Reportable Cross-Border Arrangements)” has been amended at section 7.4 to include a revised date for the reopening of the portal of 17 August 2021.

No. 143 Import One Stop Shop (IOSS) – registration procedure and reporting obligations for intermediaries[9]

Revenue’s manual “Import One Stop Shop (IOSS)” has been updated to clarify the registration procedure and reporting obligations for intermediaries under the new VAT e Commerce rules, introduced on 1 July 2021.

No. 144 Central Register of Beneficial Ownership of Trusts

The Central Register of Beneficial Ownership of Trusts (CRBOT) portal went live on Monday, 26 July 2021, and can be accessed via ROS and MyAccount.

SI 194 of 2021 transposed into legislation the Fourth and Fifth Anti-Money Laundering Directives (EU), establishing the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021.

The Registrar of Beneficial Ownership of Trusts is the Revenue Commissioners. Trustees will be required to submit details of relevant trusts and their beneficial owners to Revenue, which will manage the CRBOT. This role will be separate from Revenue’s role in tax and customs administration.

9 See article by Dermot Donegan & Denise Corrigan “VAT e-Commerce Package – 1 July 2021”, *Irish Tax Review*, 34/2 (2021).

Trustees (or their agents, advisers or employees) will be required to register through the "Trust Register" portal on ROS. Agents or advisers must submit a Trust Register TAIN Link notification on ROS if they are acting in a representative capacity. Individual filers who do not have a business tax registration number can register through MyAccount. For relevant trusts established on or before 23 April 2021, the registration deadline is 23 October 2021. Trusts created after 23 April 2021 must file within six months of their creation.

Further information is available on the CRBOT area of Revenue's website.

No. 145 Full self assessment – time limits for making enquiries and making or amending assessments

Revenue has amended the manual titled "Full self-assessment – Time limits for making enquiries and making or amending assessments" at paragraph 4. The manual confirms that assessments can be made or amended outside the four-year timeframe on conclusion of a Mutual Agreement Procedure (MAP), as provided for in s959AA(2A) TCA 1997.

No. 146 eCG50 Guide – CG50A certificate issuing to ROS inboxes

Revenue's "eCG50 – Guide for Applicants" manual has been updated at paragraph 4.7 to confirm that a copy of the CG50A certificate will now be issued to the ROS inbox of agents, advisers and filers who submit a CG50 application from the end of July 2021.

No. 147 Seafarer Allowance and Fisher Tax Credit

Revenue's "Seafarer Allowance and Fisher Tax Credit" manuals have been amended as a consequence of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

The "Seafarer Allowance" manual includes an updated definition of a "sea-going ship" in the appendix. A consequential amendment has been made to the qualifying conditions for the allowance, set out in section 1 of the manual.

The "Fisher Tax Credit" manual has been amended to include an updated definition of "fishing vessel" in section 2. Similarly, a consequential amendment has been made to the qualifying conditions for the tax credit, set out in section 3, to reflect the updated definition of a fishing vessel.

The changes are technical in nature. They ensure that the status quo regarding eligibility for the allowance or tax credit is retained after Brexit.

No. 148 Employer-provided benefits – new suite of Tax and Duty Manuals

After a comprehensive review of Revenue's guidance material on employer-provided benefits, a new consolidated suite of manuals has been created. Revenue notes that new material has been added where appropriate and existing material has been refreshed as required. These manuals are intended to set out the guidance on such benefits in a more comprehensive, cohesive and structured manner.

Revenue has created a new manual titled "Index – Employer-provided benefits" to provide an index with links to the manuals and to detail the structure for the consolidated manuals. The following manuals have been incorporated into the new consolidated suite of manuals:

- Taxation of Long Service Awards (Part 05-01-04).
- Staff Suggestion Scheme Awards, Exceptional Performance Awards and Examination Awards (Part 05-01-09).
- Luncheon Vouchers – Amounts to be treated as Emoluments (Part 05-01-10).
- Benefit-in-Kind – Provision of Free or Subsidised Accommodation (Part 05-03-06).
- Benefit-In-Kind Bus, Rail and Ferry Passes (Part 05-03-11).
- Salary Sacrifice Arrangements (Part 05-03-12).
- Benefit in Kind – Certain Benefits for Members of the Permanent Defence Force (Part 05-03-13).

- Charge to Tax in respect of Interest on Preferential Loans received by Employees from Employers (Part 05-04-01).
- Benefit-in-Kind – Private use of Employer-Provided Vehicles (Part 05-04-02).
- Provision of Bicycles and Associated Safety Equipment by Employers to Directors and Employees (Part 05-04-08).
- Benefit-in-Kind – Civil and Public Service Employees (Part 05-04-09).

No. 149 MyEnquiries – tracking of enquiries – enquiry status

Revenue has updated the "MyEnquiries – tracking of Enquiries" manual at paragraph 2.2 to reflect a change to the naming conventions on the query tracker. The query status description of "Pending" has been amended to reflect that a query is "Received". This amendment is intended to explain the query status more clearly to individuals who are submitting queries via MyEnquiries.

No. 150 Guidelines for VAT Registration

Revenue has updated the "Guidelines for VAT Registration" manual at sections 8.1 and 8.2 to reflect enhancements that enable VAT applicants to apply for Postponed Accounting[10] through the eRegistration system or on the Form TR1, TR2, TR1 (FT) or TR2 (FT).

No. 151 Administration and Control of Tax Warehouses Manual (Part 2 Breweries, Microbreweries and Cider Manufacturers)

Revenue's "Administration & Control of Tax Warehouses Manual (Part 2 – Breweries, Micro-breweries and Cider Manufacturers)" manual has been updated to reflect the extension of the relief from Alcohol Products Tax under s78A Finance Act 2003 to include qualifying beer produced by micro-breweries located in third countries and imported into the State.

No. 152 Research Services Carried out by Third Level Educational Bodies

Revenue has amended the "Research Services Carried out by Third Level Educational Bodies" manual to reflect the commencement of funding by the European Commission under the Horizon Europe Framework Programme.

In addition, the "VAT Consolidation Act 2010 and identity cards" manual and the "Enhancements to the VAT 3 Return in ROS" manual have been archived.

No. 153 Tax Relief for Health Expenses

Revenue has updated the "Health Expenses – Qualifying Expenses" manual at section 5 to include additional examples illustrating how tax relief for nursing home care is given.

No. 154 Manual on the Control and Examination of Baggage updated

Revenue's manual on the "Control and Examination of Baggage" has been updated at paragraph 8.10 to reflect changes to the criteria for qualifying for the VAT Retail Export scheme. In addition, paragraph 17.5 was amended to reflect the implementation of EU Regulation 2018/1672 regarding cash controls, and other, minor changes were made to improve the readability of the manual.

No. 155 Customs Temporary Admission Procedure

Revenue has updated its "Customs Temporary Admission" manual to include further information on the process of applying for authorisation on the Customs Decisions System (CDS). Paragraph 1.6.1 (Issue of Authorisations), paragraph 1.6.2 (Application for Authorisation on CDS) and paragraph 1.6.3 (Processing of the application) have been expanded.

No. 156 Pension Scheme Approval – Administrative Matters

Revenue has updated the Pensions Manual "Chapter 18 – Pension scheme approval – administrative matters" at paragraph 1 to state

10 See also article "Revenue Commissioner's Update", in this issue.

that applications for tax approval of a pension scheme should be submitted electronically to Revenue through MyEnquiries.

No. 157 Transborder Workers Relief

Revenue's "Transborder Workers Relief" manual has been updated in the following sections:

- Section 5: Guidance on the definition of a "proprietary director" is now included in the manual, and this section also includes additional information on the remittance basis of taxation.
- Section 9: New material regarding the PRSI treatment applicable to claimants who fall within the category of frontier workers has been included in the manual.
- Section 10: New guidance on "incidental duties" has been included in the manual.
- Section 11: Information has been included on the Covid-19 concession, which is applicable for 2020 and 2021.
- Section 12: Explanation is included on how an individual can claim Transborder Workers Relief.
- Section 13: New fields required on the income tax return for 2019 and subsequent years are now listed in the manual.
- Section 14: New illustrative examples are included in the manual.

Acts Passed from 24 April to 6 August 2021

No. 6 Children (Amendment) Act 2021

No. 7 Criminal Procedure Act 2021

No. 8 Education (Leaving Certificate 2021) (Accredited Grades) Act 2021

No. 9 Loan Guarantee Schemes Agreements (Strategic Banking Corporation of Ireland) Act 2021

No. 10 Personal Insolvency (Amendment) Act 2021

No. 11 Planning and Development, Heritage and Broadcasting (Amendment) Act 2021

No. 12 Health and Criminal Justice (Covid-19) (Amendment) Act 2021

No. 13 Criminal Justice (Perjury and Related Offences) Act 2021

No. 14 Civil Law (Miscellaneous Provisions) Act 2021

No. 15 Public Service Pay Act 2021

No. 16 Counterfeiting Act 2021

No. 17 Residential Tenancies (No. 2) Act 2021

No. 18 Planning and Development (Amendment) Act 2021

No. 19 Private Security Services (Amendment) Act 2021

No. 20 Gender Pay Gap Information Act 2021

No. 21 Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) Act 2021

No. 22 CervicalCheck Tribunal (Amendment) Act 2021

No. 23 Finance (Covid-19 and Miscellaneous Provisions) Act 2021

No. 24 Health (Amendment) (No. 2) Act 2021

No. 25 Affordable Housing Act 2021

No. 26 Land Development Agency Act 2021

No. 27 Nursing Homes Support Scheme (Amendment) Act 2021

No. 28 Maritime Jurisdiction Act 2021

No. 29 Workplace Relations (Miscellaneous Provisions) Act 2021

No. 30 Companies (Rescue Process For Small and Micro Companies) Act 2021

No. 31 Finance (Local Property Tax) (Amendment) Act 2021

No. 32 Climate Action and Low Carbon Development (Amendment) Act 2021

Selected Bills Presented from 24 April to 6 August 2021

No. 72 Pensions (Amendment) (Transparency in Charges) Bill 2021

Selected Statutory Instruments Made from 24 April to 6 August 2021

No. 188 Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 (Commencement) Order 2021

No. 194 European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021

No. 220 Taxes Consolidation Act 1997 (Covid Restrictions Support Scheme) (Date Adjustment) Order 2021

No. 221 Emergency Measures in the Public Interest (Covid-19) Act 2020 (Covid-19: employment wage subsidy scheme) (Date Adjustment) (No. 2) Order 2021

No. 228 Value-Added Tax Consolidation Act 2010 (section 46(5)) Order 2021

No. 234 Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 1) (Reckonable Income) Regulations 2021

No. 254 Companies Act 2014 (Section 12A(1)) (Covid-19) Order 2021

No. 258 European Union (Markets in Financial Instruments) (Amendment) (No. 2) Regulations 2021

No. 270 Stamp Duty (Designation of Exchanges and Markets) (No. 2) Regulations 2021

No. 281 European Union (Controls of Cash Entering or Leaving the Union) Regulations 2021

No. 285 Local Property Tax (Local Adjustment Factor) (Amendment) Regulations 2021

No. 294 Finance Act 2020 (Section 13) (Commencement) Order 2021

No. 321 European Union (Modifications of Statutory Instrument No. 110 of 2019) (Registration of Beneficial Ownership of Certain Financial Vehicles) (Amendment) Regulations 2021

No. 327 European Union (Value-Added Tax) Regulations 2021

No. 328 European Communities (Exemption from Value-Added Tax on the Permanent Importation of Certain Goods) (Amendment) Regulations 2021

No. 374 Finance Act 2018 (Paragraph 1(b) of Schedule 2) (Commencement) Order 2021

No. 387 European Union (Access to Anti-Money Laundering Information by Tax Authorities) Regulations 2021

No. 395 Companies Act 2014 (Fees) Regulations 2021

No. 396 Companies Act 2014 (Forms) Regulations 2021

No. 413 European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2021

No. 414 European Union (Alternative Investment Fund Managers) (Amendment) Regulations 2021

Determinations of the Tax Appeals Commission Published from 24 April to 6 August 2021

Case reference	Tax head/topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
65TACD2021	Income Tax & USC	Appeal against assessment to income tax and USC on a redundancy payment Sections 123, 201, 210 and Schedule 3 TCA 1997	Unknown
66TACD2021[11]	Domicile Levy	Appeal against assessment to the domicile levy Sections 1, 2, 12, 531B, 531H, 531AA, 531AB, 531AC, 531AM, 531AS, 531AX, 826, 960A, 960C and 960D TCA 1997 Sections 2, 5 and 9 Interpretation Act 2005 Articles 2 and 21 of the UK–Ireland Double Taxation Agreement Article 63 of the Treaty on the Functioning of the European Union	Unknown
67TACD2021[10]	Capital Gains Tax	Appeal against an amended assessment to capital gains tax Section 542 TCA 1997 Sections 212, 213, 215 and 217 Planning and Development Act 2000 Sections 49 and 52 Roads Act 1993 (as amended)	Unknown
68TACD2021[10]	Capital Gains Tax	Appeal against the refusal of a claim for an allowable capital gains tax loss made on a loan as a consequence of its having been disposed of at negligible value Sections 532, 538, 541, 546 and 585 TCA 1997	Unknown
69TACD2021	PAYE/USC	Appeal against refusal to treat arrears of benefits paid in 2018 in respect of a salary protection scheme disability policy after a ruling from the Financial Services and Pensions Ombudsman's office as taxable in 2015, 2016 and 2017 Section 112 TCA 1997	Unknown

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

70TACD2021[10]	**Income Tax**	Appeal against the disallowance of trading losses arising from a trade of land development Sections 3, 82, 381, 955 and 959AA TCA 1997	Yes
71TACD2021	**PAYE**	Appeal regarding tax treatment of Social Welfare contributory pension payments made including payments that attract an increase in respect of a qualified adults Sections 15, 126 and 472 TCA 1997 Section 112 Social Welfare Consolidation Act 2005	Unknown
72TACD2021	**VAT**	Appeal regarding the right to deduct VAT charged on costs incurred in connection with the acquisition of the reversionary interest in properties. The properties were subject to leases of 10 years or greater, granted before 1 July 2008. Sections 1 and 4 VATA 1972 (as at Finance Act 1996) and (as at Finance Act 1998) Sections 2 and 93 VATCA 2010 (as at Finance Act 2014) Articles 1, 9, 14, 15, 24, 135, 167 and 168 VAT Directive	Yes
73TACD2021	**IT & and VAT**	Appeal against assessments to VAT and income tax Section 16 VATA 1972 Regulations 8(1)(b)(i) and (ii) Value-Added Tax Regulations 2006 (SI 548 of 2006) Sections 81, 886, 887 and 912 TCA 1997	Unknown
74TACD2021	**USC**	Appeal against USC property relief surcharge payable and whether a surcharge had been correctly applied to capital allowances not used due to the high-income earner restriction Chapter 2A, Part 15, TCA 1997 Sections 531AL and 531AAE TCA 1997 Schedules 25B and 25C TCA 1997	Unknown

75TACD2021[10 12]	**CGT**	Whether a non-resident company was within the charge to capital gains tax in relation to the disposal of shares in a limited company and whether the shares derive their value, or the greater part of their value, directly or indirectly from land in the State Sections 5 and 29 TCA 1997 Sections 4, 5, 20 and 21 Interpretation Act 2005 Sections 9, 10 and 11 Land and Conveyancing Law Reform Act 2009 Sections 17, 59, 61 and 63 Roads Act 1993	Yes
76TACD2021[10]	**Corporation Tax**	Appeal to determine whether the business of the appellant consists of or includes the carrying on of a profession or the provision of professional services within the charge to tax pursuant to S441 TCA 1997. Section 441 TCA 1997	No
77TACD2021	**Income Tax**	Appeal against assessment relating to non-declaration of maintenance payments received by the appellant from her spouse Section 1025 TCA 1997	Unknown
78TACD2021	**Income Tax**	Appeal against denial of claim for relief from income tax in respect of the payment of spousal maintenance Section 1025 TCA 1997	Yes
79TACD2021	**Income Tax**	Appeal regarding whether Single Farm Payments paid by the Department of Agriculture during the years under appeal are taxable as income in the hands of the appellants or as income received by a company formed, owned and managed by the appellants Sections 18, 955 and 959AA TCA 1997	Yes
80TACD2021	**VRT**	Appeal in respect of the availability of transfer-of-residence relief Sections 132 and 134 FA 1992 (as amended)	Unknown

12 See also article by Shane Wallace, Jessica Hayes & Brian Mullane "Irish Capital Gains Tax Treatment of Foreign Taxpayers Can Be Such a Toll", in this issue.

		Regulation 8(1)(a) Vehicle Registration and Taxation Regulations, 1992 (as amended) (SI 318 of 1992) Sections 3 and 4 of the Vehicle Registration Tax (Permanent Reliefs) Regulations, 1993 (as amended)(SI 59/1993)	
81TACD2021	**Income Tax**	Appeal regarding inquiries into individual's tax affairs after identification of offshore transactions Sections 895 and 956 TCA 1997	Yes
82TACD2021	**PREM**	Appeal in respect of the denial of a claim for the repayment of tax as regards the application of the four-year statutory limitation period Section 865 TCA 1997	Yes
83TACD2021	**VRT**	Appeal regarding claim for repayment of vehicle registration tax in accordance with the export repayment scheme Section 135D FA 1992 (as amended)	Unknown
84TACD2021	**Income Tax**	Appeal against refusal to grant Seafarer Allowance for the years 2015 and 2016 Section 472B TCA 1997	Unknown
85TACD2021	**VRT**	Appeal in respect of the availability of relief from vehicle registration tax Section 134 FA 1992 Vehicle Registration Tax (Permanent Reliefs) Regulations 1993 (SI 59 of 1993)	Unknown
86TACD2021	**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
87TACD2021	**Income Tax**	Appeal in respect of the denial of a claim for the repayment of tax as regards the application of the four-year statutory limitation period Section 865 TCA 1997	Unknown

88TACD2021	**VRT**	Appeal in respect of the availability of transfer-of-residence relief Section 134 FA 1992 (as amended) Section 146 FA 2001 Vehicle Registration Tax (Permanent Reliefs) Regulations 1993 (SI 59 of 1993)	Unknown
89TACD2021	**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 (as amended)	Unknown
90TACD2021	**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 (as amended)	Unknown
91TACD2021	**Customs & Excise**	Appeal against an assessment to excise duty in respect of the supply of marked mineral oil (MMO) Sections 94-109 Finance Act 1999 Sections 96-153 Finance Act 2001 Mineral Oil Tax Regulations 2001 and 2012 Council Directives 2003/96/EC, 2008/118/EC and 95/60/EC The European Convention on Human Rights Act 2003	No
92TACD2021	**CGT**	Appeal regarding the identification of the person to be assessed and pursued for the collection of CGT arising on the forced sale by a French bank with an Irish branch of appellant's shares in a French-listed company Sections 28, 29, 31, 532, 537, 571 and 958 TCA 1997	Yes

93TACD2021	**Income Tax – Anti-tax avoidance**	Appeal regarding interest relief claimed in respect of loans applied in acquiring shares in two companies Sections 248, 250 and 817A TCA 1997	Yes but later withdrawn
94TACD2021	**Corporation Tax**	Appeal regarding the construction of a combined-cycle gas power station and whether connection fees in relation to the connection to both the electricity and gas national grids should be relievable as ancillary expenditure on the provision of plant and machinery, or whether the expenditure should be treated as revenue expenditure and therefore deductible. The appeal was also raised on the grounds that the assessments were raised after the four-year statutory limitation period and the doctrine of legitimate expectation should be applied. Sections 284, 396, 934, 949AK and 955 TCA 1997 Sections 16 and 34 Electricity Regulation Act 1999	Unknown
95TACD2021	**VAT**	Appeal against refusal of claims for a refund of VAT. Whether volume-based discounts granted/rebate payments made to private health insurance companies constitute a reduction in the consideration received in respect of the supply of the medical product and, consequently, if entitled to relief by a repayment of VAT. Sections 37, 39 and 67 VATCA 2010 Regulation 9 Value-Added Tax Regulations 2010 Articles 73 and 90 Council Directive 2006/112/EC	Yes
96TACD2021	**Income Tax**	Appeal regarding the averaging of farm profits Sections 12, 18, 65, 81, 381, 382, 655 and 657 TCA 1997	Yes

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

Fiona Carney Director, Tax Solutions Centre, PwC

Tax Appeals Commission Determinations

01	**Domicile Levy – Meaning of "World-wide Income" and "Income Tax"**	High Court
02	**Stamp Duty – Availability of Sub-sale Relief**	High Court
03	**CGT – Is a Loan a "Debt on a Security"?**	Tax Appeals Commission
04	**CGT – Meaning of "Land in the State"**	Tax Appeals Commission
05	**CGT – CPO and Applicable Date of Disposal**	Tax Appeals Commission
06	**Corporation Tax – Close Company Provisions**	Tax Appeals Commission
07	**Income Tax – Date of Commencement to Trade**	Tax Appeals Commission
08	**Income Tax – Domicile Levy**	Tax Appeals Commission

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

The High Court delivered its judgment in the case of ***Louis Fitzgerald vs Revenue Commissioners*** [2021] IEHC 487 on 9 July 2021. The appellant challenged the decision of the Tax Appeals Commission in 176TACD2020 that he was a "relevant individual" as defined in s531AA TCA 1997 and was hence subject to the domicile levy. [This case was covered in "Direct Tax Cases" in *Irish Tax Review*, 34/1 (2021).]

The High Court upheld the determination of the Tax Appeals Commission that the appellant was a "relevant individual" as defined because he satisfied the conditions that his "world-wide income" for the relevant tax years exceeded €1m and his "liability to income tax" was less than €200,000. This was based on two key findings:

- Firstly, relief for losses/capital allowances from the appellant's hotel business, which are deductible against other income under s381 TCA 1997, cannot be taken into account in computing the appellant's "world-wide income", defined as "an individual's income, without regard to any amount deductible from or deductible in computing total income...". The appellant sought to argue that the capital allowance/loss is a deduction that is taken in estimating income from all sources and thus not at the end of the assessment process as a "deduction from total income". However, the judge found it clear from the wording of s381(5) TCA 1997 that such losses/capital allowances are to be "regarded as a deduction to be made from...total income".

- Secondly, the universal social charge (USC) payable by the appellant cannot be taken into account in assessing whether the appellant's "liability to income tax" in the relevant years exceeded €200,000. The judge found it clear that USC is different from "income tax" and is regarded as being "in addition to" income tax. This point was also considered in tax appeal 66TACD2021, as outlined below.

Although the judge was satisfied that there was no ambiguity around this interpretation, were there any doubt, he noted that it seems clear that interpreting s531AA TCA 1997 in this manner appears to be consistent with the purpose of the domicile levy to ensure that wealthy individuals do not use tax shelters and tax-avoidance schemes to pay little or no income tax relative to their income.

02 Stamp Duty – Availability of Sub-sale Relief

The High Court delivered its judgment in the case of ***Yesreb Holding Limited vs Revenue Commissioners*** [2021] IEHC 317 on 6 May 2021. The appellant challenged the decision of the Tax Appeals Commission in 67TACD2020 that the appellant could not avail of sub-sale relief under s46(1) of the Stamp Duty Consolidation Act 1999 (SDCA 1999) in relation to its purchase of a property. This section provides that:

> *"Where –*
>
> *(a) a person having contracted for the purchase of any property, but not having obtained a conveyance of that property, contracts to sell the same to any other person, and*
>
> *(b) the property is in consequence conveyed immediately to the sub-purchaser,*
>
> *then the conveyance shall be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser."*

The property in question had been acquired by Mr Dunne under a contract entered into in 2005. By declaration of trust, Mr Dunne subsequently declared that his entire interest in this contract was held by him in trust for his wife (Ms Dunne) on foot of a separate property settlement agreement. In 2006, documents of title to the property were furnished and possession passed but no conveyance was executed. In October 2006, by nominee agreement between Matsack Ltd and Ms Dunne, Matsack Ltd agreed to hold the property together with €25,000 on trust to retain it, but with power to deal with it (including to sell or convey it), in accordance with the written instructions of Ms Dunne, as principal.

In 2013 the property was sold to the appellant. The vendor on the contract was stated to be Mr Dunne as trustee for Ms Dunne. By deed of conveyance made pursuant to the contracts of 2005 and 2013, the original vendors granted and conveyed the property to the appellant at the direction of the beneficial owner, Ms Dunne. Ms Dunne together with the original trustee (Mr Dunne) and the present trustee (Matsack Ltd) further granted, conveyed and confirmed the property to the appellant.

The appellant filed a stamp duty return based on the purchase consideration payable on foot of the 2013 contract only, on the basis that sub-sale relief applied to the conveyance. However, Revenue refused this claim on the grounds that the same person must have contracted to purchase and sell the property. Revenue contended that Mr Dunne did not have the capacity to perform the 2013 contract as trustee for Ms Dunne after the date of the nominee agreement. Absent sub-sale relief, the deed of conveyance made in 2013 was chargeable to stamp duty on the consideration payable under both the 2005 and 2013 contracts, with the appellant being the accountable person.

Revenue's position was upheld by the Tax Appeals Commission. The Appeal Commissioner was satisfied that Mr Dunne had no interest in the property and had no capacity to enter into a contract for sub-sale in respect of the property. She noted that the joinder of a person in a contract for sub-sale in circumstances where that person's involvement is unnecessary or gratuitous does not succeed in enabling a claim for sub-sale relief.

The High Court upheld the Appeal Commissioner's determination, finding that she had not erred in finding that:

- Mr Dunne did not hold an interest in the property in March 2013, whether for Ms Dunne or otherwise; it is not necessary to investigate the motivation for including his name in the contract and the deed of conveyance; and
- the appellant is the transferee under both the 2005 and 2013 contracts for sale and is hence the "accountable person" in accordance with s1 SDCA 1999.

03 CGT – Is a Loan a "Debt on a Security"?

Tax appeal **68TACD2021** considered whether a loan advanced to a company was a "debt on a security" and, hence, whether a capital loss was available for a negligible-value claim made on that loan.

In 2007 the appellant advanced a 10-year loan to a HoldCo, in which he was a shareholder. It was used to partly fund the acquisition of a hotel by its French subsidiary. The loan agreement allowed the appellant to require the HoldCo to convert the loan into shares. In 2014 the French subsidiary sold the hotel at a loss and used the proceeds to repay bank debt. As a result, the shares in the HoldCo were valueless. The shareholders agreed to write off their loans to the HoldCo.

The appellant made a negligible-value claim under s538(2) TCA 1997 on the grounds that a deemed disposal of the loan took place when the hotel was sold by the French subsidiary, as that event rendered the shares in the HoldCo, in respect of which he had a right of conversion, of negligible value. The appellant took the position that the loan was a debt on a security because it carried a right of conversion into shares and enjoyed a general right of assignability.

Revenue refused the claim on the basis that the loan was a simple debt on which neither a capital gain nor a loss could have accrued (by virtue of the provisions in s541(1) TCA 1997). In Revenue's view, the loan agreement did not afford the appellant an "automatic or explicit" right to convert the loan to shares. Also, the loan write-off was indicative of the fact that it was improbable that the loan advanced in 2007 was a marketable asset with commercial potential.

The Appeal Commissioner disagreed with Revenue, finding it clear from the agreement that the conversion was an option wholly at the discretion of the appellant and that the HoldCo had no right of refusal. On the second point, he also considered it improbable that the appellant would have lent such a substantial sum to the HoldCo were there not a realistic prospect of a return on investment. In his view, the conversion right, allied to the absence of any contractual prohibition on the sale of the debt, added to its value and made it a marketable asset.

The Appeal Commissioner therefore concluded that the loan was a debt on security within the meaning of s585 TCA 1997 and that the appellant made an allowable loss for CGT purposes when the loan was written off. 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 CGT – Meaning of "Land in the State"

Tax appeal **75TACD2021** concerned whether a charge to CGT arose under s29 TCA 1997 for a non-resident company on its disposal of shares in an Irish company operating a motorway.

The key question was whether the company's shares were "relevant assets" under s29 TCA 1997. These include "shares deriving their value or the greater part of their value directly or indirectly from" land in the State. "Land" is defined in s5 TCA 1997, the CGT interpretation section, as including "any interest in land".

The Irish company was party to a public–private partnership (PPP) contract to design, construct, finance, operate and maintain a motorway on land owned by Transport Infrastructure Ireland (TII). Under the terms, it was conferred with access rights to the motorway and surrounding areas to enable it to perform its obligations under the contract. It had the right to collect the tolls on behalf of TII and to retain a portion collected under the toll scheme.

The appellant's position was that the Irish company held a non-exclusive licence to design, construct, finance, operate and maintain the motorway lasting for the duration of the PPP contract. That licence did not provide the Irish company with an "interest in land", nor was it a licence coupled with an interest in land.

Revenue submitted that a lease is an "interest in land" and therefore falls within the definition of "land" in s5. Even if the PPP contract granted the Irish company a licence to access the lands only, such a licence fell within the definition of "lease", which is separately defined in s5.

However, the Appeal Commissioner did not agree with Revenue, finding that nothing in the legislation suggests an intention that the meaning ascribed to the word "lease" was intended to give rise to a wider construction or application of the word "land". "Land" for the purposes of s29(3)(a) TCA 1997 means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in s11(4) of the Land and Conveyancing Law Reform Act 2009. This accords with the plain and long-standing meaning of the word "land".

Having reviewed the provisions of the PPP contract, the Appeal Commissioner found that nothing therein could conceivably be said to amount to the grant of a proprietary estate or interest in land.

Revenue asserted that even if the company did not have a proprietary interest in land in the State, it was still possible for its shares to derive their value from such land. The value of its shares derived from its turnover, and most of its income stream derived from the tolls. As the motorway is situated on land in the State, the value of the company's shares is therefore indirectly attributable to land in the State.

However, the Appeal Commissioner agreed with the appellant that accepting this construction would be to give the phrase "directly or indirectly" in s29(1A)(b) TCA 1997 an overly broad meaning and would not reflect the true intention and will of the Oireachtas in enacting the legislation. He was satisfied that it was intended to cover situations where more than one corporate entity stood between the taxpayer and the relevant asset, so that a taxpayer could not escape liability to CGT if the relevant asset was held by one or more sub-subsidiaries. He agreed with the appellant that the underlying asset from which the shares derived their value must itself have the quality of being within the charge to CGT on a disposal.

The Appeal Commissioner therefore allowed the appeal, finding that the non-resident appellant did not come within the charge to Irish CGT as the shares were not "relevant assets" under s29 TCA 1997.

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court. [See also the article by Shane Wallace, Jessica Hayes and Brian Mullane in this issue, "Irish Capital Gains Tax Treatment of Foreign Taxpayers Can Be Such a Toll".]

05 CGT – CPO and Applicable Date of Disposal

Tax appeal **67TACD2021** concerned the timing of the disposal of land that was subject to a compulsory purchase order (CPO). This was relevant because the CGT rates were subject to several changes in the period from 2008 to 2012.

The appellant owned land on the route of a proposed bypass. He received notification from the local county council in February 2008 of the commencement of land surveys, which took place that year. The scheme was approved by An Bord Pleanála in 2010. The CPO compensation was agreed in 2012 and was paid in 2013.

Section 542(1)(c) TCA 1997 provides, in the context of a CPO on land, that:

> *".....the time at which the disposal and acquisition is made shall be the time at which the compensation for the acquisition is agreed or otherwise determined...or, if earlier, the date on which the authority enters on the land* **in pursuance of its powers** [emphasis added]."

The appellant included the compensation payment received in his 2013 Form 11, applying the 20% CGT rate on the basis that the disposal took place in 2008, at the time when the county council entered onto the land. Revenue contended that the disposal took place in 2012, at which time the 33% CGT rate applied.

The Appeal Commissioner found that it was only when An Bord Pleanála had approved the scheme in 2010 that the council became authorised to exercise its compulsory purchase powers. As there was no evidence presented of the council's entering upon the appellant's land after that date, the date of disposal of the land was the date on which the compensation was agreed in 2012. He therefore refused the appellant's appeal, finding that amended assessments raised by Revenue should stand. 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.

06 Corporation Tax – Close Company Provisions

Tax appeal **76TACD2021** concerned the close company surcharge on undistributed income of service companies contained in s441 TCA 1997. This appeal considered whether the appellant, a company engaged in the provision of management consultancy services, was a "service company". This is defined as "a close company whose business consists of or includes the carrying on of a profession or the provision of professional services".

The Appeal Commissioner noted the difficulty in attempting to ascribe a meaning to the term "profession" and the absence of a statutory definition. However, he noted his understanding that the word involves not only a certain educational requirement, relevant experience and a public interest dimension but also some form of regulatory control over the persons engaged in the profession.

In this case, taking account of the absence of a formal education structure to qualify the appellant's staff to perform their work and the lack of accountability and regulation by any supervising regulating body, the Appeal Commissioner concluded that the appellant was not engaged in a "profession" or "the provision of professional services" for the purposes of s441 TCA 1997 and that the assessments raised by Revenue should therefore be reduced to nil.

Revenue's Tax and Duty Manual Part 13-02-06 was subsequently updated to confirm that a management consultant is an activity not generally considered to constitute the carrying on of a profession. 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.

07 Income Tax – Date of Commencement to Trade

Tax appeal **70TACD2021** considered the question of whether a land development trade had commenced, thereby giving an entitlement to loss relief.

The appellant drew down a loan to purchase a site in 2005 with the intention of developing houses for resale. The land was zoned for agricultural use, but no planning applications were made. Development plans were put on hold in 2007 pending improved market conditions. The appellant claimed the loan interest payable as an expense of the trade of land development and deducted the resulting losses from his other income under s381 TCA 1997. Revenue issued amended assessments disallowing the trading losses claimed on the basis that no trade was in existence or operation over the relevant period.

The appellant submitted that, for the relevant tax years, he was carrying on a trade or an adventure in the nature of a trade as a land developer. He placed considerable reliance on the 2018 High Court case of *Revenue Commissioners v O'Farrell* [2018] IEHC 171, where the taxpayer had purchased a property with the intention of redeveloping the site. He obtained permission to build a single house on foot of his third planning application, but no physical development works ever took place at the site.

In determining whether the taxpayer had commenced to trade, the High Court applied the principles established in *Mansell v Revenue and Customs Commissioners* [2006] STC (SCD) 605, finding that the taxpayer had a specific idea in mind of his intended profit-making activities. He was thus engaged in the trade of land development and began that trade on the day on which he purchased the property with a clear development plan and the financing to support it. On that date, the taxpayer ventured in the hope of gain and with the risk of loss from the development of the land, and he was entitled to claim losses from that date.

However, the Appeal Commissioner distinguished *O'Farrell* from this case because no planning application had been submitted and no trade of land development was lawful until such permission was secured. Verbal agreements only were in place for bank finance and with building contractors. The lack of evidence of serious intent (via agreements) and the absence of planning applications/permissions led the Appeal Commissioner to conclude that the appellant was not carrying on a trade of land development in the years in question. He therefore found that the amended assessments should stand.

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court

08 Income Tax – Domicile Levy

Tax appeal **66TACD2021** concerned whether the appellant was a "relevant individual" within the meaning of s531AA TCA 1997 for the purposes of the domicile levy.

The appellant submitted that he was not a "relevant individual" because his liability to income tax in the State for the years in question (2010 and 2011) was not less than €200,000 taking into account the amounts of income levy, USC and UK income tax due and payable for those years. The appellant was subject to Irish income tax on UK-source rental income, and double taxation relief was claimed in respect of UK income tax paid on that rental income.

Consistent with determinations 175TACD2020 and 176TACD2020, the Appeal Commissioner held that the income levy and USC are both taxes on income, but neither is an "income tax" and neither could be taken into account in computing the appellant's "liability to income tax" for this purpose.

The appellant contended that his "liability to income tax" should be computed before credit is given for the UK income tax payable on the basis that he is liable to Irish income tax on his worldwide income in the first instance. Revenue's position was that the calculation was limited to the tax due and payable to Irish Revenue after the credit. The Appeal Commissioner agreed with the appellant, finding that UK income tax due and payable should be taken into account in computing the appellant's "liability to income tax". However, the non-inclusion of the income levy and USC meant that the €200,000 threshold was not met in either year, in any case, and the appellant was a "relevant individual".

The appellant also submitted that he should be entitled to a credit against his liability to the domicile levy for the UK income tax paid in accordance with the UK–Ireland double taxation agreement ("the DTA"). This was on the basis that the domicile levy is identical to or substantially similar to income tax. However, the Appeal Commissioner found that the domicile levy is not a tax but is a charge more akin to rates or national insurance. It is not within the scope of the DTA, and no credit is available for the UK income tax paid.

Finally, the Appeal Commissioner disagreed with the appellant's submission that the treatment of his UK rental income for domicile levy purposes breached his right to the free movement of capital afforded to him as an EU citizen.

He therefore concluded that the notices of assessment to the domicile levy should stand. 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

Stephen Ruane Partner and Leader, Tax Solutions Centre, PwC
Patrick Lawless Tax Senior Manager, Tax Solutions Centre, PwC

	Topic	Court
01	Corporation Tax – Capitalised Revenue Expenditure	
02	Corporation Tax – Treaty Interpretation	
03	Income Tax – "Wholly and Exclusively"	
04	Capital Gains Tax – Guarantee Rights	
05	Corporation Tax – Share Buy-back	

01 Corporation Tax – Capitalised Revenue Expenditure

In ***West Burton Property Ltd v HMRC*** [2021] UKFTT 160 (TC) the First-tier Tribunal (FTT) determined that a company was entitled in principle to a deduction in computing its rental profits for capitalised revenue expenditure that remained unamortised when the asset to which it related was sold.

West Burton Property Ltd (WBPL), which is part of the EDF group, owned a power station, which it leased to its parent company. It regularly incurred expenditure of a revenue nature – in that the expenditure related to the maintenance of the power station and not its modification or improvement. However, in line with UK generally accepted accounting practice, WBPL capitalised the costs in the financial year in which they were incurred and then amortised them, over which period they presumably were deducted against rental income.

In 2011 the company disposed of the power station to its parent company for an amount equal to its net book value. The transfer at "book value" meant that the consideration for the disposal equalled the aggregate value in WBPL's accounts of (a) the depreciated cost of the power station and (b) the capitalised revenue expenditure (some £65m). As the disposal took place at net book value, neither a profit nor a loss for accounting purposes arose, meaning that a nil amount was recorded in respect of the sale in the profit and loss account. Notwithstanding this, the taxpayer claimed a deduction for the £65m in unamortised capitalised revenue expenditure in calculating taxable rental profits for the accounting period in which the sale was made. HMRC sought to disallow the deduction.

The FTT held that the expenditure was allowable. Firstly, it was found that the sale by the taxpayer of the power station was a transaction that fell to be taken into account in calculating the taxable profits of the taxpayer's rental business. This was because the sale was the disposal of the main capital asset that was used in carrying on that business. Secondly, the FTT determined that both the sale proceeds and the net book value of the power station had in fact been brought into account as a credit and as a debit (respectively) in calculating the profits of the appellant's rental business. In calculating the taxable profits, the credit was to be disregarded as a capital receipt, and to the extent that the debit related to capital expenditure, it was also to be disregarded. However, the amount of the debit related to the capitalised revenue expenditure was not to be adjusted, meaning that a deduction was available in computing the taxable rental profits.

02 Corporation Tax – Treaty Interpretation

In ***G E Financial Investments v HMRC*** [2021] UKFTT 210 (TC) the First-tier Tribunal (FTT) held that a UK-resident company was not also US resident for the purposes of the UK–US double taxation treaty.

The taxpayer, G E Financial Investments Ltd (GEFI), was incorporated in the UK. GEFI was also a limited partner in a Delaware limited partnership (LP) that was engaged in financing activities. GEFI's shares could only be transferred at the same time as those of GE Financial Investments Inc. (GEFI Inc.), a US-incorporated member of the group. They were treated as "stapled stock" for US tax purposes. As a result, the UK-incorporated company was treated as a domestic corporation for US tax purposes and therefore liable to US federal income tax on its worldwide income. HMRC rejected the taxpayer's claims for double taxation relief.

The tribunal focused on whether the share staple between GEFI and GEFI Inc. meant that GEFI was "a resident of the [US]" for the purposes of Article 4 of the UK–US double taxation treaty. For this purpose, the FTT had to consider the meaning of the expression "any other criterion of a similar nature" in Article 4(1). In the judgment, the FTT accepted the HMRC argument that for there to be "criterion of a similar nature" there must, in addition to the imposition of a worldwide liability to tax, be an attachment or connection to a contracting state similar to domicile, residence, citizenship, place of management, place of incorporation etc. In other words, the tribunal held that although worldwide taxation is a necessary feature of a connecting criterion, it is not sufficient by itself. This interpretation was referenced as a narrower territorial interpretation. The FTT went on to find that the share staple, although it did demonstrate a connection between two entities – or, more precisely, their shareholders – did not represent a connection between the stapled entity, GEFI, and the relevant state, the US. The connection or attachment was between the stapled entities rather than to the country concerned. Accordingly, GEFI was not resident in the US under Article 4.

The taxpayer (GEFI) also argued that double taxation relief should be available within the terms of Article 7 of the UK–US double taxation treaty, as GEFI, through its participation in the Delaware LP, carried on business in the US through a permanent establishment situated therein. In considering whether GEFI was carrying on a business in the US, the FTT consulted several cases on what amounts to a "business". It was contended by the taxpayer that because GEFI participated in the Delaware LP, which made and managed a series of loans, received substantial sums by way of interest and made distributions to the partners, it was carrying on an effective business. However, in the FTT's view, these were not the only factors that had to be considered. It was also necessary to consider whether the activities were actively pursued with reasonable or recognisable continuity, whether they had a certain amount of substance in terms of turnover, whether they were conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind that, subject to differences of detail, are commonly undertaken by those who seek to profit by them.

The tribunal concluded that GEFI did not carry on business in the US through a US permanent establishment, for a number of reasons, including that the activity associated with the loans advanced by the LP was more a passive, sporadic or isolated activity than a regular and continuous series of activities.

As GEFI was neither resident in the US nor carrying on a business through a permanent establishment there, it was not entitled to relief under the treaty.

03 Income Tax – "Wholly and Exclusively"

In ***Messrs Elliot Balnakeil v HMRC*** [2021] UKFTT 193 (TC) the First-tier Tribunal (FTT) held that farmhouse renovation costs were capital in nature and disallowable for income tax purposes.

The appellants, Messrs Elliot Balnakeil, were a partnership that had run a farm for many years. Balnakeil House, the biggest farm property, was used until 1992 to provide accommodation for the general farm manager, who was then responsible for managing and running the farm. However, he moved out, and the house fell into disrepair.

The house was listed as being of "national importance". As a result, in 2008, when working with Historic Scotland, the decision was taken that the farmhouse would need to be "repaired and improved", and that it was unlikely to be needed as a farmhouse. A decision was taken to use the property as a furnished holiday letting. Historic Scotland offered to help fund the costs of its renovation.

The taxpayer's tax returns included deductions for expenditure on its costs in the renovation. However, HMRC denied the deductions on the basis that the disputed expenditure (1) was capital in nature and (2) had not been incurred wholly and exclusively for the purposes of the partnership trade. The taxpayer appealed.

In relation to the first issue, the FTT determined that the disputed expenditure in its entirety was capital in nature and not eligible for deduction in computing profits. The tribunal held, as a matter of fact, that the house was transformed from being a farmhouse of minimal facilities and not fit for modern living to being a luxury holiday home. The house's overall character had been changed, and the expenditure that had brought about this transformation was of a capital nature.

In relation to the "wholly and exclusively" question, the FTT was tasked with determining (a) what was the object or purpose of the expenditure and (b) whether it was to benefit or further the trade carried on by the taxpayer in question (i.e. a farming partnership) or for some other purpose. The tribunal held that although the renovation expenditure was incurred under the name of the taxpayer, it was not incurred for the purposes of the farming trade, as the trade of furnished holiday lettings had never been part of the trade.

Accordingly, the taxpayer's appeal was dismissed.

04 Capital Gains Tax – Guarantee Rights

In ***Tenconi v HMRC*** [2021] UKFTT 107 (TC) the First-tier Tribunal (FTT) found that a disposal of guarantee rights was the disposal of a capital gains tax asset, which did not qualify for UK entrepreneurs' relief, as the guarantee rights did not constitute "ordinary share capital".

The company in question, MAH Ltd, was a company limited by both share capital and guarantee rights. The articles of association of the company provided for two classes of member: shareholder members and investor members. Only shareholder members were to pay or contribute to the capital of the company; investor members were, instead, required to pay for one or more "distribution rights". Each such distribution right cost £100, which was described in the articles of association as received by MAH "for its own benefit".

The appellant became a director of MAH in July 2008 and, in June 2009, became an investor member as he acquired four "distribution rights" for £100 each. The distribution rights gave general voting rights to the investor members. During 2015 another company, SHL, wished to purchase the shares of a subsidiary of MAH. The taxpayer agreed to sell the entire beneficial interest in his four distribution rights. After completion, the appellant would hold the rights as nominee and on trust for SHL and would have no beneficial interest in the rights. He undertook to exercise the voting and other rights attaching to the distribution rights, specifically undertaking to vote in favour of the acquisition by SHL of the shares in the MAH subsidiary. He also undertook to account to SHL for any dividends or other receipts paid in respect of the rights. The consideration paid was £1m. The taxpayer made a claim for entrepreneurs' relief, which HMRC rejected.

The tribunal disagreed with the taxpayer's contention that there had been no disposal. The appellant submitted that there was no disposal within the meaning of the UK equivalent of s532 TCA 1997 because the disposal was not within the scope of any of the sub-sections of that section. The tribunal pointed out that the UK equivalent of s532 TCA 1997 clearly includes "incorporeal property generally" within the scope of assets and, therefore, an asset for the purposes of these rules can include rights such as contractual rights. The distribution rights were found to be rights arising from the corporate governance documents of MAH and, therefore, capable of being disposed of. In any event, the tribunal held that if there had been no actual disposal, there would have been a deemed disposal arising from the receipt of a capital sum for the "use or exploitation of assets" for the purposes of the UK equivalent of s535 TCA 1997.

Lastly, the FTT held that the disposal did not qualify for entrepreneurs' relief. The articles of association stated that the amount contributed in exchange for distribution rights was received by the company "for its own benefit", that is, it was not received as part of the share capital of the company. On that basis, the tribunal held that the rights could not fall within the definition of "ordinary share capital", which is defined in largely similar terms in the UK to the definition in s2 TCA 1997.

05 Corporation Tax – Share Buy-back

On 30 April 2021 the England and Wales Court of Appeal delivered a unanimous decision in ***Bostan Khan v HMRC*** [2021] EWCA Civ. 624. Mr Khan, who was an accountant, had prepared the management accounts of a company for several years. In June 2013 the three shareholders wanted to exit, and they sought to access the company's distributable reserves. Mr Khan agreed to facilitate the arrangement.

The transaction involved Mr Kahn's purchasing all 99 shares from the existing shareholders. This was funded by a loan made to Mr Khan by the company. The company then bought back all but one of the 99 shares from Mr Khan for an almost identical amount. The transactions occurred on the same day, and the net effect was that Mr Khan owed one share in the company for an amount equal to the difference between the amount spent on purchasing the shares from the existing shareholders and the amount received when the company bought back the shares (*c*. £18,000).

Although the three shareholders achieved capital gains tax treatment, Mr Khan was less fortunate, as the payment made to him by the company on the purchase of its own shares was considered by HMRC to be a "distribution" chargeable to income tax under the UK equivalent of s130 TCA 1997. As an income receipt, it would not be possible to deduct the (capital) acquisition cost of the shares from the distribution income in respect of those shares.

Mr Khan contended that he was not entitled to a distribution because, although he had received the distribution, it was part of a series of transactions in which the distribution benefited the vendor shareholders. The taxpayer implored the Court of Appeal to take a purposive, *Ramsay* approach and to look at the sale and buy-back of the shares as a single, composite transaction. It would be unusual for a taxpayer to invoke the *Ramsay* approach (which is generally invoked by HMRC when seeking to challenge artificial tax-avoidance schemes). In any event, the court refused to do so, viewing the share sale and the share purchase as separate, given that the transactions were governed by separate agreements and advised on separately.

Mr Khan was also unsuccessful in arguing for the disapplication of income tax treatment by virtue of the UK equivalent of s176 TCA 1997, due to an insufficient holding period, and was similarly unsuccessful in arguing that the purchase and sale (buy-back) of shares in the company was a trading transaction and that the disposal of shares amounted to a disposal of trading stock. It was held that Mr Khan's acquisition of the company was in the nature of an investment.

Accordingly, Mr Khan was subject to income tax on the amount of the distribution received.

Compliance Deadlines

Helen Byrne
Senior Manager, Tax Knowledge Services, EY

General

Oct 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 September are due on 7 October.
Oct 15	Due date for submission of EWSS Employer Eligibility Review Form for September 2021.
Oct 23	Deadline for updating the Central Register of Beneficial Ownership of Trusts in respect of trusts established on or before 23 April 2021.
Nov 1	Valuation date with respect to local property tax liability for 2022. Date on which residential property must be held in order to be liable for 2022 local property tax.
Nov 15	Due date for submission of EWSS Employer Eligibility Review Form for October 2021.
Nov 30	Applications under the Business Resumption Support Scheme must be made by this date.

Dec 15	Due date for submission of EWSS Employer Eligibility Review Form for November 2021.
Dec 31	A four-year time limit generally applies to repayment claims. A claim for repayment of corporation tax for the year ended on 31 December 2017 must generally be lodged with Revenue by 31 December 2021. Claims for repayments of income tax for the year of assessment 2017 must also be submitted by 31 December 2021. The reduced rate of USC applicable to medical card holders (aged under 70 years) who earn less than €60,000 per annum is scheduled to expire on this date. The bank levy is scheduled to expire on this date. The enhanced Help to Buy scheme is scheduled to expire on this date. The Employment Wage Subsidy Scheme (EWSS) is scheduled to terminate on this date. The debt warehousing scheme period 1 (Covid-19 restricted trading phase) is extended to this date. The Covid Restrictions Support Scheme (CRSS) is scheduled to terminate on this date. Contributions by employers to approved occupational pension schemes are tax-deductible on a payment basis, as are charges on income (e.g. patent royalties and certain interest). Companies, sole trades and partnerships with 31 December year-ends may wish to review their positions to maximise/minimise deductions before the year-end.

Relevant Dates for Companies

Oct 14	Dividend withholding tax return filing and payment date (for distributions made in September 2021).
Oct 21	Due date for payment of preliminary tax for companies with a financial year ending on 30 November 2021. If this is paid using ROS, this date is extended to 23 October 2021. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 30 April 2022. If this is paid using ROS, this date is extended to 23 October 2021.

Oct 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 January 2021 if filed using ROS. 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 of corporation tax in respect of the same accounting period. Loans advanced to participators in a close company in the year ended on 31 January 2021 may need to be repaid by 23 October 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 October 2020 year-ends, this should extend the iXBRL deadline to 23 October 2021.
Oct 31	Last date for filing third-party payments return 46G for companies with a financial year ended on 31 January 2021. Latest date for payment of dividends for the period ended on 30 April 2020 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only).[1] Covid-19 interim corporation tax loss relief claims for losses in the year ended on 31 May 2021 must be made by 31 October 2021 (applies to specified accounting periods which overlap the period 1 March 2020 to 31 December 2020). CbC reporting notifications relating to the fiscal year ending on 31 October 2021 must be made to Revenue (where necessary) no later than 31 October 2021, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 31 October 2020 must be filed with Revenue (where necessary) no later than 31 October 2021.
Nov 14	Dividend withholding tax return filing and payment date (for distributions made in October 2021).
Nov 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 December 2021. If this is paid using ROS, this date is extended to 23 November 2021. Due date for payment of initial instalments of preliminary tax for companies (not “small” companies) with a financial year ending on 31 May 2022. If this is paid using ROS, this date is extended to 23 November 2021.
Nov 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 28 February 2021 if filed using ROS. 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 of corporation tax in respect of the same accounting period. Loans advanced to participators in a close company in the year ended on 28 February 2021 may need to be repaid by 23 November 2021 to avoid the assessment (on the company) of income tax thereon. A concessional three-month filing extension for iXBRL financial statements (**not** Form CT1) may apply. For 30 November 2020 year-ends, this should extend the iXBRL deadline to 23 November 2021.
Nov 30	Last date for filing third-party payments return 46G for companies with a financial year ended on 28 February 2021. Latest date for payment of dividends for the period ended on 31 May 2020 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only).[1] Covid-19 interim corporation tax loss relief claims for losses in the year ended on 30 June 2021 must be made by 30 November 2021 (applies to specified accounting periods which overlap the period 1 March 2020 to 31 December 2020). CbC reporting notifications relating to the fiscal year ending on 30 November 2021 must be made to Revenue (where necessary) no later than 30 November 2021, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 30 November 2020 must be filed with Revenue (where necessary) no later than 30 November 2021.
Dec 14	Dividend withholding tax return filing and payment date (for distributions made in November 2021).
Dec 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 January 2022. If this is paid using ROS, this date is extended to 23 December 2021. Due date for payment of initial instalments of preliminary tax for companies (**not** "small" companies) with a financial year ending on 30 June 2022. If this is paid using ROS, this date is extended to 23 December 2021.
Dec 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 March 2021 if filed using ROS. 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 of corporation tax in respect of the same accounting period.

Loans advanced to participators in a close company in the year ended on 31 March 2021 may need to be repaid by 23 December 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 December 2020 year-ends, this should extend the iXBRL deadline to 23 December 2021.

Dec 31

Last date for filing third-party payments return 46G for companies with a financial year ended on 31 March 2021.

Latest date for payment of dividends for the period ended on 30 June 2020 to avoid ss440 and 441 TCA 1997 surcharges on investment/rental/professional services income arising in that period (close companies only).[1]

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

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

A two-year time limit applies to some corporation tax group relief and loss relief claims. Potential claims for the period ended on 31 December 2019 may need to be considered before 31 December 2021.

Research and development (R&D) tax credits in respect of R&D expenditure incurred in an accounting period ended on 31 December 2020 must be claimed by 31 December 2021.

Knowledge Development Box claims in respect of an accounting period ended on 31 December 2019 must be made by 31 December 2021.

Relevant Dates for Personal Taxes

Oct 31

Due date for payment of preliminary income tax (inclusive of USC and PRSI) for the tax year 2021 (if the ROS pay and file deadline extension of 17 November 2021 is not availed of).

Due date by which self-assessed income tax and capital gains tax returns must be made for the year of assessment 2020 (but see 17 November 2021 ROS pay and file deadline extension).

Due date for payment of any balance of income tax for the tax year 2020, assuming that adequate preliminary tax was paid for 2020.

Due date for payment and return of €200,000 domicile levy for 2020.

	Latest date for making contributions to a PRSA, an AVC or an RAC for the tax year 2020 (subject to an extension to 17 November 2021 for ROS pay and filers).
Nov 17	An extension of the income tax pay and file deadline of 31 October 2021 to 17 November 2021 may be availed of if taxpayers submit their payment and file their tax return through ROS. Extended due date for payment of capital acquisitions tax (CAT) and filing of returns in respect of gifts and inheritances taken in the 12-month period ended on 31 August 2021 (if done through ROS – otherwise, 31 October 2021).
Dec 31	Every individual is entitled to a capital gains tax exemption of €1,270 per annum. This exemption cannot be transferred and is lost if not used by the end of the tax year. An exemption from capital acquisitions tax (CAT) applies to gifts up to the value of €3,000 received from any person in the tax year. Where a gift exceeds €3,000, only the excess is taken into account in calculating the CAT. Valuation date for the 2021 domicile levy. Irish assets held on this date will be taken into account in ascertaining whether the €5m "Irish asset test" has been met.

Notes

[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.

Additionally, 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.

Budget 2022 and Finance Bill 2021, which are scheduled to be released in October 2021, could impact on the deadlines above. (See also article by Fiona Carney, "DAC 6: Recent Revenue Guidance Updates", in this issue.).

Note that Finance Act 2020 provided that a CAT return must be filed where a gift or inheritance comprises agricultural property or relevant business property and agricultural relief or business relief applies.]

Louise Kelly
Tax Partner,
Deloitte Ireland LLP

Geraldine McCann
Tax Director,
Deloitte Ireland LLP

International Tax Update

01 US Tax Developments

US Treasury Green Book

The White House released a fiscal year 2022 Budget Blueprint on 28 May 2021. Until the release of this blueprint, President Biden had addressed the proposed US tax changes that formed part of the "Made in America Tax Plan" in only a very general way. However, the blueprint includes a "Green Book", which provides more granular details from the Treasury Department on how the tax proposals would operate – including their effective dates and projected impact on federal revenues. All told, the administration projects that its tax proposals would generate a net increase in federal tax receipts of nearly $2.4 trillion between 2022 and 2031.

Readers will recall that the notable tax provisions of the "Made in America Tax

Plan" were highlighted in Issue 2. To recap, the following are among the more notable provisions, together with the proposed effective dates, as provided for in the "Green Book":

- Increasing the headline rate of federal corporate tax from 21% to 28%, effective for taxable years beginning after 31 December 2021.
- Confirming plans to bring in, for taxable years beginning after 31 December 2021, a 15% tax on the book profits of companies that pay no federal income tax. However, this would only kick in for companies with book income above a threshold of $2bn. In addition, there would be a mechanism to take account of prior years' taxes paid that exceeded the minimum tax, as well as the potential utilisation of certain credits.
- Replacement of the Base Erosion and Anti-Abuse Tax (BEAT), which was introduced in the 2017 tax reform, 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. What defines a low effective tax rate could come out of the OECD's discussions on Pillar Two (which are currently considering a 15% minimum tax rate as proposed by the US), but if not, then it would be equal to the proposed rate on GILTI income (currently proposed at a rate of 21%). The rule would apply to financial reporting groups with an annual turnover exceeding $500m and be effective for taxable years beginning after 31 December 2022.
- 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. These changes would take effect for taxable years beginning after 31 December 2021.
- Repealing the Foreign Derived Intangible Income (FDII) regime with effect for taxable years beginning after 31 December 2021.
- A proposal for an additional interest limitation rule that would operate to disallow interest expense deductions of the US subgroup in proportion to the portion of the subgroup's net interest expense (calculated for financial reporting purposes on a separate company basis) that exceeds the subgroup's proportionate share of the overall group's net interest expense reported in the group's consolidated financial statements.
- Tightening existing rules to prevent inversions of US companies.

Although the Budget gives the President the opportunity to formally lay out his tax policy agenda and provide further detail on the various proposals, these proposals are not binding, and the authority for drafting actual legislation lies with members of Congress. As of the date of writing this article, the US tax proposals are still navigating through the Senate and the House of Representatives; however, progress is well under way. Assuming that agreement is reached this year, it may involve some compromise and changes to what President Biden has proposed.

02 OECD/BEPS: Recent Developments

BEPS

Pillar One and Pillar Two

Readers may be aware that, since 2017, the member countries of the G20/OECD Inclusive Framework on BEPS have been developing a proposed solution to address the tax challenges arising from the digitalisation of the economy. This led to the publication of two detailed "blueprints" in October 2020 on potential rules for addressing nexus and profit allocation challenges (Pillar One) and for global minimum tax rules (Pillar Two). With the US Biden Administration delivering a fresh negotiating position in April 2021 (discussed in Issue 2) the proposals were updated and simplified, These new proposals formed the basis for recent political discussions by the G7 Finance Ministers, the OECD Inclusive Framework and the finance chiefs of the G20 Member States.

- **G7 Agreement**: On 5 June 2021 the G7 Finance Ministers published a communiqué setting out high-level political agreement on global tax reform, including the reallocation of a share of the global residual profit of certain businesses to market countries and a minimum effective tax rate in each country in which a business operates of at least 15%.
- Political agreement among the world's largest economies was a huge step for international tax reform. The G7 agreement is brief and focuses on the big-picture framework. It makes clear that the two pillars will continue to progress, politically and technically, in parallel.
- **OECD Inclusive Framework Agreement**: On 1 July 2021 the Inclusive Framework reached agreement but not unanimous consensus on the key aspects of the two-pillar solution to address tax challenges arising from the digitalisation of the economy.
- 130 members of the G20/OECD Inclusive Framework published a statement agreeing the key components of the allocation of taxing rights between countries (Pillar One) and the introduction of a global minimum tax (Pillar Two), with implementation scheduled for 2023. The key elements of the statement are outlined in the Legislation & Policy Monitor in this edition of *Irish Tax Review*.
- **G20 Political Agreement**:Further political agreement was reached on 10 July 2021 at a G20 meeting, when the finance chiefs from the 20 leading economies endorsed the key components of the two-pillar approach to international tax reform that was endorsed by the OECD Inclusive Framework.

As a result of the recent progress made in terms of political agreement, it is expected that a global tax agreement on tax reform is forthcoming; however, the exact detail of the agreement is not yet finalised.

Launch of Irish public consultation on OECD/BEPS proposals

Ireland is one of the countries that did not sign up to the Inclusive Framework Agreement in its current form. The Irish Government has been clear in expressing its broad support for the agreement but has expressed its reservation, in particular, on the proposed global minimum effective tax rate of "at least 15%".

On 20 July 2021 Minister Donohoe launched a public consultation on the OECD international tax proposals. The consultation will be helpful in identifying the challenges and opportunities of the proposals in respect of Ireland's corporate tax code and broader industrial policy. The consultation period runs until 10 September.

03 EU Tax Developments

EU to put on hold digital levy following G20 minimum tax plans

As a result of the meeting of the G20 finance chiefs on 10 July 2021, where they endorsed an overhaul of the rules for taxing international companies, the European Union has announced that it is putting on hold a proposed EU digital levy. A spokesperson for the EU said the European Commission has "decided to put on hold our work on a proposal for a digital levy until October 2021."

The EU had faced intense US pressure to postpone any announcement on an EU digital levy until the agreement by the G20/

OECD Inclusive Framework for the reform of the global corporate tax framework could be advanced, as the EU levy was seen as conflicting with the G20 deal.

European Commission publishes "Fit for 55" package

The European Commission on 14 July 2021 adopted the "Fit for 55" package of legislative proposals, within the framework of the European Green Deal, intended to reinforce the EU's position as a global climate leader. The package aims to upgrade existing legislation in line with the EU's 2030 climate target and introduce new policy measures to help deliver the transformational change needed across the economy, society and industry in order to reach climate neutrality by 2050 and, to support this, reduce net emissions by at least 55% (compared to 1990) by 2030.

From a tax perspective, key proposals include:

- A revision of the Energy Taxation Directive to align the taxation of energy products with EU energy and climate policies.
- Changes to the European Emissions Trading System (ETS), with the overall emissions cap further reduced.
- The introduction of a new Carbon Border Adjustment Mechanism (CBAM).
    - The CBAM will establish a carbon price on imports of a targeted selection of products to prevent "carbon leakage" and to encourage countries outside the EU to take steps in the same direction. The CBAM is expected to be fully operational from 2026, following a transitional phase where it first starts to take effect from 2023 to 2025. The products within the initial scope of the CBAM proposal are cement, iron and steel, aluminium, fertilisers and electricity. EU importers of such goods will be required to buy CBAM certificates from their national authorities, with carbon prices already paid on production deducted from the certificate price.

European Commission launches roadmap to tackle debt equity bias in corporate taxation

On 14 June 2021 the European Commission released a roadmap for drafting a Directive debt–equity bias reduction allowance (DEBRA), expected in the first half of 2022. This initiative aims to encourage companies to finance their investments through equity contributions instead of debt and thereby reduce their overall debt–equity ratio. The intention is to mitigate the tax-induced debt–equity bias, which can be achieved by either disallowing the deductibility of interest payments or creating an allowance for equity that enables the tax deductibility of notional interest for equity.

EU legislators reach agreement on public country-by-country reporting

Representatives of the Portuguese Presidency of the Council of the EU announced via press release on 1 June 2021 that political agreement has been reached on the proposed public country-by-country reporting (CbCR) Directive. A final compromise text was made available by the Council on 9 June 2021.

The final compromise text would require multinationals, either EU-parented groups or non-EU-parented groups with large EU subsidiaries or branches, with annual global consolidated revenue exceeding €750m to disclose publicly, on a country-by-country basis, corporate income tax information relating to their operations in each of the 27 Member States, as well as information for certain third countries on the EU list of non-cooperative jurisdictions.

It is expected that the timetable required would mean that the likely first year to report would be 2024, which would be reportable in 2025. However, Member States have the ability to introduce the Directive earlier into local laws, and therefore the timing is still uncertain.

The final compromise text now must be endorsed by the Council Committees on Economic and Monetary Affairs and Legal Affairs and the Parliament as a whole, as well as the Council. The vote in plenary is expected after the summer recess.

04 India: CBDT Notifies Thresholds for Significant Economic Presence

India's Central Board of Direct Taxes (CBDT) on 3 May 2021 issued Notification No. 40/2021, which prescribes the thresholds for constitution of a significant economic presence (SEP) in India for the purposes of establishing a business connection of a non-resident in India and confirms the date from which the SEP concept will apply.

The concept of SEP was introduced by Finance Act 2018 to incorporate the notion of a digital permanent establishment into domestic law by expanding the scope of taxation of digital transactions. Activities or transactions may give rise to an SEP and, hence, be taxable in India regardless of whether the non-resident has a place of residence or place of business in India or renders services in India.

The notification confirms that the SEP concept will apply as from 1 April 2022 (i.e. financial year 2021–22, corresponding to assessment year 2022–23) and specifies the relevant thresholds for determining whether a non-resident taxpayer may be considered to have an SEP in India. In summary, an SEP means:

- A transaction in respect of any goods, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India, provided the gross receipts from India exceed a specified threshold (INR 20m, i.e. USD 0.27m/EUR 0.22m); or
- Systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, provided the number of users exceeds a specified threshold (300,000).

A non-resident taxpayer that exceeds either of specified thresholds will be deemed to have an SEP in India. So much of income as is attributable to the above transactions shall taxable in India.

The SEP provisions will have a wide impact not only on digital transactions but also on transactions involving sale of goods (including physical goods) and the sale of services. Treaty relief may be available depending on the tax profile of the non-resident; however, it will be imperative that all non-residents analyse their eligibility to claim tax treaty benefits.

It is also relevant to note that digital transactions undertaken by foreign entities in India are already subject to equalisation levy. With introduction of SEP, it becomes imperative to understand the interplay between SEP and equalisation levy. Hence, it is pertinent for all (foreign entity, as well as Indian payer entity) to take note of the above amendments.

05 Greece Announces Reduced 22% Corporate Income Tax Rate from 2022

Greece has announced that its corporate income tax rate will be permanently reduced from 24% to 22% starting in 2022 in respect of the 2021 tax year. As a result, income earned in 2021 will be subject to 22% tax in 2022.

In addition, for legal entities, the advance payment of tax will be permanently reduced from 100% to 80% as of 2022, with a temporary reduction to 70% as of 2021.

06 Germany: Upper House of Parliament Approves Law to Implement EU Anti-Tax-Avoidance Directive

On 25 June 2021 Germany's Upper House of Parliament approved the "ATAD implementation law" to implement the EU Anti-Tax-Avoidance Directive (including provisions of ATAD I and ATAD II) into domestic German tax law. The final version of the ATAD implementation law does not contain any changes from the version that was approved by the Lower House of Parliament on 21 May 2021. The approval of the Upper House marks the end of a more than 18-month journey to implement the ATAD rules into German law since the first draft was published on 10 December 2019.

All formalities have now taken place, and the law is now enacted and in force. As expected, the rules have retroactive effect and apply as from 1 January 2020.

07 Germany Grants Extension of Deadline for Certain ORIP-Related Filings

The German Ministry of Finance (MOF) published a decree on 14 July 2021 that extends the deadline for certain filings that are required in connection with the German extraterritorial taxation of royalty payments derived by non-residents ("ORIP" cases) from the original 31 December 2021 date to 30 June 2022.

Under the German rules for limited liability taxpayers, royalty income from the licence of rights (royalties) that are being exploited in a German permanent establishment or other German facility or registered in a German public book or register may give rise to a German limited tax liability. This is referred to as an "ORIP" (offshore receipts in respect of intangible property) situation. Capital gains derived from the transfer of such rights also may be subject to a German tax that often is referred to as ETT (extraterritorial transfer tax), although the terms ETT and ORIP are not used in the relevant legislation.

In the case of royalty payments (ORIP), the tax must be withheld at the time of payment and remitted quarterly by the licensee even if the withholding tax (WHT) obligation may be mitigated under a relevant tax treaty, unless the licensor provides the licensee with a valid German WHT exemption certificate as required under Germany's domestic WHT rules, allowing the application of a reduced or 0% royalty WHT rate.

In an earlier decree, published on 11 February 2021, the MOF provided some procedural relief relating to royalty WHT filings and payments in relation to certain non-residents that qualify for benefits under an applicable tax treaty with Germany; the relief provided in that decree is available for 2013 and subsequent years. The relief is available for treaty-protected taxpayers (it must be clear that treaty protection is available, without any uncertainties) and requires, among other things, that an application for a royalty WHT exemption certificate for all payments until 30 September 2021 be filed with the federal tax office by the licensor (or, under certain conditions, by the licensee) by 31 December 2021.

The MOF's 14 July 2021 decree now allows necessary disclosure documents to be filed until 30 June 2022 regarding all royalty payments made until that date. However, it is important to note that the filing relief does not apply to cases where treaty protection is uncertain (e.g. due to the anti-treaty-shopping rules or because of hybrid elements or dual-resident companies in the structure) and that filing must occur without delay after having identified the applicability of the law and carried out the subsequent analysis. It should also be noted that the relief, as provided in the 11 February 2021 decree, applies only to German-nexus rights that are German-registered rights and not in cases where intellectual property (IP) is being exploited in a German permanent establishment or other facility.

In the case of ETT (i.e. on the alienation of the IP), the tax must be declared via a German tax return filed by the non-German transferor even if treaty protection is available. The original filing and disclosure obligations remain unchanged where German-nexus rights are transferred (ETT scenario), i.e. required nil returns must be filed by 30 September 2021 for treaty-protected past periods.

08 Poland Announces Upcoming Transfer Pricing Simplifications

The Polish Ministry of Finance has announced its plan to revise the country's transfer pricing regulations, with a series of amendments that clarify the definition of related parties and ease taxpayers' documentation and compliance obligations. The amendments, announced on 28 June, largely consist of proposed changes to Poland's transfer pricing documentation regime, including the extension of key deadlines and the creation of exemptions for low-risk taxpayers and transactions. However, the consultation document also includes some substantive changes to Poland's transfer pricing regulations, most of which concern the assessment of relatedness between partnerships and their partners.

09 Jersey and Guernsey – Economic Substance Regime Extended to Partnerships

Following the introduction of economic substance rules for companies in 2019, Jersey and Guernsey are extending the substance requirement to partnerships, in line with commitments given to the EU Code of Conduct Group.

In relation to Jersey, the legislation is in force for financial periods commencing on or after 1 July 2021 for new partnerships formed on or after this date. Existing partnerships (i.e. those in existence before 1 July 2021) will benefit from a six-month transition period, and the legislation will therefore take effect for financial periods commencing on or after 1 January 2022.

The legislation broadly mirrors Jersey's existing economic substance legislation for companies. Where a "resident partnership" has gross income in relation to relevant activity carried on by or through that partnership, it will be required to meet the economic substance test.

In response to commitments made with regard to the EU Code of Conduct in November 2020, the Guernsey Revenue Service on 11 May 2021 issued Circular 18, announcing that the economic substance rules are to be extended to partnerships.

10 UK: Uncertain Tax Positions and Asset-Holding Companies

In July 2021 the UK published draft legislation intended for the next year's Finance Bill.

Uncertain tax positions

In relation to the proposal requiring large businesses to notify HMRC of uncertain tax treatments – the draft legislation provides that these rules will apply to tax treatments included in returns filed after 1 April 2022. The requirement will apply to "large" companies and partnerships. The definition of large is to be based on the senior accounting officer (SAO) rules and will include businesses with UK turnover of more than £200m or UK balance sheet totals of more than £2bn. For companies that are members of a group (>51% subsidiaries), the thresholds will apply to the aggregate UK turnover/balance sheet totals of the company and any other company in the same group.

An amount is uncertain if one or more of the following applies (referred to as the uncertainty "hallmarks"):

- A provision has been recognised in the accounts of the company or partnership in accordance with accounting principles.
- Reliance was placed on an interpretation or application of the law that is not in accordance with HMRC's known position.
- There is a substantial possibility that a court or tribunal would, if it were to consider the treatment, conclude that the way the amount has been arrived at is incorrect.

"Substantial possibility" is not defined; however, it is clear that it is considered to be a lower threshold than "probable", but the legislation does not include a numerical threshold or prescribe how the test is to be applied.

Asset-holding companies

The UK Government has also reaffirmed the case for implementing a new, attractive UK tax regime for certain asset-holding companies. The draft legislation sets out the initial elements of an elective regime for the taxation of qualifying asset-holding companies (QAHCs), which is intended to apply from April 2022. A QAHC must be at least 70% owned by diversely owned funds, or certain institutional investors, and exist to facilitate the flow of capital, income and gains between investors and underlying investments. Not all of the legislation has been published, and HMRC confirmed that it does not currently have a timetable for when the remainder of it will be published. The policy paper notes that the regime will include:

- exempting gains on disposals of certain shares (broader than SSE) and overseas properties;
- exempting property business profits taxed overseas;
- allowing deductions for certain interest payments that would otherwise be treated as a distribution;
- disapplying withholding tax on interest payments made to investors;
- share buy-backs being treated as capital returns;
- and stamp duty reliefs.

VAT Cases & VAT News

Gabrielle Dillon
Director, Twomey Moran

VAT Cases

01 Supply of Extended Warranties and Input Recovery Entitlement

The CJEU delivered its judgment in ***Rádio Popular – Electrodomésticos SA v Autoridade Tributária e Aduaneira*** C-695/19 on 8 July 2021. The case related to the entitlement of Rádio Popular (RP) to reclaim input VAT incurred on costs associated with the sale of extended warranties. The case dealt with the interpretation of Article 174(2)(b) and (c) of Council Directive 2006/112/EC "the EU VAT Directive", which outlines the method of calculating the deductible amount in a dual-use scenario. Article 174(2) outlines the amounts that can be excluded from the calculation; paragraph (b) excludes the amount of turnover attributable to incidental real estate and financial transactions, and paragraph (c) excludes the amount of turnover attributable to the transactions specified in points (b) to (g) of Article 135(1) of the EU VAT Directive in so far as those transactions are incidental.

RP sold household electrical appliances and other computer and telecommunications equipment. It also offered ancillary services to its customers, which included the sale of extended warranties. The purchaser entered into an insurance contract with the insurance provider, with RP acting as intermediary in the sale of the insurance product (i.e. the extended warranty). RP did not charge VAT on the sale of the extended warranty as it treated the supply as an insurance transaction. However, it deducted VAT on all of its inputs and argued that the sale of the extended warranty was a financial transaction that was incidental to its supplies of goods. It argued that those transactions should qualify for the derogation under Article 174(2)(b) and (c) and be disregarded in calculating the deductible proportion of input VAT. The tax authority argued that the sale of extended warranties was exempt from VAT and therefore that an apportionment of input VAT should have applied. It also argued that the supplies could not be classified as financial transactions or incidental transactions in the context of Article 174.

The question posed was whether the derogation in Article 174(2)(b) and (c) of the EU VAT Directive, read in conjunction with Article 135(1) of that Directive, means that it applies to transactions by a taxable person acting as intermediary in the sale of extended warranties when engaged in its main activity of sale of goods so that its turnover from those ancillary transactions can be excluded from the deductible proportion calculation.

The court noted that the sale of extended warranties by an intermediary came within the exemption for insurance transactions (in Article 135(1)(a)) but insurance transactions are not covered by the exceptions in Article 174(2). The court indicated that it would have to determine whether the transactions undertaken by RP came within the exemption for insurance transactions or related services performed by insurance brokers etc. and, if so, whether the exceptions in Article 174(2) would, nonetheless, apply. In this case, RP acted as an intermediary between the insurer and the purchaser. To qualify for the insurance exemption, the services must relate to insurance transactions, and the transactions must be performed by insurance brokers and agents. The conditions to be satisfied were highlighted by the court. Firstly, on the sale of extended warranties that take the form of an insurance contract, it indicated that such a supply must be regarded as relating to an insurance transaction within the meaning of Article 135(1)(a). Secondly, the supplier of services must be related to the insurer and the insured party and, if so, the activities must cover the essential aspects of the work of an insurance agent (e.g. the finding of prospective clients and their introduction to the insurer, with a view to concluding insurance contracts).

The court found that RP is in direct contact with both the insurer, whose insurance products, including warranty extensions, it sells, and the insured party, with a view to selling those products when selling goods, and that in so doing it carries out activities that are essentially related to the function of an insurance agent.

As insurance transactions are not covered by the exception in Article 174, the court questioned whether the services could also be classified as incidental financial transactions. Article 135(1)(a), as noted above, covers insurance transactions, whereas Article 135(b) to (g) covers financial transactions, and it is only the latter that can be excluded from Article 174 where they are incidental. In this context the court noted that the transactions are not similar and therefore can be treated differently for the purposes of the exclusion. As the transactions are not similar, the fiscal neutrality principle was not breached.

The court held that Article 174(2)(b) and (c) did not apply to transactions carried out by RP as intermediary in the sale of extended warranties and therefore an apportionment exercise is to be carried out in relation to its input VAT without excluding the turnover from the extended warranty sales.

02 Fund Management Exemption and Outsourced Services

The CJEU delivered its judgment on joined cases ***K* C**58/20, ***DBKAG* C**59/20 ***v Finanzamt Österreich, formerly Finanzamt Linz*** on 17 June 2021. The Austrian tax authorities refused to grant exemption to K and to DBKAG in respect of the exemption provided for in Article 135(1)(g) of Council Directive 2006/112/EC "the EU VAT Directive" (management of special investment funds).

In the case of K, it provided services to investment management companies (IMCs) that related to the calculation of the taxable income of unit-holders from the funds (e.g. tax statements). The IMCs were responsible for submitting the data to the tax authority. K did not charge VAT on its services and relied on the exemption relating to the management of special investment funds, on the basis that the services were specific administrative services essential for the management of the funds.

In the case of DBKAG (fund manager), it paid a German company for a licence to use software that was essential to risk management and performance measurement, and it was also supplied with additional support services, such as training. The invoice issued by the German company fell within the reverse charge, but DBKAG did not account for Austrian VAT and, instead, applied the exemption, on the basis that the software provides services for calculating risk and performance indicators that are specific to and essential for the management of special investment funds.

A similar issue arose in the two cases, and therefore they were considered together. The question referred was whether the exemption in Article 135(1)(g) could apply to services supplied by third-party service providers to management companies that managed special investment funds where those services were tax-related responsibilities (*K* case) and the grant of the right to use specialist software (*DBKAG* case).

The court noted that management services performed by a third-party managers generally come within the scope of the exemption, but to do so, the services must, viewed broadly, form a distinct whole fulfilling in effect the specific, essential functions of the management of special investment funds. The court considered this under two headings – you have to ascertain whether the services, viewed broadly, form a distinct whole, and you have to assess whether the services are specific to and essential for the management of special investment funds.

The court noted that the provision of a service that is specific to and essential for the management of special investment funds must be outsourced in its entirety. But this could lead to a limitation of the practical effect of the possibility for such a service to benefit from that exemption when it is provided by a third party.

In both cases, it will be up to the referring court to assess whether the services supplied must be regarded as being specific to and essential for the activity of managing special investment funds. In the case of K:

> "The fact that it is for the management companies to draw up standardised declarations on the basis of calculations made by a third party and to forward those declarations to the reporting office is not in itself decisive for the purpose of deciding whether such services are covered by that exemption".

In the case of DBKAG:

> "The fact that the software at issue runs only on the technical infrastructure of the management company concerned and can fulfil its functions only in conjunction with the minor involvement of that company through ongoing recourse to market data provided by that company is not in itself decisive for the purpose of deciding whether such services are covered by that exemption".

It is also necessary to examine whether the service provided by the third party is intrinsically connected to the activity characteristic of a management company, so that it has the effect of performing the specific and essential functions of management of a special investment fund. The court considered the meaning of the term "management" in the context of special investment funds and reviewed previous case law on this issue.

The concept covers investment management, as well as administrative and accounting services. The court indicated that if the services are intrinsically connected to the activity of managing special investment funds, they fall within the exemption, but if the services are not specific to the activity of a special investment fund, they do not fall within the exemption.

As accounting and administrative services are covered under the management heading, K's services could be covered by the exemption but only where the conditions are satisfied. In the case of DBKAG, where the grant of a right to use software is provided exclusively for the purposes of managing special investment funds, and not to other funds, it may be considered to be "specific" for the management purpose. The services in both cases could come within the exemption if they are intrinsically connected to the management of special investment funds and if they are provided exclusively for the purposes of managing such funds. It will be for the referring court to determine whether the services provided to the management companies satisfy the conditions highlighted in the decision. The court held that:

> "…..article 135(1)(g) of the VAT Directive must be interpreted as meaning that the provision of services by third parties to management companies of special investment funds, such as tax-related services consisting in ensuring that the income received from the fund by the unit-holders is taxed in accordance with national law and the grant of a right to use software which is used exclusively to carry out calculations which are essential for risk management and performance measurement, fall within the scope of the exemption provided for in that provision **if they are intrinsically connected to the management of such funds and if they are provided exclusively for the purpose of managing such funds, even if those services are not outsourced in their entirety** [emphasis added]".

03 Property Letting and Management and Fixed Establishment

The CJEU delivered its judgment in ***Titanium Ltd v Finanzamt Österreich, formerly Finanzamt Wien*** C-931/19 on 3 June 2021. Titanium, a company with its registered office and management in Jersey, is involved in property management and the management of housing and accommodation. It owns a commercial property in Vienna and let it to two Austrian traders. It appointed a real estate management company in Austria to deal with all matters relating to the property on its behalf. However, Titanium retained the decision-making power to enter into and to terminate leases; to determine the terms of the leases; to make investments and repairs and to organise the financing for same; to choose third-party suppliers; and to select, appoint and oversee the real estate management company itself.

The tax authority argued that the property in Austria constituted a permanent establishment of Titanium in that Member State. Titanium argued that it did not have a permanent establishment in Austria and therefore it was not liable to pay VAT on it's letting activity. The question referred was whether a property let in a Member State constitutes a fixed establishment within the meaning of Article 43 of Council Directive 2006/112/EC "the EU VAT Directive" and Articles 44 and 45 of the EU VAT Directive (as amended) in a scenario where the property owner does not have its own staff to provide the services relating to the letting.

The court referred to earlier case law dealing with the concept of fixed establishment, which implies a minimum degree of stability derived from the permanent presence of both the human and the technical resources necessary for the provision of services. In other words, a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis are required. The court noted that, in particular, a structure without its own staff cannot fall within the scope of the concept of "fixed establishment". Although effective after the tax period in question here, Article 11 of Implementing Regulation No. 282/2011 was also referred to by the court; this provides that a fixed establishment is characterised by, *inter alia*, a suitable structure "in terms of human and technical resources".

In the case of Titanium, it did not have any of its own staff in Austria and it had appointed a real estate management company to deal with certain property management tasks, but it took the important decisions regarding the property itself. The court held that:

> "A property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a fixed establishment within the meaning of both Directive 2006/112 and Directive 2006/112, as amended".

Hence, a property that is let in a Member State by the owner of the property where that owner does not have its own staff to carry out the relevant services does not constitute a fixed establishment.

04 Input VAT Recovery Entitlement and Appointment of Liquidator

The judgment in ***BE, DT v Administrația Județeană a Finanțelor Publice Suceava, Direcția Generală Regională a Finanțelor Publice Iași, Accer Ipurl Suceava, acting as court-appointed liquidator of BE, EP*** C-182/20 was delivered by the CJEU on 3 June 2021. The case dealt with the interpretation of Articles 184 to 186 of Council Directive 2006/112/EC "the EU VAT Directive" in the context of adjustments to input VAT by the tax authority after BE was declared insolvent but in respect of input VAT incurred before the insolvency. BE, which was previously engaged in economic activities for VAT purposes, was declared insolvent and was the subject of a tax audit, as a result of which assessments were raised for repayment of VAT. The input VAT that had previously been deducted related to goods and consumables, capital equipment and the letting of immovable property.

The question referred related to whether Articles 184 to 186 are to be interpreted as precluding national legislation or practice that automatically places an obligation on the trader to adjust input VAT claimed in respect of goods and services acquired before it was declared insolvent.

The court noted that the right to deduct input VAT, as set out in Article 168, is an integral part of the VAT system and may not be limited in principle, and that the adjustment mechanism set out in Articles 184 and 186 is integral to the VAT deduction scheme under the Directive. The purpose of the adjustment mechanism is to establish a connection between the right to input VAT recovery and the use of the goods or services for taxable purposes.

In this case, the tax authority took the view that the insolvency proceedings brought the economic activity of BE to an end, and it therefore sought to make adjustments to BE's VAT deductions before those proceedings. It argued that the transactions after insolvency were carried out only with a view to liquidating assets for the benefit of BE's creditors and had no economic purpose.

The court considered the meaning of the term economic activity and noted that its scope is very wide and it is objective in character, i.e. the activity is considered *per se* and without regard to the purpose or results. The court indicated that the mere fact that the initiation of the insolvency proceedings changes the purpose of the trader's transactions cannot, in itself, affect the economic nature of the transactions engaged in before those proceedings. Once the trader continues its activities during the proceedings, it is in competition with other taxable persons, and hence the supplies would be treated in the same way for VAT purposes. BE continued to be VAT registered during the proceedings and was required to account for VAT on supplies made during that period, which indicated that BE continued to carry on an economic activity. The court was of the view, then, that the initiation of the insolvency proceedings did not break the link between the right to deduct and the use to which the goods and services were put. The court therefore held that national legislation or practice was precluded from imposing an automatic obligation on the trader to adjust its input VAT where the commencement of the proceedings did not prevent the trader from continuing to carry on an economic activity.

05 Entitlement to Input VAT Recovery on Costs Associated with Acquisition of Reversionary Property Interests

Tax Appeals Commission determination ***72TACD2021*** was published on 3 May 2021 and related to the entitlement to input VAT recovery in relation to costs incurred on the acquisition of reversionary interests in property. The properties that the appellant had acquired were subject to legacy leases (leases of 10 years or more created before 1 July 2008). Revenue refused to repay the VAT reclaimed by the appellant in respect of costs incurred on acquisition, e.g. legal services, on the basis that s93(3)(b) of the Value-Added Tax Consolidation Act 2010 (VATCA 2010) precluded the recovery of VAT charged in connection with the acquisition of a reversionary interest. The grant of the legacy leases had been liable to VAT based on the capitalised value of the lease, so that VAT was accounted for upfront on the rental income over the course of the lease term. The appellant acquired the landlord's interest and therefore was entitled to receive the rental payments.

The appellant submitted that it was engaged in an economic activity (the exploitation of tangible property for the purposes of obtaining an income therefrom on a continuing basis). It submitted that the taxable supply was the grant of the lease that had been subject to VAT when it was granted and that therefore there is a right to deduct VAT on costs that have a direct and immediate link to that taxable supply over the term of the lease. The appellant had a right to deduct input VAT in relation to post-letting expenses under s93(3) VATCA 2010 as it was engaged in an economic activity in relation to the property, i.e. its continuing exploitation in return for payment. It therefore argued that the costs incurred in acquiring the reversionary interest should be treated in the same way as the costs that have a direct and immediate link to the same activity.

Revenue submitted that the appellant must establish that the costs incurred have a direct and immediate link to a taxable supply. It submitted that the original grant of the lease, which was a taxable supply of immovable goods, was the only taxable supply that occurred, and hence there can be a right to deduct only in respect of costs incurred for the purposes of that supply.

After a detailed review of relevant case law – in particular, *Erin Executor* [1998] 2 IR 287[1] – and the legislative provisions in operation at that time, the Appeal Commissioner found that:

> "...there is an objective link between the costs incurred by the Appellant in connection with the acquisition of the reversionary interest in [redacted] and the economic activity of the Appellant as a whole of the exploitation of tangible

1 *Erin Executor and Trustee Company Limited (as a trustee of Irish Pension Fund Property Unit Trust) v The Revenue Commissioners* [1998] 2 IR 287.

property for the purposes of obtaining income therefrom on a continuing basis to establish a direct and immediate link to give rise to a right to deduct in full. This interpretation makes it possible to relieve the Appellant of the burden of the VAT paid in the course of its economic activity. Accordingly, the Appellant has a right to deduct under section 59 VATCA 2010."

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court.

06 Understatement of VAT and Income Tax Returns

The Tax Appeals Commission published determination ***73TACD2021*** on 5 May 2021, which concerned an appeal against an assessment to VAT and income tax. The appellant is a sole trader who traded as a publican, and after an audit, Revenue took the view that he had understated his returns. The appellant submitted that the assessments were overstated due to a number of reasons, including the impact of the financial crash on the trade, flooding of the premises and the inability of the appellant to work for an extended period due to ill health. Revenue noted deficiencies in record-keeping as one of the factors leading to the amended assessments. The TAC acknowledged the appellant's arguments and reduced Revenue's assessment to income tax and VAT accordingly. It is unknown if the Tax Appeals Commissioners have been requested to state and sign a case for the opinion of the High Court.

07 Rebate Payments for Medical Products – Entitlement to VAT Repayment

Tax Appeals Commission determination ***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. The appellant supplies a medical product that is ultimately administered in hospital by clinicians to patients. The appellant supplies the medical product to a wholesaler who then distributes it to hospitals. The appellant entered into various agreements with PHICs. The funds flow was described as follows: the wholesaler pays the appellant; the private hospitals pay the wholesaler; and the PHICs pay the private hospitals. The appellant pays the wholesaler for the distribution service and makes rebate payments to the private hospitals and PHICs. The medical product is included in the schedule of benefits of the PHIC and is supplied at the ex-factory price, which is the price paid by the wholesaler and the hospitals – a mark-up is not imposed by the wholesaler. The rebate payments are made after the supply of the medical product to both hospitals and PHICs.

The appellant submitted that the discounts granted to PHICs constitute a reduction in the consideration received by it for the supply of the medical product and therefore that it is entitled to a repayment of VAT. The appellant also makes rebate payments to hospitals, and in respect of such payments, Revenue allows the discounts to be treated as a reduction in the consideration received by the appellant. The appellant argued that the value that it received for the medical product was a value less the rebate payment made to the PHICs in the same way that the rebate payment to the private hospitals reduces the value actually received by it. As Revenue allows discounts granted to private hospitals as a reduction in the consideration received, the appellant argued that the principle of fiscal neutrality would be breached if the rebate payments to the PHICs were treated differently. The appellant argued that the PHICs pay for the product and are therefore the final consumer of that supply.

Revenue argued that the question is whether the conditional payments to the PHICs should be considered as reducing the taxable amount for the supply of the medical product from the appellant to the wholesaler and that the payments made by the appellant to PHICs do not constitute a reduction in the consideration received by the appellant. It submitted that the arrangements between the appellant and the PHICS should be treated as supply of services on the grounds that the agreements do not provide for a supply of goods, as the agreements provide for payments in return for reimbursement cover under all insurance policies and the provision of commercial data. Revenue argued that the final consumer of the medical product is the private hospital and not the PHIC and that the payments fall outside the supply chain of the medical product, which, it argues, is from appellant to wholesaler to private hospitals.

The Appeal Commissioner indicated that the appellant grants discounts to private hospitals and PHICs and that it has contractual agreements that provide for volume-based discounts for the medical product with PHICs and with private hospitals. It was noted that Revenue allowed rebate payments to private hospitals as a reduction in the consideration received by the appellant but has not applied a similar approach to rebate payments to the PHICs. The Appeal Commissioner referred to the CJEU decision in *Boehringer* C-462/16[2], where "it was stated 'one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain'". The Commissioner found that:

> "...having regard to the foregoing, the VAT position of the Appellant in relation to the discounts granted to private health insurance companies comes within the conclusion of the Court in ***Boehringer*** that 'since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place'.

Hence, it was found that the rebate payments constituted a reduction in the consideration received by the appellant in respect of the supply of the medical product, and it was entitled to a repayment of the VAT. The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court.

2 Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH [C-462/16].

VAT News

Ireland

New e-commerce rules

Revenue eBrief No. 132/2021, published on 5 July 2021, announced that a new Tax and Duty Manual (TDM), "VAT Treatment of Intra-Community Distance Sales of Goods", has been published to incorporate the new eCommerce rules effective from 1 July 2021. The TDM "Telecommunications, Broadcasting and Electronic (TBE) Services" has been published to consolidate and update information that was previously provided elsewhere on the Revenue website. The TDM "VAT Treatment of eGaming Services" has also been updated, and the following TDMs have been archived: "VAT on Goods – Distance Sales" and "VAT eCommerce Registration for the One Stop Shop (OSS) and Import One Stop Shop (IOSS) from 1 April 2021".

VAT registration

Revenue eBrief No. 150/2021, published on 31 July 2021, outlined that the TDM Part 38-01-03b, "Guidelines for VAT Registration", has been updated at sections 8.1 and 8.2 to reflect enhancements that enable VAT applicants to apply for postponed accounting through the eRegistration system or on the relevant VAT registration forms.

Third-level research

Revenue eBrief No. 152/2021, published on 3 August 2021, stated that the TDM on "Research Services Carried out by Third Level Educational Bodies" has been updated. The updates primarily reflect the commencement of funding by the European Commission under the Horizon Europe Framework Programme. The eBrief also indicated that the following TDMs have been archived – "VAT Consolidation Act 2010 and Identity Cards" and "Enhancements to the VAT 3 Return in ROS".

UK

Non-EU VAT refunds

Revenue and Customs Brief 10 (2021), "repayment of VAT to overseas businesses not established in the EU and not VAT registered in the UK", outlined the steps being taken by HMRC in relation to VAT refund claims by non-EU-established traders who are having difficulty obtaining a certificate of status from their tax authority. It relates to claims for the period from 1 July 2019 to 30 June 2020. Applications for reclaims were to be submitted by 31 December 2020, and HMRC had previously provided a six-month extension to submit the certificate. However, there are continuing difficulties due to Covid-19 in obtaining certificates of status, and HMRC is granting a further six-month extension, i.e. the certificate of status must be submitted by 31 December 2021. The notice also states that:

> "Businesses must still submit their application for VAT refunds and all other documentary evidence required to process claims for the prescribed period 1 July 2020 to 30 June 2021, on or before 31 December 2021. All certificates provided to HMRC throughout 2021 will remain valid for claims in the prescribed period 1 July 2020 to 30 June 2021."

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

AML for Financial Services Sector

The Central Bank of Ireland has issued an updated version of its "Anti-Money Laundering and Countering the Financing of Terrorism Guidelines for the Financial Sector". The new guidance reflects the changes brought about by the enactment of the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 and is available from https://www.centralbank.ie/.

GoAML

Accountants working in practice should all be registered with GoAML (https://fiu-ireland.ie/Home). GoAML has a message board function for registered users, which identifies the latest prevailing scam or criminal activity and serves as a reminder of the red flags to look out for. Some recent announcements were in respect of vaccine fraud, invoice redirects and investment fraud. Anti-money-laundering supervisors, including professional accounting bodies, like to see a practice being registered as it shows intent to report should a report be needed.

Insolvency Service of Ireland 2020 Annual Report

The ISI's 2020 Annual Report notes that it continued to operate during Covid-19 and processed 1,232 debtor settlement arrangements (PIAs, DSAs and DRNs), down by 200 on the previous year. Bankruptcies halved from 263 in 2019 to 130 in 2020. Given the various moratoriums on debt and repayments, that reduction is not unexpected, notwithstanding the difficult financial situation that people might have encountered during the lockdowns.

Many accountants participate in a scheme called Abhaile, where they make themselves available either as accountants or as personal insolvency practitioners (PIPs) to provide advice to mortgagors in danger of repossession. The scheme is run through MABS (the Money Advice and Budgeting Service). A total of 1,833 vouchers to obtain advice from a professional were issued under the Abhaile scheme. Some 71% of the people referred to a professional adviser were recommended to use a personal insolvency arrangement (PIA), and of those who did, 97% remained in their home after the process. Of the people who used the scheme, an additional 15% ended up with an alternative, informal solution, 4% used the mortgage-to-rent scheme and 4% entered bankruptcy.

Where creditors reject a proposed PIA, the PIP can apply to the court for an order under s115 of the Personal Insolvency Act 2012, and there were 402 such applications in 2020. To date, there has been a 48% approval and a 52% non-approval rate for s115 applications. There is now a significant body of jurisprudence on what will and will not be accepted by the courts, and links to the significant cases are included on page 10 of the ISI Annual Report.

Insolvency Guidance Updated

There has been a recent update to the Statement of Insolvency Practice 9B: Remuneration of Insolvency Office Holders – Republic of Ireland. The guidance deals with the requirements of the legislation, disclosure of fees and agreement of the basis for charging a fee.

Personal Insolvency (Amendment) Act 2021

The legislation has been passed and commenced as of 25 June 2021. It allows for an easing of the conditions to seek a review by the court of the refusal by a creditor to agree to a settlement. Debt relief notices have had an increase in the asset limits allowed from €400 to €1,500. The legislation also allows for the extension of the protective period to give a personal insolvency practitioner more time to put together a personal insolvency arrangement.

UK Businesses Needing to Access the IOSS or OSS

Revenue requires that registrations are made by an agent resident in the EU, but many are reluctant to take on this work as it appears to be quite a manual process and incurs some professional risk without a commensurate return. However, the Royal Mail is offering a solution for UK businesses that need access to the IOSS or OSS; see https://www.royalmail.com/business/international/guide/delivered-duties-paid-ioss.

Rethinking Risk

An ACCA report has recently been released on ERM (enterprise risk management) and the role of accountants in managing risk. The report, "Rethinking Risk for the Future", offers a fresh understanding of how risk management is evolving with the practice and principles of accountancy and how the profession can help foster the mindsets and behaviours needed to address the existential risks that organisations are facing today.

Free Accounting Training Material

FRS 102 is based on IFRS for SMEs, and the latter standard has a suite of free-to-access training material available at https://www.ifrs.org/supporting-implementation/supporting-materials-for-the-ifrs-for-smes/modules/. There are 35 modules, including a number of modules on group consolidations; an area that can problematic for accountants who are more familiar with the mythology used prior to the revision of IFRS 3

Ethical Standard for Auditors (Ireland)

The Irish Auditing and Accounting Supervisory Authority's (IAASA) revised Ethical Standard for Auditors in Ireland became effective as of 15 July 2021. The new standard has an increased emphasis on independence and objectivity, resulting in a number of additional restrictions on non-audit services. There is an enhanced role for the ethics partner, additional restrictions on acting in a management role, and restrictions on gifts and hospitality. The cooling-off period for key audit partners has also been reduced from five to three years. Note that the

IAASA's standard diverges from the UK one, so firms with UK clients will have slightly different requirements.

Firms may complete engagements relating to periods commencing before 15 July 2021 in accordance with existing standards. Engagements to provide previously non-prohibited non-audit services entered into before 15 July 2021, and on which the firm has already started work, may continue until completed in accordance with the original engagement terms, subject to the application of appropriate safeguards.

The standard can be downloaded from http://www.iaasa.ie/Publications/Auditing-standards/Standards-Guidance-for-Auditors-in-Ireland/Ethical-Standard-for-Auditors-(Ireland). Compliance will be most easily achieved by updating any audit work programme checklists.

Looking for New Staff?[1]

There is a shortage of accountants at all levels but particularly accountants with audit and Small- and medium-sized practices (SMPs) experience. The traditional recruitment options are failing to meet demand, and as a result many SMPs are looking abroad for staff. The ACCA jobs board offers a job listing service, which can be free for many employers. That jobs board listing can be geo-locked if you only want to recruit, for example, somebody with Irish tax and Irish company law experience. However, the power of the site is that you can open the advertisement and also recruit from abroad, with reasonably large numbers of Brazilian, Indian, Malaysian, Chinese and Philippino accountants being recruited into positions in Ireland, where the non-EEA work visa scheme makes this a relatively painless process.

Pension Rules and Regulations

On 22 April 2021 the Irish Government enacted the European Communities (Occupational Pension Schemes) Regulations 2021, which transpose Directive 2016/2341 (IORP II) into Irish law. If you are a trustee of a pension, you will need to address IORP II as a matter of urgency.

Audit of Cash-Flow Statements

The Financial Reporting Council (FRC) in the UK has carried out a review of the audit of cash-flow statements. The review was undertaken because of its observation of recurring errors in the preparation of these statements. Some 9% of FRC reviews in 2019/20 and 17% of reviews in 2020/21 identified issues with the cash-flow statement. The FRC said that the majority of misstatements resulted in overstatement of operating cash-flow, a key number for investors and analysts. The review found basic inconsistency and misclassification errors, a lack of challenge to management's calculations, insufficient technical guidance, inadequate review processes and the use of manual cash-flow workings, increasing the complexity of the audit process. The full report is available at https://www.frc.org.uk/getattachment/210aafc1-5b1c-49a2-8a12-884b0654fff8/FRC-Audit-of-Cashflow-Statements-FINAL.pdf.

1 https://taxinstitute.ie/members-2/find-a-job/

FRS 101 Amendments

This standard is used by subsidiaries of IFRS companies that use IFRS accounting but with greatly reduced disclosures. The standard has just been amended, with one disclosure requirement in IAS 16 removed, the disclosure of "the existence and amounts of restrictions on title, and property, plant and equipment pledged as security for liabilities". The amendment also removed a reference to IAS 1 that mentioned paragraphs that had been removed from IAS 1.

Moved by a Tweet

Pump-and-dump schemes are fraudulent price manipulations through the spread of misinformation or, indeed, personal endorsement by somebody in a position of influence. If a stock market trader or listed company executive moved the price of stocks to their own advantage by making a public statement, they would be prosecuted, fined and potentially jailed. The sector is robustly regulated, and there are extensive conflict of interest and disclosure rules. The rules, however, have not caught up with crypto-currency.

The European Commissioner in charge of financial services, Mairéad McGuinness, recently announced that the EU will ban crypto-currency anonymity. The plan would see a requirement for crypto-currency virtual wallet providers to prove the identity of the owners of the crypto-currency. The main aim of the new proposals is to thwart money launderers, but it might also shine a light on pump-and-dump schemes.

New Practice Clients and the RBO

Before entering into a business relationship with a new client, practices must do a search of the RBO (Register of Beneficial Ownership) and confirm that the beneficial ownership details are consistent with their understanding. Short videos on how to search the RBO details for a new client are available at https://www.rbo.gov.ie/how-to.html.

If the new client is not on the register, the RBO has said that the practice should report them using a non-compliance notification form. In practice, the assignment is refused until the client registers on the RBO. If the beneficial ownership details are wrong, then a discrepancy notice is filed – a DN2 form – which is available to the practice's RBO Liaison Officer by contacting discrepancies@rbo.gov.ie.

The rules were brought in for corporate clients by the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 and for trust clients by the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021. Trusts have six months from 24 April 2021 to upload their details for the first time to the RBO. Corporate entities had until 22 November 2019 to do so.

New Auditing Standard for Fraud

The auditor's responsibilities relating to fraud in an audit of financial statements have been clarified by the updating of the UK auditing standard ISA 240. The Irish Auditing and Accounting Supervisory Authority has proposed a similar revision in Ireland. The revised standard makes auditors' obligations clearer, enhances the risk assessment that they carry out and sets clearer requirements for what the auditor then does. ISA 240 has been described by Sir Donald Brydon as "a balancing act between managing, or possibly lowering, expectations whilst seeking to avoid going so far as to affect significantly users' perceptions as to the value of audit". The person with primary responsibility for detecting fraud is the director, and the auditor's role is to provide "reasonable assurance" about whether the financial statements as a whole are free from material misstatement due to fraud. The new standard requires additional professional scepticism, better risk assessment and a requirement to remain alert to fraud during the auditor's work.

Quick Checklist of New Anti-Money-Laundering Law Changes

It may be difficult to maintain full anti-money-laundering (AML) compliance in an accounting practice during a period when multiple new laws and regulations are issued. If you have not updated your procedures since the start of the pandemic, the new legislation requires the following additional procedures:

- Implement a whistle-blowing procedure whereby staff may report internally to the AML reporting officer any instances of non-compliance with AML requirements (a single-paragraph addition to a procedure manual).
- Change engagement letters' reference to "the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Acts 2010 to 2021".
- Check the Register of Beneficial Ownership (RBO) before starting work with a new corporate client to ensure that it is consistent with your understanding.
- Extend the checks of the RBO to new trust clients once that register becomes live.
- File a report of discrepancies if the RBO is incorrect.
- If you have a Politically Exposed Person as a client, then extend your period of supervision beyond the previously required 12 months.
- Amend your standard procedures to require enhanced supervision of clients from high-risk countries.
- Amend your standard procedures to require enhanced supervision of clients with complex businesses or business structures.
- Amend your practice procedures manual to include the new whistle-blowing procedure, RBO verification work and other matters above.

A suite of supporting documents to assist a practice maintain and document its AML compliance is available at https://www.accaglobal.com/ie/en/technical-activities/technical-resources-search/2019/may/aml-guidance.html. In summary, a practice needs a firm-wide risk assessment, a procedures manual and a customer due diligence form, and all staff need to be trained.

Valuing and Amortising Intangible Assets

FRS 102 requires that purchased intangible assets and goodwill be valued at cost and amortised over their useful life. Where that life cannot be measured, a default ten years (previously, five years) is applied. If a business creates its own intangible asset and incurs costs in that creation, such as a patent registration fee, the business may capitalise those direct costs. Internally generated intangible assets where there is no directly measurable cost incurred, e.g. the good name of the business, is not capitalised unless it meets such strict criteria that it might as well be banned outright.

Frequently, businesses object to the requirement to amortise goodwill while the underlying value of the goodwill is still the same or greater than it was on the date of its acquisition. This is especially egregious when generating a good name is itself expensive, so the profit and loss is being hit with a double charge of the goodwill at date of purchase being amortised as it wears out over time and the cost of maintaining the underlying goodwill. IFRS GAAP allows goodwill to be tested for impairment and not amortised, and conversion to IFRS is always an option for a business. FRS 102 continues to require amortisation of goodwill.

Don't Pay the Ransom

When you are hit by a ransomware cyber-attack, it may be tempting simply to pay the ransom or allow your cyber-insurance company to pay it on your behalf. Your clients will be very unhappy to have their information compromised, and it is very expensive to decrypt your computers and restore the information. And, no, you cannot just restore from back-up; most cyber-criminals lurk in your system for six weeks before striking to make sure that the malware in on your back-ups as well. However, it should be noted that s7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 states that:

> *"A person commits an offence if…the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct…transferring, handling…the property…[when] the person knows or believes…the property is the proceeds of criminal conduct."*

Paying a ransom is transferring criminal proceeds and a crime under anti-money-laundering legislation. The penalty is a fine and up to 14 years in prison. Any designated person, such as a bank, insurance company, accountant, cyber-wallet provider or solicitor, who becomes aware that a ransom was paid by their client is obliged to make a suspicious transaction report in respect of that payment. The client may not be told that the report was made. A staff member in a designated business is obliged to report directly to that business's anti-money laundering supervisor (the Central Bank or professional accounting body) if they become aware that a report was not made or that the business itself paid a ransom and did not report itself. A Garda also commented that paying a ransom could be construed as being an accessory after the fact. If nobody paid the ransom, then nobody would need to pay a ransom.

Sustainable SME Checklist

Accountancy Europe has published a sustainability checklist for SMEs, available at https://www.accountancyeurope.eu/wp-content/uploads/3-STEP-sustainability-assessment-for-SMEs.pdf. It should assist SMEs to build a more durable business model.

SORP: Accounting for Charities and Covid 19

Example disclosures for charities that have been impacted by Covid-19 are available at https://www.charitysorp.org/about-the-sorp/example-trustees-annual-reports/. Although these are full SORP financial statements and SORP is not yet compulsory in Ireland, the example disclosures are applicable to non-SORP trustee/directors' reports in Ireland.

IAASA Publishes Annual Report

Every year the Irish Auditing and Accounting Supervisory Authority (IAASA) publishes a summary of its activity, and the 2020 report has just been published. The IAASA directly regulates 8 audit firms, which between them audit 677 public-interest entities (PIEs): 195 insurance entities, 28 credit institutions, 30 equity listed companies, 301 debt listed companies and 123 listed funds. The quality assurance reports on the IAASA's monitoring of these audits are in a separate publication.

In terms of enforcement, the IAASA commenced two s934 investigations of possible contraventions of legislation by a statutory auditor and one s933 investigation into whether a prescribed accountancy body has complied with its approved investigation and disciplinary procedures. The outcome of one of these cases was published on http://iaasa.ie/.

The IAASA also monitors the supervision by professional bodies of their non-PIE audit firms. At the time of the report, there were five recognised accounting bodies (RABs), but since the surrender of registration by ICAE&W and ICAS, there are now only three: ACCA, CPA and CAI. Between them, the RABs have 1,851 statutory auditors resident in Ireland, working in 1,155 audit firms.

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Revenue Commissioner's Update

Gillian Morrow Assistant Principal Officer, Revenue's Business Division
Teresa Cunningham Assistant Principal Officer, Revenue's Business Division

Revenue Outlines VAT Postponed Accounting and VAT Returns

On 31 December 2020 when the UK left the EU VAT regime, Customs Union and Single Market, trade with Great Britain (UK not including NI) became third country trade and goods purchased from Great Britain and brought into Ireland are now treated as imports. These goods are subject to Customs requirements and taxation at the point of importation. To assist businesses to mitigate the associated cashflow impact, postponed accounting arrangements were introduced on 1 January 2021. Postponed accounting is not restricted to trade with Great Britain and may be applied to imports from any third countries.

Many businesses are correctly recording postponed VAT in their returns to Revenue. However, Revenue has identified instances where postponed VAT is not being correctly recorded. This article provides practical advice on avoiding such errors, as businesses continue to adapt to the changes to the relevant returns.

Background

All accountable persons in Ireland that are registered for VAT and Customs & Excise, who import goods from countries outside of the European Union (EU) VAT area, may use postponed accounting arrangements. This is subject to the conditions laid out in the Value-Added Tax Regulations 2010 (Regulations 14A) (Amendment) Regulations 2020.

Postponed accounting allows an accountable person to account for VAT on imports on their VAT3 Return. This results in a VAT-neutral transaction for traders who import goods into Ireland meaning traders do not have to pay VAT at the time of importation. Instead, and subject to the usual rules on deductibility, import VAT may be reclaimed at the same time as it is declared on a VAT3 Return. i.e. the import VAT is simultaneously recorded as VAT deducted on a 'purchase' and charged on a 'sale'. This is similar to how intra-community acquisitions are currently recorded on the return.

The importer rather than his or her customs declarant or representative is obliged to account for the postponed VAT on their VAT3 return and the VAT RTD.

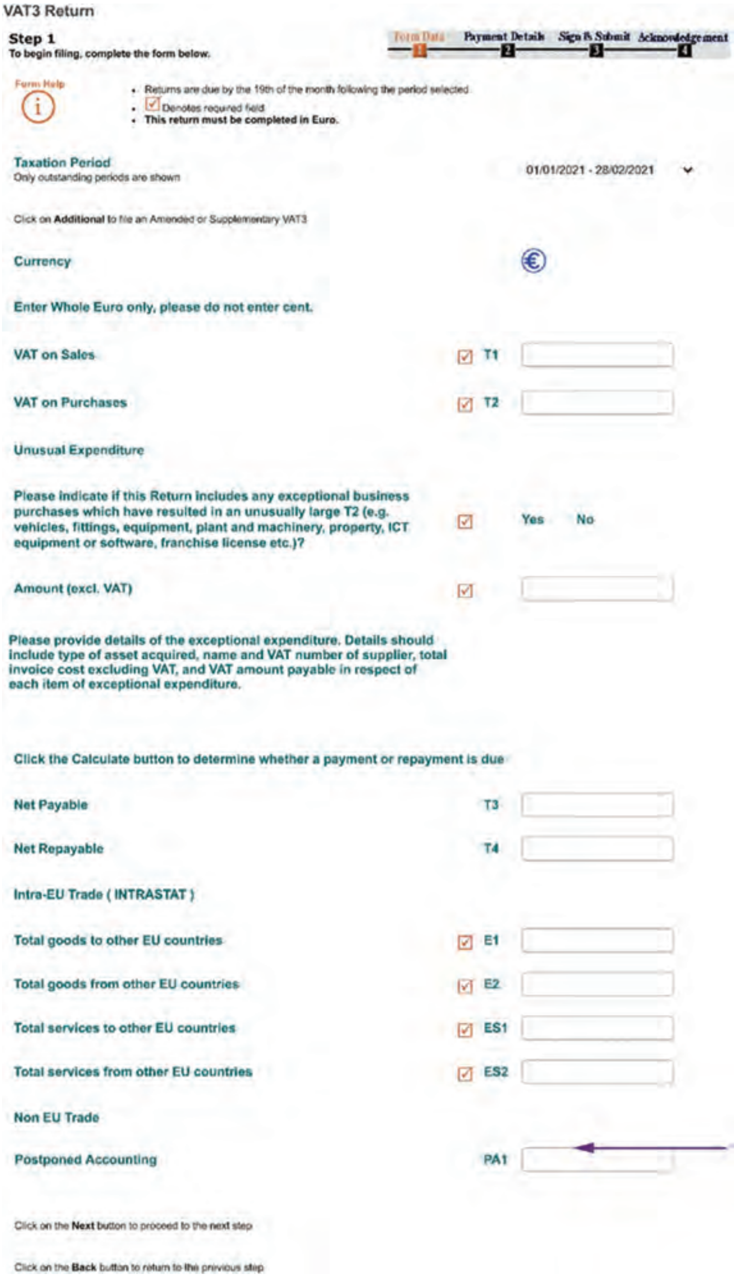
Completing the VAT3 Return

The VAT3 Return was changed to incorporate postponed accounting from 1 January 2021:

- The VAT3 Return includes an additional field 'PA1'. This field is used to capture the Customs value of goods imported under postponed accounting as per Customs Declarations plus the Customs Duty. The figure entered in the 'PA1' field should include all goods imported under postponed accounting regardless of the VAT rate applicable. Imported goods that are classed as zero-rated goods should also be included in the 'PA1' field, if postponed accounting was applied on the Customs Declaration for these particular goods.

- The 'T1' figure on the VAT3 Return should include the amount of VAT applicable to the figure in the 'PA1' field on the return.
- The 'T2' figure on the VAT3 Return should also include the amount of VAT applicable to the figure in the 'PA1' field on the return, subject to the usual rules of deductibility.

Further information and guidance on the Customs value of goods is contained in the Customs Manual on Valuation on www.revenue.ie.



VAT3 Return

Step 1
To begin filing, complete the form below.

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

Form Help

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

Taxation Period — 01/01/2021 - 28/02/2021
Only outstanding periods are shown

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

Currency — €

Enter Whole Euro only, please do not enter cent.

VAT on Sales — T1

VAT on Purchases — T2

Unusual Expenditure

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

Amount (excl. VAT)

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

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

Net Payable — T3

Net Repayable — T4

Intra-EU Trade (INTRASTAT)

Total goods to other EU countries — E1

Total goods from other EU countries — E2

Total services to other EU countries — ES1

Total services from other EU countries — ES2

Non EU Trade

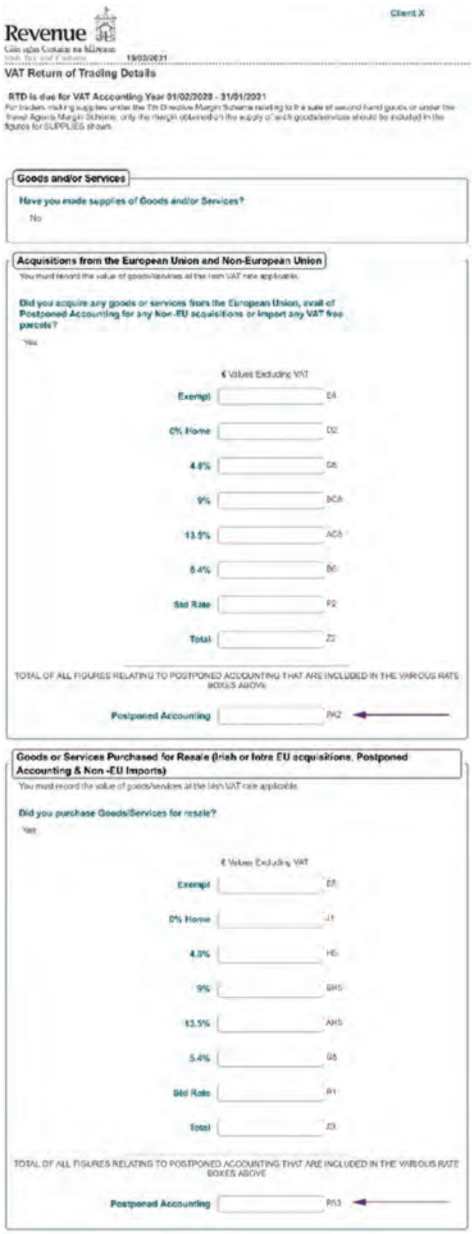
Postponed Accounting — PA1

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

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

VAT Return of Trading Details (RTD)

The VAT Return of Trading Details (RTD) was changed to facilitate the recording of information in relation to postponed accounting. Detailed instructions on how to complete the VAT RTD are contained in the Tax and Duty Manual VAT - Postponed Accounting on www.revenue.ie. This manual also has useful general information on postponed accounting.



Revenue
Client X
19/02/2021

VAT Return of Trading Details

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

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

Goods and/or Services

Have you made supplies of Goods and/or Services?

No

Acquisitions from the European Union and Non-European Union

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

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

Yes

€ Values Excluding VAT

Exempt		E4
0% Home		D2
4.8%		C6
9%		BC6
13.5%		AC6
5.4%		B6
Std Rate		P2
Total		Z2

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

Postponed Accounting PA2

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

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

Did you purchase Goods/Services for resale?

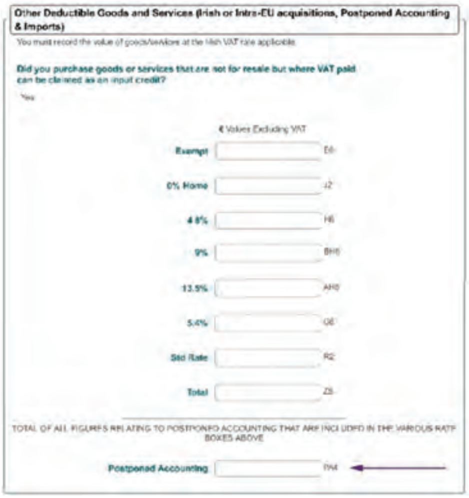
Yes

€ Values Excluding VAT

Exempt		E5
0% Home		J1
4.8%		H5
9%		BH5
13.5%		AH5
5.4%		G5
Std Rate		R1
Total		Z3

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

Postponed Accounting PA3



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

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

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

Yes

€ Values Excluding VAT

Exempt		E6
0% Home		J2
4.8%		H6
9%		BH6
13.5%		AH6
5.4%		G6
Std Rate		R2
Total		Z5

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

Postponed Accounting PA4

The VAT 56A Scheme

A person authorised under section 56(1) of the VAT Consolidation Act 2010 should use that authorisation to import qualifying goods VAT-free under the 56A Scheme. Postponed accounting arrangements should not be used by a person authorised under section 56(1).

Further Guidance

Detailed guidance on postponed accounting is available on the Revenue website at www.revenue.ie and businesses availing of postponed accounting should refer to this guidance regularly.

On Tuesday 15 June 2021, Ray Ryan of the Revenue Commissioners spoke on this topic at an Irish Tax Institute seminar. You can find a recording of it here.

Lauren Clabby
Director, KPMG

Preparing for Pay and File 2021

Introduction

> "Income tax returns are the most imaginative fiction being written today."

It is fair to say that a CTA would certainly not agree with the opinion of American author Herman Wouk on the topic of tax returns. Not being a fictional creation, Form 11s are becoming increasingly complex. This article will highlight a number of aspects of completing a 2020 Form 11 that perhaps require more consideration than might at first be anticipated.

The Practicalities: Administrative Matters

Pay and file deadline

The customary 31 October deadline will apply for 2021 pay and file obligations. As has been the practice in previous years, an extended deadline (17 November 2021) will apply where taxpayers file their 2020 personal tax return and also pay their final 2020 income tax balance and 2021 preliminary tax online. The extended filing date also applies to payments to personal retirement savings accounts, retirement annuity contracts and additional voluntary contributions that qualify for tax relief.

Preliminary tax

Preliminary tax for 2021 should be equal to:

- 90% of the final liability for 2021,
- 100% of the final liability for 2020 or
- 105% of the final liability for 2019.

Compliance with preliminary tax obligations has come under increased Revenue scrutiny in recent years. Interest on underpayments is charged at a rate of 0.0219% per day and is charged from 31 October of the year in question to the date of payment. In addition, the amount on which the interest is charged is 100% of the final liability for the year in question.

Typically, the 105% option is not considered. This option is available only where preliminary tax is paid by direct debit, and it does not apply where the tax payable for the pre-preceding year was nil. It is worth considering that where this option is availed of on an ongoing basis, there must be at least eight equal monthly instalments during the year in question. The number of monthly instalments is reduced to three where the option is being availed of for the first time, thus facilitating the late preparation of the taxpayer's tax return. This option is useful where a taxpayer's income has increased significantly over the previous two years but they have not made adequate cash-flow provisions to facilitate availing of either of the other options above.

Self-correction

Taxpayers can "self-correct" a return without penalties where they realise after filing that the return is not entirely accurate. Revenue allows a taxpayer to "self-correct without penalty" if the following conditions are satisfied:

- the self-correction is notified to Revenue within 12 months of the due date for filing the return that is being adjusted and
- the taxpayer notifies Revenue in writing of the adjustment to be made.

A self-correction will not in itself result in a Revenue audit, but a taxpayer who has been notified of an audit or who has been contacted by Revenue in respect of an enquiry/investigation cannot avail of self-correction.

Tax advisers will be aware that a much stricter regime applies where corrections to prior-year tax returns are being made outside of the parameters of self-correction, particularly if the correction relates to foreign income or assets. Accordingly, where at all possible, the self-correction facility should be availed of.

Local property tax

Failure by the taxpayer to file a local property tax (LPT) return and/or pay the LPT liability by the tax return deadline deems the tax return to be late, and therefore the late-filing surcharge applies.

As noted in Irish Tax Institute and Revenue's Personal Division Meeting[1] Revenue raised the importance of taxpayers regularising their LPT compliance position before their Form 11 is filed. LPT compliance is built into the Form 11, so an outstanding LPT liability or return will automatically result in the application of a Form 11 surcharge. To avoid the surcharge, the LPT outstanding must be dealt with before the income tax return is filed.

Revenue has clarified that this surcharge will not exceed the amount of LPT due where the LPT return and/or payment due is subsequently paid or an agreed payment arrangement is reached. Taxpayers should also be mindful that outstanding LPT returns and liabilities are taken into account for tax clearance purposes.

Form 11 2020: Main Changes

Revenue has published "Income Tax Return Form 2020: ROS Form 11" (Part 38-01-04E of the Tax and Duty Manual), which provides information and guidance on changes to the Form 11. The main changes that advisers should be mindful of are outlined below.

1 https://taxinstitute.ie/wp-content/uploads/2021/02/Final-Summary-Note-of-ITI-Branch-Network-meeting-with-Revenues-Personal-Division-24-September-2020.pdf

Guidance on dealing with Covid-19 business support schemes

There is significant guidance on including details of Covid-19 supports – loss claims, restart grant, Employment Wage Subsidy Scheme (EWSS), Covid-19 Restrictions Support Scheme (CRSS) – in a tax return (see also the separate Covid-19 related discussion below).

Guidance on the Extracts from Accounts

There are a number of changes related to the mandating of certain fields, additional validation checks and a layout change. Revenue has advised that the changes are intended to improve the integrity of data by reducing inaccuracies, which will in turn improve risk profiling and minimise unnecessary contact with compliant taxpayers. All fields are mandatory if turnover is €20,000 or greater, and where turnover is less than €20,000, the existing mandatory fields, marked by an asterisk, remain.

Force majeure

The section of the Form 11 dealing with tax residency now contains questions relevant to filers who are availing of the temporary measures related to residence rules and force majeure circumstances. The questions relate to the period that is to be disregarded for the statutory residence test. A link to Revenue's guidance on the statutory residence test – force majeure in the context of Covid-19, published in December 2020, is included in the manual.

Calculation of TWSS-related liabilities

The Institute asked Revenue about a suggested methodology that employers could use in calculating the tax liabilities related to the Temporary Wage Subsidy Scheme (TWSS) for self-assessed employees or directors that could be paid BIK-free (by the 30 September 2021 deadline). Appendix 3 of the manual sets out two suggested options for self-assessed employees or proprietary directors to determine whether there is an underpayment of income tax and USC on TWSS income and to calculate its value. Self-assessed employees or proprietary directors can either apply their marginal rate of tax (20% or 40%) and USC (0.5%, 2%, 4.5% or 8%) to the amount of TWSS received or use the calculation facility in the 2020 Form 11 (i.e. to compare the calculation of the liability with and without the TWSS income, without submitting a return). These are suggested options to assist with the calculation of the TWSS-related liability and are not mandatory. The manual emphasises that employers must engage directly with employees and agree the value and the method to pay the liability.

Note to amend assessment if employer is paying the TWSS tax

Paragraph 11.2 advises of the note to appear on the assessment where the taxpayer is in receipt of TWSS income. The filer will be reminded that where an employer is paying the liability arising on the individual's TWSS income and is doing so after the income tax return has been filed,, the individual needs to amend the return. This amendment should be made after the tax has been paid. This will ensure that credit for the tax paid is given.

Non-resident landlords

The Form 11 for 2020 was updated to reflect the legislative requirements regarding the tax treatment of non-resident landlords.Taxpayers who are non-resident landlords are now required to confirm if;

- the Form 11 is being prepared by a collection agent, or
- whether tax was withheld by the tenant from the gross rents.

Difficulties were encountered in completing the Form 11 where neither scenario applied, for example, where tax was not withheld by the tenant and the non-resident landlord had not appointed a collection agent but was filing the return in their personal capacity. A temporary work-around has been implemented to facilitate the filing of the Form 11 for 2020 in such circumstances pending further updates to the form. Even if tax has not been withheld by the tenant, this box should still be ticked on the form if a collection agent has not been appointed. The filer should make **no entry** in the field "Amount of Irish Tax Withheld" in these circumstances. The Institute had engaged with Revenue on the difficulties in completing the Form 11 resulting in the temporary workaround and requested confirmation that the use of the suggested approach does not constitute the filing of an incorrect return. Revenue has confirmed[2] that the work-around will not deem the tax return to be incorrect, provided that no amount is entered in the "Amount of Irish Tax Withheld" (where tax has not been withheld by the tenant). The Institute has also raised the legislative provisions underpinning the tax obligations on non-resident landlords in its recent Pre-Finance Bill submissions[3] seeking a more streamlined approach to their compliance obligations.

Summary of information pre-filled by Revenue

Appendix 2 of the manual provides a summary of the information pre-filled by Revenue, where available, when a pre-populated version of the Form 11 on ROS is used. Taxpayers should be mindful that, with the exception of income data (including information relating to social welfare payments received during 2020) – which is detailed in large, highlighted boxes – all information contained (in the standard boxes) is carried forward by Revenue from the 2019 tax return, so caution is advised when completing a pre-populated form.

The manual notes that the questions relating to the Employment Investment Incentive (EII) are being updated.

The New Complexities: Covid-19

Stay and Spend scheme

The Stay and Spend incentive delivered a tax refund of up to 20% for taxpayers who spent a minimum of €25 on accommodation, food and non-alcoholic drinks between October 2020 and April 2021, up to a maximum refund of €125 per taxpayer or €250 per jointly assessed couple. The tax credit may be set against the claimant's USC liability where they do not have a sufficient income tax liability to absorb the credit fully in the year of assessment. Receipts can be submitted to Revenue via the Revenue Receipts Tracker, which can be found in myAccount or ROS and the amount of the claim is included in the Form 11. Clients can download and send the PDF summary to their agents and that summary can be used for tax return preparation purposes.

Remote working from home

Remote working relief can be claimed for:

- 10% of the cost of electricity and heat incurred, apportioned based on the number of days worked at home over the year; and
- 30% of the cost of broadband incurred, apportioned based on the number of days worked at home over the year.

Similarly to the Stay and Spend scheme, receipts must be submitted to Revenue and then included in the Form 11. A claim cannot be made in respect of amounts made good by the taxpayer's employer.

New office equipment purchased during 2020, such as laptops, office furniture and printers, does not qualify for any form of tax credit.

Debt warehousing[4,5]

The debt warehousing scheme has been extended until the end of 2021. In practical terms, this means that taxpayers will not have to pay warehoused tax liabilities until 1 January 2023, with interest at a rate of 3% applying for a certain period thereafter.

2 Paragraph 4, Revenue Tax and Duty Manual Income tax return form 2020 ROS Form 11.

3 2021-07-01-ITI-Pre-Finance-Bill-2021-Submission.pdf (taxinstitute.ie) 2 July 2020 – Pre-Finance Bill 2020 submission https://taxinstitute.ie/wp-content/uploads/2020/07/2020-07-02-ITI-Pre-Finance-Bill-2020-Submission.pdf

4 See article by Paul Nestor "Finance Act 2020: Overview of Covid-19-Related Measures", *Irish Tax Review*, 34/2 (2021).

5 See article by Florita Dolly "Financial Provisions (Covid-19) (No. 2) Act: What Do the Measures Mean for Individuals and Companies?", *Irish Tax Review*, 33/4 (2020).

A credit for tax deducted from the emoluments of a proprietary director will not be available where the company has warehoused its PAYE tax debt (it is worth bearing in mind that if the proprietary director in question qualifies for debt warehousing in a personal capacity, the Schedule E component may be warehoused thus avoiding cashflow difficulties for the individual)

The Institute has raised this matter with the Minister for Finance in our Pre-Finance Bill 2021 submission, seeking legislative amendment in recognition of the unique situation arising from the pandemic.

Loss relief for self-employed

Section 395A of the Taxes Consolidation Act 1997 (TCA 1997) provides for income tax relief in respect of losses incurred in the period 1 January 2020 to 31 December 2020 (and for 2021 for certain taxpayers). The relief is available to individuals carrying on a trade or profession, either as sole traders or in partnerships. The section provides that where, in a year of assessment, an individual carrying on a trade or profession:

- incurs a loss that would, but for the operation of this relief, be available to carry forward to the following year of assessment, and
- all or part of the loss is incurred in the relevant period,

the individual may claim to have any part of the loss that is incurred in 2020 carried back and set off against the profits of the same trade or profession for the year of assessment 2019 subject to a maximum claim of €25,000. Where such relief is given, relief in respect of the loss may not be claimed under any other provision of the Income Tax Acts. If a taxpayer made an interim claim for 2020 losses on their 2019 income tax return, they should review the Form 11 2019 as necessary. If a taxpayer is making an interim claim for 2021 losses on their 2020 Form 11 guidance is provided by Revenue in Part 12-01-03 of their Tax and Duty Manual.

Tax treatment of government supports

There should be no income tax implications for employers whose employees received TWSS payments.

The EWSS is taxable income for employers, but a tax deduction is available to the employer for the portion of wages subsidised by the EWSS.

A CRSS payment is treated as a reduction of otherwise tax-deductible trading expenses for tax purposes and therefore is, effectively, a taxable payment that is subject to income tax. However, for taxpayers who have incurred significant trading losses in 2020, this should result only in a reduction of the amount of those trading tax losses available to carry forward to future periods rather than triggering an income tax liability.

No special tax treatment applies to the restart grant, and the grant is therefore taxable under general rules on the taxation of government grants and depends on whether the grant was expended for capital or revenue purposes.

The Old Complexities

Domicile levy

For 2020 the domicile levy of €200,000 and the filing of a Form DL1 apply where an individual:

- is Irish domiciled – the requirement to be an Irish citizen does not apply for 2012 and subsequent years,
- has worldwide income for 2020 in excess of €1m,
- holds Irish property valued at in excess of €5m on 31 December 2020 and
- has an Irish tax liability for 2020 of less than €200,000.

The scope of the domicile levy is wider than anticipated when it was introduced by Finance Act 2010. Initially, it was thought to apply only to non-Irish tax resident individuals, but although it was introduced to target such taxpayers, the underlying legislation does not limit the charge in this way. Accordingly, it can apply to all taxpayers who otherwise satisfy the criteria. Tax practitioners should also be mindful that Revenue does not consider that universal social charge (USC) comprises part of a taxpayer's Irish tax liability for the purpose of determining whether the €200,000 threshold above has been exceeded. This view has been upheld by the Tax Appeals Commissioners. Where the €200,000 levy is payable for 2020, it may be offset by income tax (not USC) paid for 2020.

High-income earner restriction

Since 2007 a high-income earner restriction has applied to those claiming "specified reliefs". There is a limit on the use of specified reliefs by taxpayers with "adjusted income" in excess of €125,000. The specified reliefs are restricted to €80,000 or 20% of the relief due before the restriction, whichever is greater. Tapering relief applies to taxpayers with income of between €125,000 and €400,000. In the case of married taxpayers, each spouse has a €125,000 threshold. In addition to filing a Form 11, those taxpayers subject to the high-income earner restriction are obliged to file a Form RR1.

Finance Act 2020 deleted a number of specified reliefs from Schedule 26B TCA 1997; however, these were reliefs that were no longer available in any event, e.g. exemption of profits or gains from stallion fees.

Property relief

Finance Act 2012 introduced a 5% property relief surcharge in the form of an increased USC charge where annual gross income is at least €100,000 (as calculated in accordance with USC computational rules). The surcharge applies to income sheltered by property reliefs, i.e. "specified" reliefs. The increased USC charge is calculated before taking the high-income earner restriction into consideration.

Passive investors should not claim any unused accelerated capital allowances carried forward beyond 2014 (or the tax life of the building or structure, if later).

Home Renovation Incentive

The Home Renovation Incentive (HRI) allowed homeowners to claim tax relief on the cost of home improvements undertaken by tax-compliant contractors. The relief was originally due to expire on 31 December 2016 but was extended by two years to 31 December 2018.

The main features of the scheme are:

- It applies to owner-occupiers from 25 October 2013 and landlords from 15 October 2014.
- The tax relief equates to the 13.5% VAT being charged by the contractor, with a minimum spend requirement of €4,405 (before VAT at 13.5%) per property.
- The excess of expenditure over €30,000 does not qualify for tax relief.
- Tax relief is claimed over the two years after the year in which the expenditure was incurred, and details should be included in the taxpayer's tax return for those two years. Therefore 2020 is the last year in which a credit is available for this relief.
- Details of qualifying work are available on ROS.

Foreign income: double taxation relief

Individuals who are Irish tax resident and domiciled are subject to Irish income tax on a worldwide basis. Many taxpayers invested in foreign property. Such investors are normally taxed in the foreign country, by virtue of the property's being located there, but are also taxable in Ireland, by virtue of being Irish tax resident.

For Irish tax purposes, the net taxable rental income must be calculated in accordance with Irish computational rules. The main difference between Irish and foreign rental tax computations tends to be in the area of capital allowances/wear-and-tear. By way of example, before 2015/16, wear-and-tear for UK tax purposes was typically 10% of the net rent from residential lettings; this has since been replaced with "replacement domestic item relief".

Although rental profits and losses from different foreign properties can be pooled, and for the most part foreign income is collectively categorised as being Schedule D, Case III, foreign rental losses cannot be used to offset non-rental sources of foreign income but, instead, are carried forward and can be used to offset future foreign rental income.

The double taxation agreement (DTA) between Ireland and the other jurisdiction concerned will usually provide that a credit is to be allowed in the taxpayer's Irish tax return for tax paid in the foreign jurisdiction. The following steps summarise the methodology used to determine the relief allowed in respect of foreign tax paid for Irish tax purposes:

- Calculate the effective rate of foreign tax.
- Calculate the effective rate of Irish tax.
- Gross up the **net** foreign income, i.e. foreign income less foreign tax at the lower of the foreign effective rate or the Irish effective rate.
- Where the revised foreign income is less than the **gross** foreign income, the difference is the amount of relief, which is given by way of a deduction from income (in addition to a credit).
- The tax credit available is the difference between the re-grossed net foreign income and the net foreign income.
- The grossed-up foreign income is the amount to be included as the income figure in the tax computation.
- Any remaining tax is available for offset against the taxpayer's USC liability.

These steps must be followed in respect of each separate source of foreign income, i.e. multiple foreign income sources cannot be amalgamated for the purpose of calculating the foreign tax credit allowable.

Tax practitioners should be mindful that many DTAs allow for a foreign tax credit of 15% in respect of foreign withholding tax on foreign dividends (any amounts in excess of 15% must be recovered from the relevant foreign tax authority), and DTAs do not necessarily cover all taxes and levies, e.g. US state taxes.

Foreign income: attribution of income

Section 806 TCA 1997 relates to the transfer of assets abroad and typically operates to tax the income of foreign companies and trusts on Irish-resident shareholders and beneficiaries. Originally, s806 did not apply if the relevant transactions were genuine commercial transactions that were not designed to avoid Irish tax and did not apply to non-domiciled individuals.

Finance Act 2017 amended s806: now, where EU entities are involved, s806 can apply unless genuine economic activities are being carried on in an EU Member State, EEA or the UK (and reference to the motive for/main purpose of the arrangement or scheme being to avoid tax is removed). After Finance Act 2015, where a non-domiciled individual is in receipt of income out of assets that have been transferred abroad, the remittance basis of taxation is not available.

Foreign income: portfolios

The area that possibly presents the greatest difficulty for a tax adviser when preparing a tax return is determining the status of different assets held in an investment portfolio. The popularity of collective investment vehicles has soared in recent years, and where such vehicles are domiciled outside Ireland, they are typically considered to be "offshore funds" as defined under Irish law. As most practitioners know, such a classification is not necessarily favourable for a taxpayer. Revenue's Tax and Duty Manual Part 27.02.01, which was last updated in June 2020, includes very useful decision trees to assist in determining the nature of foreign investments that have the appearance of possibly being offshore funds. Key points to remember when reviewing portfolios are:

- An eight-year charge applies to EU/EEA/OECD-regulated funds, i.e. a disposal is deemed to occur based on the uplift in value of the fund in the eight-year period. The onus is on the taxpayer, not the fund manager, to calculate the tax due and return details of the deemed disposal in their tax return.

- The death of the holder of an EU/EEA/OECD-regulated fund triggers an exit charge. The units of the fund are deemed to have been disposed of and immediately reacquired by the deceased for market-value consideration (this is often overlooked and is particularly detrimental where the fund is bequeathed to a spouse and it was assumed that no tax would arise).
- Loss relief is not available in respect of losses arising from an EU/EEA/OECD-regulated fund.
- The remittance basis does not apply to gains arising from regulated funds within the EU/EEA/OECD.
- As regards ETFs, current Revenue guidance confirms that, for investments made on or after 1 January 2014, it will accept that ETFs domiciled in the USA, the EEA and other OECD countries would not be regarded as having structures and regulation that would be similar in all material respects to Irish ETFs, which would take them out of the tax regime applicable to offshore funds and bring them into the mainstream income tax and capital gains tax treatment that would apply to share investments generally.

Guidance on the appropriate tax treatment of investments is ever evolving, and tax advisers should review the guidance regularly. Readers are reminded in particular that Revenue advised in September 2021 that prior guidance which confirmed that investments in ETFs domiciled in the USA, the EEA or in an OECD member state (other than the USA) with which Ireland has a double taxation treaty follows the treatment that would apply to share investments generally does not apply to such investments with effect from 1 January 2022.

Foreign bank accounts

Opening a foreign bank account deems a taxpayer to be a "chargeable person" for self-assessment purposes in the year in which the bank account is opened. Full details of the bank account, including the amount of money deposited, must be reported.

Individuals should be mindful that opening an online bank account that is regulated by a foreign authority could constitute the opening of a foreign bank account for Form 11 reporting purposes.

It is worth considering that foreign currency is a chargeable asset in its own right. Examples of currency-related disposals for capital gains tax purposes are:

- converting foreign currency into any other currency and
- moving foreign currency from one bank to another bank.

Where foreign currency has been acquired on different dates but the entire amount has not been disposed of for CGT purposes, the FIFO rules apply in identifying what has been disposed of for base cost calculation purposes.

Finance Act 2020 amended the rules relating to transfers of foreign currency. In summary, the change ensures that **either a gain or a loss** accruing on a disposal of a debt (i.e. money on deposit) shall not be a chargeable gain or allowable loss where the sum standing to the credit of the holder of the account concerned is transferred in whole or in part to another account of that holder in the bank concerned or in any other bank **in the same currency**. The current base cost is maintained, so although there is no capital gains tax when the foreign currency moves from one account to the other, when the foreign currency in the new account is eventually disposed of the base cost is the cost of the original foreign currency, not the replacement foreign currency.

Foreign authority reporting

As tax advisers will be well aware, clients with foreign assets are coming to Revenue's attention as a consequence of the sharing of information by foreign authorities under exchange of information provisions including FATCA and CRS. Taxpayers should be reminded that information that can be shared with Revenue includes:

- personal details of the taxpayer,
- bank account numbers,
- the name and identifying number of the reporting institution,
- the account balance or value as at 31 December of the particular year,
- the date of closure of the account and
- details of interest or other income earned.

Mobile employees: SARP and FED

The special assignee relief programme (SARP) is available to an inbound assignee who commences an assignment in Ireland during the years 2012 to 2022, inclusive. For 2020, the relief operates by granting an exemption from income tax on 30% of the assignee's employment income over €75,000, subject to an income cap of €1m. The SARP does not extend to PRSI or USC, but taxpayers who qualify for the SARP may also be entitled to receive, tax-free, certain travel expenses or costs associated with their children's education.

In broad terms, the criteria for eligibility for 2020 are:

- The assignee must earn a salary of at least €75,000, exclusive of bonuses, benefit-in-kind etc.
- The assignee must work in Ireland for at least 12 months.
- The assignee must have been non-tax resident in Ireland for a minimum of five years before arriving in Ireland.
- The assignee must have worked for their foreign-based employer for at least six months before arriving in Ireland.
- The assignee must commence their Irish assignment during the tax years 2012 to 2022, inclusive.
- The employer must be incorporated and resident in a country with which Ireland has DTA/information exchange agreement or be an associated company of such a company.

For 2020, the foreign earnings deduction (FED) applies to taxpayers who spent at least 30 qualifying days in a year working in certain specified countries. A day qualifies if it is one of at least three consecutive days throughout which the taxpayer works in a qualifying country.

The relief operates by way of a deduction against employment income, subject to a maximum deduction of €35,000. Where the taxpayer is also entitled to claim a credit for foreign tax paid on the same income in accordance with a DTA, the amount of FED being claimed must be reduced by the amount of income generating the foreign tax credit.

Share schemes

With the exception of stock options, PAYE has been applicable to share awards since 1 January 2012. Taxpayers who exercise unapproved stock options continue to be obliged to pay the income tax, USC and PRSI due on the exercise through the RTSO regime and are considered chargeable persons in accordance with s128 TCA 1997.

The acquisition of employee shares should alert the tax practitioner to the possibility of a disposal (to fund any tax liability arising on the acquisition). Where employee shares are subject to a "clog" (thus benefiting from a reduced taxable benefit-in-kind value) are sold, Revenue has confirmed that it is the full market value of the shares that is applicable for CGT base cost purposes where the shares were already in existence, i.e. they were not acquired as new shares on subscription.

Department of Social Protection payments

Tax practitioners should be mindful that the Department of Social Protection now exchanges data with Revenue in respect of payments made by the former. Although social welfare payments are exempt from USC and PRSI, they may be subject to income tax. Typical examples of taxable payments are PUP, maternity benefit, paternity benefit, illness benefit and state pension payments.

Taxation of married couples

The deadline for claiming separate assessment for 2020 income tax purposes was 31 March 2020. Such a claim cannot be backdated and continues into future years until it is withdrawn. The spouse or civil partner who made the initial claim for separate assessment must be the person to withdraw it, and again a 31 March deadline in the year in question applies.

Capital gains tax

Capital gains tax (CGT) is an integral part of a Form 11 tax return. Taxpayers who are not obliged to file a Form 11 are still obliged to return to Revenue details of any chargeable disposals made by filing a Form CG1, even where no tax is due because of the availability of reliefs, losses etc. A typical example of this could be the disposal of a property in the UK. Such a disposal before April 2015 (if residential) or April 2019 (if commercial) would not have been subject to UK CGT if the property was owned by a non-UK tax resident. However, UK CGT now applies, and UK tax on such a sale may mitigate Irish CGT on that disposal through claiming a credit for UK tax paid.

Capital gains tax on disposals made from 1 January 2020 to 30 November 2020 should have been paid by 15 December 2020, and in respect of disposals made in December 2020 by 31 January 2021.

Capital acquisitions tax

Although capital acquisitions tax (CAT) is not an integral part of a Form 11 tax return, it is mandatory to disclose the receipt of a gift or inheritance on a personal tax return.

Delivery to Revenue of a return and discharge of the associated CAT liability in respect of gifts or inheritances with a valuation date arising from 1 September 2020 to 31 August 2021, inclusive, must be undertaken by 31 October 2021 (or 17 November 2021, if filing online).

Filing of CAT returns through ROS is mandatory from 14 June 2010. Paper returns are permissible only where:

- no relief, exemption or credit is being claimed other than the small gift exemption,
- the interest in the gift/inheritance is absolute, with no conditions or restrictions, and
- property is being taken from one disponer only and is not part of a larger benefit or a series of benefits taken by the beneficiary on the same day.

It is mandatory to report all agricultural or business relief claims since 19 December 2020.

Conclusion

The Covid-19 pandemic has, similarly to all aspects of life, added complexity to the 2020 Form 11 that will impact a wide cross-section of taxpayers. The claiming of the various reliefs and the corresponding entries on tax returns are likely to be subject to increased Revenue scrutiny as time goes on. Being a diligent tax practitioner is increasingly challenging in circumstances that are constantly evolving, as even before Covid-19, in the authors view despite growing tax complexities which the ordinary taxpayer faces, the level of tolerance of minor errors has decreased.

Key Temporary Covid-19 concessions pertaining to Pay & File 2020

Directly transposed from www.revenue.ie

Temporarily step out of income averaging for farmers

Note
This is available to farmers who may also have stepped out of income averaging in one of the four preceding tax years.

Farmers have an option to step out of income averaging for the tax year 2020.

To avail of this additional step-out option, you must have:

- used the option to temporarily step out of the averaging regime in one of the four preceding years of assessment

  and
- sustained a loss in the period 1 January 2020 to 31 December 2020.

Where such an election is made, you may not elect to step out of averaging for a further five years.

Transborder Workers Relief

Employees might be required to work from home in the State due to COVID-19 restrictions. In this situation an individual will still be entitled to claim Transborder Workers' Relief.

This concessionary measure began in 2020 and will continue to apply for the tax year 2021 where:

- an employee is required to work from home in the State due to COVID-19

  and
- all other conditions of the relief are met.

Section 482 Buildings and gardens re-opening

Usually the Relief for expenditure on approved buildings and gardens is clawed back if your building or garden no longer offers reasonable public access.

In 2021, Revenue's assessment of 'reasonable public access' is guided by the Framework for Living with COVID-19 Plan. It is expected that properties located in a region to which restrictions in line with:

- Level 1 are open to visitors, but may restrict the number of visitors at any one time to a group of ten
- Level 2 are open to visitors but may restrict the numbers of visitors at any one time to a group of six
- Level 3 or higher will be closed to visitors.

These are the expectations of all properties unless the occupiers of the property have been advised to self-isolate by a doctor.

Note
Determinations will not be revoked where the restrictions are correctly adhered to.

Visitor appointments

Revenue accept that all visitors may be required to make an appointment before visiting a property. This is on the condition that appointments can be made for days the property is scheduled to be open to the public.

Residence rules

Note
The force majeure concession will not apply where the departure is after 1 June 2020. The exception to this is if you were prevented from leaving the State on or by 1 June 2020 due to contracting COVID-19.

Force majeure circumstances

If you are prevented from leaving the state due to COVID-19, Revenue will consider this ‘force majeure’ for the purpose of establishing tax residence.

Your departure will have been considered prevented if:

- you have COVID-19 or a family member or partner with whom you are travelling has COVID-19
- you are being quarantined or self-isolating in a particular location due to suspected COVID-19
- you are self-isolating whether on advice from a health professional or public health guidance or self-imposed
- you have received medical advice not to travel
- an employer requests that you not travel
- border controls or entry restrictions in your home country prevent you from returning
- there was no availability of commercial flights.

Maximum length of time that may be disregarded

The period that may be disregarded is the day after the original planned departure date up to whichever is the earliest of:

- 18 May 2020
- the actual departure date.

If you travelled to the State between 24 March and 5 May 2020 this disregarded period is subject to a maximum of 30 days. The exception to this is if you were prevented from leaving due to contracting COVID-19.

The days in the disregarded period must be consecutive days.

If you had more than one trip to the State during the period up to 5 May 2020, only days relating to the first trip will be considered for this concession. Any days relating to a second or subsequent trip do not qualify for relief under this force majeure concession.


Brendan Murphy
Tax Partner, Roberts Nathan
Kevin Donovan
Tax Assistant Manager, Roberts Nathan

Corporation Tax Returns for 2020: Key Considerations

Introduction

In last year's September edition of *Irish Tax Review* the authors set out the considerations from a corporation tax compliance perspective for 2020 corporation tax filings. It is fair to say that one did not expect at that time to be writing a follow-up article this year which was still dominated by the impact of Covid-19. However, with the country gradually reopening, we can be hopeful that future articles will not require the same focus on the pandemic.

This September could prove to be a particularly busy one for those involved in the corporation tax compliance cycle. Reliefs from surcharges have been removed, and many businesses may be behind schedule on finalising their accounting information due to closures and the pressures of reopening. Similarly, for this reason the authors consider that some corporation tax returns may have been filed based on draft financial statements, or even management accounts where financial statements were not available, in the last 18 months. Therefore, for those taxpayers this compliance cycle will have the added burden of reviewing the original returns and ensuring that amended returns are filed if required. This is particularly important where the taxable profits have increased compared to the draft financial statements, as taxpayers can self-correct corporation tax returns in certain circumstances without incurring a penalty if corrected within 12 months of the due date for filing the corporation tax return.

The authors summarise below some of the other key areas for practitioners to consider ahead of the corporation tax deadline, along with the changes to the Form CT1, which will be of assistance to advisers approaching this busy period.

Impact of Covid-19

Late-filing surcharges and loss relief restrictions

In response to the Covid-19 pandemic, Revenue last year announced that late-filing surcharges and loss relief restrictions would not be applied in respect of late corporation tax returns and iXBRL financial statements for companies with accounting periods ending on or after 30 June 2019. This concessionary treatment was cited to last "until further notice".

On 30 March 2021 Revenue gave notice that this concession would cease to apply from 1 July 2021. The concession was beneficial for the time it was in place, but it is important to remember that debt warehousing does not extend to corporation tax liabilities. As a result, payments due on a date before 1 July 2021 became due immediately from 1 July. It is therefore vital that corporation tax returns for 31 December 2020 are filed on time to ensure that costly late-filing surcharges and loss restrictions are not applied.

The rules around iXBRL financial statements have been in place for a number of years, and they continue to be required within three months of the due date for filing corporation tax returns unless all of the following criteria are satisfied:

- the total assets of the company do not exceed €4.4m,
- the turnover of the company does not exceed €8.8m and
- the average number of employees does not exceed 50.

Revenue also requires iXBRL financial statements to be filed by companies whose tax affairs are dealt with by the Large Corporates Division, even where all of the above conditions are satisfied.

Given the comments above in relation to late preparation of accounts and the use of draft accounts, an important exercise will be required by practitioners to ensure that the final agreed financial statements reflect the accounts submitted for iXBRL purposes. It is common for Revenue queries to be raised on variations arising in information included in the iXBRL financial statements and the Form CT1, so it is important that there is consistency between the results reflected in the filings.

Preliminary Tax

With regard to preliminary tax payments arising during 2020, in the authors experience a greater proportion of companies than normal opted to base the payment on 90% of the current-year expected liability rather than 100% of the prior-year liability. The requirement to satisfy preliminary tax rules should, therefore, be kept in mind for these taxpayers when preparing 2020 corporation tax returns, as top-up payments may be required before filing, once the liability is known, to minimise any interest exposure.

For companies that are generally regarded as "large" for preliminary tax purposes, there may be movements between being "large" and "small" companies for preliminary tax purposes in recent years. It is important to monitor the timing of when a company falls into the 'large' category, i.e. when its corporation tax liability for a period is greater than €200,000, to ensure that the correct preliminary tax treatment is applied.

Loss Relief

Many previously profitable companies may find themselves in a position where they have incurred trading losses for the first time due to the impact of Covid-19. With this in mind, it is important to consider the wide range of options available for utilising these losses immediately instead of carrying them forward to be used in subsequent periods.

These losses may be offset against trading profits and investment income arising in the prior accounting period, along with profits from separate trades or investment income in the current period. The losses can also be surrendered to other group companies where the minimum shareholding relationship exists.

However, companies should exercise care to ensure that the losses are utilised in the correct order as set out in legislation.

R&D Tax Credit

There has been some focus over the last 12 months on the type of expenditure that qualifies for the R&D tax credit.

The updated position regarding rent is included in a new section of the Tax and Duty Manual. Revenue's current approach is to allow rental costs as qualifying expenditure only where it would not be possible to carry on the R&D activities outside of a specialised setting such as a laboratory or clean room. This is differentiated from the cost of renting office spaces or spaces for manufacturing. Given the topicality, it is important to review the nature of the rented facilities for any R&D claims being included in corporation tax returns.

Enhancements to the R&D tax credit regime for small and micro companies were introduced in Budget 2021, the most notable being the increase in the tax credit rate for such companies to 30%. These companies may now also make claims for R&D tax credits before the commencement of their trades.

Companies can be considered small and micro where they have:

- fewer than 50 employees,
- turnover of less than €10m and/or
- a balance sheet total of less than €10m.

However, it is worth noting that despite the 30% R&D rate being included in the Form CT1, this has not yet been approved by ministerial order. Therefore, small and micro companies cannot yet claim the 30% rate and should be careful to ignore this option on the current Form CT1.

Close Company Considerations

Revenue has allowed a 9-month extension to the 18-month window in which companies can make a distribution without incurring a close company surcharge. To avail of this concession an application via MyEnquires is required. The concession is available on the basis that the company's cash-flow is affected by Covid-19 and it is not in a position to make a distribution. It is important to monitor the position for companies that have availed of this extension as well as monitoring their distributable-reserves position.

Where at the end of the extension window a company is in a negative or less favourable distributable-reserves position, consideration should be given to s434(7) TCA 1997, which states that any restriction imposed by law on making a distribution should be taken into account in the close company surcharge calculation. Therefore, a company that incurred a surcharge based on its 31 December 2019 income may have been allowed an extension for making a distribution from the normal date of 30 June 2021 to 31 March 2022. If the company is not in a position legally to make a distribution by 31 March 2022, due to negative distributable reserves, then no close company surcharge should be imposed due to this legal restriction on making a distribution.

This has led to companies being required to consider their reserves position at three points in time:

- the end of the accounting period in which the close company surcharge is calculated on income,
- the end of 18 months after that accounting period end and
- the end of 27 months after that accounting period end.

Directors' loans taken from a company are always an important consideration for close company purposes, due to the withholding requirements whereby the loan should be grossed up and 20% withholding tax paid over to Revenue. Given the difficult position for many business owners over the past 18 months, it will be important to watch out for any advances made to directors in 2020 when completing the corporation tax return. If the loans are paid off before the corporation tax filing, the withholding tax charge should not apply but the benefit-in-kind rules will need to be considered.

Elections and Time Limits

As always, companies should ensure that the relevant elections are made in the corporation tax return and that claims for tax credits and reliefs are made within the required timeframe. Some of the most common elections include:

- Joint election under s434 TCA 1997 to have dividends disregarded for close company surcharge purposes.
- Election under s452 TCA 1997 to have interest payable to non-resident entities not be treated as a distribution for corporation tax deduction purposes.
- Claims for capital allowances on specified intangible assets under s291A TCA 1997 must be made within 12 months of the end of the accounting period in which the capital expenditure is incurred. A Revenue concession is in place in relation to assets under construction, but an election must still be made in writing in this regard.
- Claims under the R&D tax credit regime must also be made within 12 months of the end of the accounting period in which the qualifying R&D expenditure was incurred.

Changes to Form CT1

The changes to the Form CT1 for companies with accounting periods ending in 2020 are set out in the table below.

Change	Comments
Company Registration Office number	Revenue has introduced a new question that requires the CRO number to be included in the return.
Mandatory disclosures	A new question to include reportable cross-border arrangement reference numbers has been added.
Transfer pricing[1]	Revenue now requires a response to three questions: (1) Does the company qualify for the SME exemption? (2) Is it required to prepare a Local File? (3) Is it required to prepare a Master File? The automatic response to these questions is "no", and care should therefore be taken when completing the form.
Associated companies	"Has the company associated companies" has now become a mandatory question.

1 See also article by Ronan Finn, Ashita Popat, George Thompson, "Contemporaneous Transfer Pricing Documentation: Key Compliance Considerations", in this issue.

Change	**Comments**
Stock borrowing and repurchasing agreements	New mandatory questions have been added to determine whether the company has sold or purchased financial transactions within the meaning of s753A TCA 1997.
Section 291A trades	The layout of the s291A trade section has been changed, with most of it moved to a sub-panel.
Extracts from accounts	Revenue now requires the accounting framework used for the purposes of the company's financial statements to be reported. This is a mandatory question.
Leasing profits	A single new question has been added to allow taxpayers to report profits from non-trading leasing activities taxable at a rate of 25%.
Research and development	New panels have been added to reflect the Case IV charge to corporation tax on a clawback of the R&D tax credit. A new section has also been added to allow claims by micro and small companies in line with s766C TCA 1997. The latter is subject to a ministerial commencement order as outlined above, therefore care should be taken when completing this section of the return.
Anti-hybrid rules	The Form CT1 now includes a section to report adjustments required under anti-hybrid mismatch rules.
Exit tax	This section has been split into two panels, one for the 12.5% rate and one for the 33% rate.
CGT	A new panel has been inserted to reflect the amount of capital losses available for offset in the current period.
DWT	The maximum number of distributions that can be recorded on the return has been increased to 100 (previously 40).

Conclusion

This article serves as a useful reminder for those entering the corporation tax compliance season of some of the key areas that may be of relevance this year.

Ronan Finn
Partner, Transfer Pricing, PwC
Ashita Popat
Director, Transfer Pricing, PwC
George Thompson
Director, Transfer Pricing, PwC *(not pictured)*

Contemporaneous Transfer Pricing Documentation: Key Compliance Considerations

Introduction

Finance Act 2019 (FA 2019) introduced radical changes to the Irish transfer pricing (TP) legislation. The new requirements apply to chargeable periods commencing on or after 1 January 2020. One of the key changes introduced is the enhanced contemporaneous TP documentation requirements (i.e. Master File and Local File).

The Revenue Commissioners also released Part 35A-01-01 of their Tax and Duty Manual (hereafter "the Tax and Duty Manual") in February 2021. The Tax and Duty Manual seeks to give taxpayers additional guidance on the new rules introduced by FA 2019.

Changes to the Corporation Tax Return Form (CT1)

In light of the changes introduced by FA 2019, a new TP section was added to the FY2020 Form CT1. Under this new section, taxpayers are required to answer (with a "yes" or "no") the following three mandatory questions[1] and, as a result, disclose their TP documentation obligations (i.e. Master File and Local File) for that fiscal return period:

- Does the company qualify for the SME exemption under section 835EA? Yes / No.
- Is the company required to prepare a Local File, tick the box? Yes / No.
- Is the company required to prepare a Master File, tick the box? Yes / No.

The responses to these three questions inform the Revenue Commissioners of the taxpayer's TP documentation obligations for FY2020 and also form the basis for them to request TP documentation from the taxpayer if they have queries on the return from a TP perspective.

Thresholds

The Master File and Local File requirements will be subject to certain *de minimus* thresholds. Taxpayers that exceed the *de minimus* thresholds will be required to prepare a group Master File and/or Local File for each Irish entity involved in inter-company transactions (subject to some limited exceptions) for chargeable periods commencing on or after 1 January 2020. The *de minimus* thresholds to be satisfied are:

- a Master File must be prepared where consolidated group revenues are €250m or more; and
- a Local File must be prepared where consolidated group revenues are €50m or more.

The content of the Master File[2] and Local File[3] are broadly aligned to the requirements under the OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Paris: OECD Publishing, 2017) ("OECD 2017 Guidelines"). However, there are some local nuances covered in the Tax and Duty Manual that taxpayers need to comply with. The Tax and Duty Manual also provides guidance on the documentation needed for taxpayers that do not exceed the *de minimus* threshold for the Local File.

The Master File provides a high-level outline of the business operations and policies at an MNE group level. Conversely, the Local File illustrates detailed entity-level information. It identifies related-party transactions with associated persons in different countries, the amounts involved in those transactions and the company's analysis of the TP determinations it has made with regard to those transactions.[4]

Where the *de minimus* threshold for the Master File and/or Local File is not met, taxpayers should still maintain sufficient documentation to demonstrate that the inter-company transactions are undertaken on an arm's-length basis (however, the documentation requirements are less prescriptive).

Small and Medium Enterprises

In relation to small and medium enterprises (SMEs), s835F of the Taxes Consolidation Act 1997 (TCA 1997) as inserted by FA 2019 kept micro and small enterprises outside the scope of the Irish TP rules. Although medium enterprises have been brought within the scope of the Irish TP rules, this is subject to a commencement order by the Minister for Finance.

The definition of an SME is assessed at group level and is based on the definition of SME in the European Commission's Recommendation

1 See Revenue's Tax and Duty Manual Part 38-02-01E, "Completion of Corporation Tax Returns Form CT1 2020", section 2.5.

2 OECD 2017 Guidelines, annex I to chapter V.

3 OECD 2017 Guidelines, annex II to chapter V.

4 See Revenue's Tax and Duty Manual Part 35A-01-01, "Transfer Pricing", **section 8**.

of 6 May 2003.[5] An SME is an enterprise that, on a group basis:

- employs fewer than 250 employees and
- has an annual turnover not exceeding €50m or annual total assets not exceeding €43m.

The Tax and Duty Manual clarifies the definition of SME, as well as the documentation requirements for medium enterprises once the commencement order is issued by the Minister for Finance. These requirements include that the medium enterprise has TP documentation in place for a relevant arrangement. A relevant arrangement is one:

- between a medium enterprise and an associated person who is not a qualifying relevant person and
- where the consideration exceeds €1m.

A relevant arrangement also includes an arrangement between a medium enterprise and an associated person who is not Irish resident where:

- that arrangement involves the disposal or acquisition of a chargeable asset for the purposes of chargeable gains,
- the asset has a market value exceeding €25m and
- the asset ceases to be a chargeable asset, in the case of a disposal, or was not a chargeable asset before its acquisition, in the case of an acquisition.

The TP documentation required where there is a relevant arrangement is reduced and simplified, as compared to the TP documentation required to be provided by taxpayers that exceed the Master File and/or Local File *de minimus* thresholds explained above.

Timeline

From a timing perspective, the TP documentation requirements are contemporaneous, in that documentation must be prepared on or before the due date of the tax return and must be provided to the Revenue Commissioners within 30 days of a request.

The Tax and Duty Manual states that Irish TP documentation prepared and stored outside Ireland will be accepted by the Revenue Commissioners if the above conditions regarding timeline are satisfied. In addition, the Tax and Duty Manual allows counter-party documentation to be used to support related-party transactions where the documentation meets the Master File/Local File specifications in s835G TCA 1997.

Penalty and Penalty Protection

To promote compliance, FA 2019 also introduced a penalty regime for TP documentation.

Fixed penalty

There is a fixed penalty if a taxpayer does not submit TP documentation within 30 days of a request by the Revenue Commissioners:

- Where taxpayers do not satisfy the Master File and/or Local File threshold, a fixed penalty of €4,000 will apply where TP documentation is not provided on request.
- Where a person subject to the Local file requirements fails to provide any required TP documentation on request, the penalty increases to €25,000 plus €100 for each day of continued failure.

Penalty protection

In line with the OECD 2017 Guidelines recommendation,[6] a penalty protection regime has also been introduced. In the event of a TP adjustment, where additional tax is due, penalty protection from tax-geared penalties in the "careless behaviour" category will be available. To avail of this protection, the taxpayer must:

- prepare contemporaneous TP documentation on or before the due date of the tax return;
- submit such contemporaneous TP documentation within 30 days of a request by the Revenue Commissioners; and

5 Annex to Commission Recommendation 2003/361/EC1.

6 OECD 2017 Guidelines, chapter V, D.7, para. 5.43.

- provide accurate records and demonstrate that the taxpayer has made reasonable efforts to comply with the Irish TP legislation. The Tax and Duty Manual elaborates on how taxpayers can demonstrate that reasonable efforts have been made to avail of the penalty protection.

It is important to note that no protection will be available for adjustments that arise as a result of deliberate behaviour.

Overall, taxpayers must think strategically about their approach to TP documentation. Given the current spotlight on transparency, it is increasingly important that a taxpayer's global documentation is consistent, that it provides an accurate and holistic view of the group's operations, and that the information provided in the Master File and Local File is largely aligned with publicly available information and the data that is shared in the Country-by-Country Report (where applicable).

Scope of Inter-Company Transactions

In addition to introducing contemporaneous TP documentation requirements, FA 2019 broadened the scope of the Irish TP rules. Consequently, the following inter-company transactions, in addition to the trading transactions that are currently within the scope of Irish TP rules, will need to be documented:

- non-trading, with certain exclusions,
- capital transactions and
- grandfathered transactions, with certain exclusions.

Non-trading transactions

A very significant change was the extension of the TP rules to bring non-trading transactions into the scope of the provisions, with a very limited range of domestic transactions being exempted.

The application of domestic exemption is one of the most complex areas of the new TP rules. The Tax and Duty Manual clarifies that this exclusion does not include all domestic non-trading transactions. A non-trading transaction will be excluded from the new TP rules only if it meets certain, very specific, criteria, and the exclusion is itself subject to anti-avoidance provisions.

With this amendment, all non-trading transactions (including historical inter-company debt balances), which to this point had been disregarded, are now brought within the scope of the Irish TP regime. Given the historical nature of loan balances, the Tax and Duty Manual acknowledges the potential difficulties in tracing their origins and confirms that, where it is not possible to trace the origin of each movement, the balance should be treated as arising from the earliest date for which reliable information is available.

Capital transactions

The Irish TP rules are applicable to capital transactions with a market value exceeding €25m. Capital transactions below this threshold will continue to be subject to existing market-value rules. In addition, Irish TP rules will not apply where certain group reliefs are available. Furthermore, the Revenue Commissioners, through the Tax and Duty Manual, note that the TP rules do not apply to "deemed" transactions for capital allowances and capital gains tax purposes.

Grandfathered transactions

Inter-company transactions the terms of which were agreed before 1 July 2010 were formerly "grandfathered" and therefore outside the scope of TP. However, FA 2019 has now brought these previously grandfathered transactions within the scope of TP, with the possibility of a very limited range of domestic transactions being exempted. The difficulties noted for historical debt balances/transactions would apply also to previously grandfathered transactions now within scope of Irish TP rules.

Key TP Documentation Considerations

As mentioned above, the Revenue Commissioners issued the Tax and Duty Manual to provide additional detailed guidance to taxpayers on the application of changes introduced by FA 2019. One of the aspects that the Tax and Duty Manual covers is in respect of TP documentation and the requirements to be satisfied by taxpayers to ensure compliance. Given this, taxpayers should pay close attention to the following considerations when preparing TP documentation.

Debt capacity and serviceability analyses

An examination of the quantum of debt forms part of the accurate delineation of the transaction under chapter I of the OECD 2017 Guidelines. Additionally, the Tax and Duty Manual states that although the OECD financial transactions TP paper[7] issued in February 2020 is not yet enshrined in law, it will be considered as best practice by the Revenue Commissioners in analysing issues and testing the arm's-length nature of financial transactions. Given this, taxpayers will be required to test the arm's-length nature of the quantum of debt (i.e. debt capacity and serviceability analysis), in addition to the existing interest rate analysis requirements, in the Local File for debts that are in place for the period commencing on or after 1 January 2020. Per the Tax and Duty Manual, this includes loan arrangements that were agreed in periods starting before 1 January 2020.

The Revenue Commissioners have noted that where no debt capacity analysis was performed at the time when the arrangement was entered into, companies may use other available information to assist in considering debt capacity at the time of the arrangement. Separately, in the context of tracing historical balances, the Revenue Commissioners note that taxpayers can rely on the earliest historical information that is available. However, there is a relatively high burden on taxpayers to demonstrate that all efforts to trace the original/historical data have been exhausted and that due consideration has been given to any available information that could be used to assist in testing the arm's-length nature of such historical transactions at the time of the arrangement.

Reconciliation

The Local File must also contain information showing how the TP policy was applied, including a reconciliation to the local statutory accounts. This requirement will be of particular importance for taxpayers that apply their TP policies using non-Irish GAAP accounts.

Benchmarking

Where a Transactional Net Margin Method (TNMM) benchmarking study is used to support the arm's-length nature of controlled transactions, the Tax and Duty Manual notes:

- Pan-European comparables may be accepted in the benchmarking study; however, the tested party's local market or geographical difference should be factored, to the extent possible, into the benchmarking.
- The Revenue Commissioners expect that full benchmarking study to be conducted every three years, and in the interim years the taxpayer must refresh the financials of the accepted comparables.

Country file

A simplification measure has also been introduced that allows taxpayers to prepare a consolidated local Irish Country File, in lieu of multiple individual Local Files for their Irish-resident companies. If taxpayers choose to avail of this option, it is important to note that entity-level qualitative and financial information should also be included in such Country Files.

Related-party documentation

If taxpayers wish to rely on TP documentation available elsewhere in the group, then such an option is available. However, in such circumstances, the TP documentation must contain all of the information required under the Irish TP legislation.

In addition, the Irish-entity Local File can make reference to or include (for example, by way of an appendix to the Local File) the relevant

7 OECD, *Transfer Pricing Guidance on Financial Transactions (Inclusive Framework on BEPS: Actions 4, 8–10)* (Paris: OECD Publishing, February 2020).

sections from the TP documentation available elsewhere in the group.

Low-value intra-group services guidelines

The low-value intra-group services guidelines issued by the Revenue Commissioners through the Tax and Duty Manual dated 15 March 2018 are superseded and replaced by the low-value-adding intra-group services guidance provided under chapter VII of the OECD 2017 Guidelines.

Key Action Items

Taxpayers should review their TP documentation obligations and start planning now to ensure sufficient time to prepare the relevant documentation ahead of filing the corporation tax return, given:

- the upcoming deadline of 23 September for 31 December 2020 year-end companies;
- the significant changes to the Irish TP landscape; and
- the relatively low Master File and Local File thresholds (based on consolidated group revenues).

Taxpayers that exceed the *de minimus* threshold for Master File and/or Local file should consider the following action items to ensure sufficient time for compliance with the contemporaneous TP documentation requirements:

- Perform a detailed review of inter-company transactions to identify those that fall within scope of FY2020 Irish TP documentation (particularly given the expansion of the Irish TP legislation).
- Review the existing TP documentation, including benchmarking analysis, currently available in the group to test the arm's-length nature of inter-company transactions that are within scope of the Irish TP legislation to see if reliance can be placed on it.
- Consider the approach to be adopted to test the arm's-length nature of the inter-company transactions within scope of the Irish TP rules – particularly the more historical inter-company transactions, where obtaining information could be challenging.
- Consider how the reconciliation of the TP policy to local statutory accounts would be performed and the impact of such reconciliation, including the treatment of differences, if any, identified.
- Ensure timely compliance for penalty protection.

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Accounting for Tax Transactions: Adjustments to Accounts Due to the Covid-19 Pandemic

Introduction

The pandemic has had a very broad impact on businesses, and that impact will be reflected in financial statements that, in turn, form the basis for the calculation of the business's tax liability. Getting the accounting right ensures that the underlying tax is also correct. Some of the main impacts are discussed in this article.

Impairments

The most impactful effect of Covid-19 has been in the area of impairment. Under both Irish GAAP and IFRS, the pandemic qualified as a trigger event requiring that an impairment review be performed by all businesses and for all assets. There is no doubt that businesses directly affected by Covid-19 may need to impair the value of their assets, but there has also been a general reduction in value of many types of business properties. This means that even businesses that were unaffected by the pandemic may be operating from a building that has reduced in market value. A pharmacy trade may be unaffected by the pandemic, but if there are a number of empty retail properties nearby, the value of the pharmacy's building will reduce; this reduction may require an impairment charge in the financial statements of the pharmacy, and at a minimum it triggers a requirement to perform an impairment review.

An impairment review is an exercise of comparing the current carrying value of the asset or group of assets to their recoverable amount. Where the carrying value exceeds the recoverable amount, the asset is written down to its recoverable amount. The recoverable amount is the higher of the market value of the asset and the value in use of the asset, the latter being a discounted cash-flow calculation of all of the cash that the asset or business will generate over its life plus the residual value. Both calculations are problematic, however: market value can be hard to determine, and value in use is based on uncertain projections and a market value, which does not accord with any known measure.

Some of the more common reasons for an impairment charge would be:

- Office buildings: due to changes in work practices, under-use due to less-than-ideal layout and desk spacing, ventilation issues, access issues and remote working.
- Retail buildings: changes in spending patterns, the growth of online retail, excess physical retail capacity, lower footfall and abandonment of a retail unit.
- Hospitality businesses: changes in usage volumes/capacity and building layout, access to outdoor areas, lower footfall and lower profitability.
- Fixtures and fittings: needing to upgrade air-handling equipment, abandonment of buildings.
- Inventories/stock: due to ageing or damage or to inability to sell the stock.
- Intangible assets: licences or goodwill may become worth less if the business model changes.
- Intra-group balance(s) becoming uncollectable and investments in subsidiaries being unsupportable – notwithstanding that both will eliminate on consolidation.

Being impacted by Covid-19 does not mean that an impairment charge is a certainty. The standards take a long-term view of a business and will allow management to forecast beyond the pandemic for periods as long as 20 years. However, matters such as reduced capacity, discontinuation of business lines and the overall business plan need to be taken into account. Impairment reviews cannot include provision for fresh investment; they have to be based on the current assets and the business plan to use those assets. An auditor will require that the impairment cash-flow projections are reasonable, consistent and achievable, so, for example, a projected increase in retail sales would need to be accompanied by appropriate increases in staff levels, stock room, delivery capacity etc.

A value-in-use calculation will include an estimation of residual value, which for some businesses will be a site value and for others a projected market value of the business at the end of the value-in-use projection period. For some – for example, in a leased property – residual value may be nil. In practice many businesses will use a business valuation model to determine the residual value. An auditor will need to see some supporting reasons for the residual value selected.

Note that, although not a tax issue, Covid-19 has potentially affected the useful live and residual value of property, plant and equipment, and therefore the depreciation charge for these may need to be reassessed.

Events After the Reporting Period

Both Irish GAAP and IFRS require that certain matters that happen after the balance sheet date be either adjusted or disclosed. Depending on the balance sheet date, Covid-19 can be either a disclosing or an adjusting event. To be adjusting, the event needs to be accompanied by evidence of conditions existing at the year-end. Covid-19 was first reported in China on 7 December 2019; on 31 December 2019 it was identified as a new virus; on 24 January 2020 the first European case was recorded; on 11 March the World Health Organization declared a pandemic; and on 23 March 2020 Ireland first "locked down". It can be difficult to determine what the cut-off date for Covid-19 is, with some companies adjusting for Covid-19 based on a February 2020 year-end and others not adjusting for 31 December 2019 year-ends. Second- and third-wave shutdowns that commenced after a year-end will also need to be considered when preparing financial statements for 2021. There is no doubt that for financial year-ends after 11 March 2020 Covid-19 was an adjusting event, but a divergence of opinion exists on the other dates.

Provisions

To create any provision that will stand up to scrutiny, the paperwork needs to demonstrate that: there is an obligation as at the reporting date, as a result of a past event; it is probable that payment will be made; and the amount can be reliably estimated. See the appendix to section 21 of FRS 102 for some examples of provisions that would be allowed under the standard and ones that would not.

Many businesses are restructuring to make themselves viable in the new business environment. Restructuring provisions have their own set of rules. For a deduction to be allowable, you do not need to have contracts signed or redundancy offers made; but, in summary, you do need to have a detailed plan that has been formally communicated to those affected, and there needs to be a valid expectation that the plan will be implemented.

Regarding losses, if a business expects to make losses over the Covid-19 period, those losses cannot be anticipated and provided for under FRS 102 or IFRS. However, the existence of losses would suggest that assets may be overvalued and may require an impairment.

Contingent assets have a different recognition criterion from contingent liabilities. The liability is recognised when it is 51% or more likely. A contingent asset is recognised only when it is virtually certain. It is perfectly possible that an insured loss is recognised as an expense but the insurance recovery may not meet the "virtually certain" threshold and is not booked as income.

Onerous Contracts

Onerous contracts must be provided for and should be a tax-deductible expense. An example would be a retailer abandoning a retail unit for which a number of years remain on the lease. Once that retailer closes the units, it needs immediately to provide for the full remaining lease payments. If there were sublet potential for the abandoned unit, then that would reduce the quantum of the onerous contract provision.

Service contracts for office buildings that are surplus to requirements – such as cleaning, photocopier maintenance – may also all become onerous once they cease to provide economic benefit and cannot be cancelled. Abandoned office leases may also include a requirement for the tenant to return the building to its pre-let condition, and a provision for that would need to be created if it was not already in place.

Some specific Covid-19-related examples of onerous leases are:

Let's first consider a large office block that is unusable or uneconomic to use unless, for example, an open-plan format was converted to small offices or partitions were put in place if:

- The building was leased by a business: a provision would not be allowed under GAAP to provide for that renovation work unless the renovation contracts were signed before the year-end.
- The building was owned by a business: a provision would not be allowed under GAAP until contracts are signed, but the business might need to impair the value of the building.

What would the position be for :

- A large leased office building that is abandoned, where staff are all working from home: a provision for an onerous contract may be made for the remaining lease payments to the first break clause. Temporary abandonment, with a plan to reoccupy, would not be considered an onerous lease.
- A pub where health regulations require that it spends €5,000 on partitions and screens, and the pub expects to open shortly: no provision can be made until contracts are signed to make the refurbishments. Even if the pub reopens and the renovations have not been done yet, the provision will be the lower of the possible fine and the cost of the renovations.

What about assets and software? Let's consider some examples:

- A three-year lease for a photocopier that is now sitting forlorn in an abandoned office building while all of the staff work from home and the business model has gone fully digital: then it may be possible to create an onerous lease provision now for the lease payments up to the first break clause.
- A software application that has been abandoned because Covid-19 caused a pivot to the business model and made the software redundant: any remaining software assets on the balance sheet need to be written off immediately.

What about late-completion penalty clauses where there are no force majeure clauses? It may be possible to provide for the penalty once it becomes 51% likely that the contract will be delivered late and the penalty clause will be enforced.

Revenue Recognition

For businesses that have gone online and have changed some of their distribution channels, they may I also need to revisit when they recognise their sales. A sale has not necessarily been made if the customer can return the item within 14 days or the item is sold based on sale or return. For IFRS users, IFRS 15 will require that capitalised sales commission costs be written off to expenses where long-term sales contracts are repudiated or cancelled.

Other Matters for Consideration

- Covid-19 has indirectly affected interest rates, and therefore most fair-value calculations for matters as diverse as pension liabilities and the value of complex investments may need to change. Fair-value changes will usually have a direct impact on reported profit.
- Loan modifications, loan restructuring or repayment forgiveness can also result in an accounting profit being recognised.
- Lease concessions or forgiveness or postponement of lease payments can also have a profit and loss effect. Note that there is an optional Covid-19 concessional treatment for lease payment forgiveness, which will accelerate the tax charge if the concession is availed of. Not availing of the concession will result in a lot of hard sums for accountants but a balance sheet movement only.
- The Business Resumption Support Scheme also has a tax effect that may need to be reflected in deferred tax this year and in future corporation tax liabilities[1]. (See also article by Michelle Dunne, "Finance (Covid-19 and Miscellaneous Provisions) Bill 2021: Overview of Covid-19 Support Schemes", in this issue.)
- For IFRS users, IFRS 5 could see some assets reclassified as available for sale where a decision has been made to dispose of the asset or business. This may change the carrying value of the asset as the accounting treatment changes from cost-less-impairment to the lower of cost and net realisable value.
- For property investors, some investment property has diminished in value and that diminution is recognised in the profit and loss account.
- In a manufacturing business, if there has been a lowering of production levels, not all overheads may have been absorbed into stock, and therefore there could be an increase in expenses.
- Many businesses are experiencing an increase in bad debts. It would be important to ensure that both the VAT and any corporation tax deduction were treated correctly for what could be quite a material number for some companies.
- For IFRS users, if the credit terms on intra-group balances have exceeded contractual terms, IFRS 9 requires that they be assessed for impairment based on lifetime loss and not the 12-month loss model used when contractual terms are adhered to. FRS 102 users continue to use the incurred loss model for intra-group loans.

I hope that the next article I write for *Irish Tax Review* will be titled "Accounting for the Recovery", but I am fearful that it could be on accounting for hyperinflation.

1 See article by Paul Nestor, "Finance Act 2020: Overview of Covid-19-Related Measures", *Irish Tax Review*, 34/2 (2021).

Michelle Dunne
Manager, Grant Thornton

Finance (Covid-19 and Miscellaneous Provisions) Act 2021: Overview of Covid-19 Support Schemes

Introduction

The Finance (Covid-19 and Miscellaneous Provisions) Act 2021 ("the Act") was signed by the President on 19 July 2021. The Act has given a legal footing to the Government's announcement of 1 June 2021 regarding a set of measures to support businesses as they reopen and resume normal trading. Over the last 18 months, the Covid-19 pandemic has severely impacted all aspects of the Irish business ecosystem. We are currently on the path out of our third lockdown, with the Government looking to introduce more relaxed rules for some businesses. At the time of writing this article, non-essential retailers have been allowed to reopen, along with pubs and restaurants for outdoor dining only, with indoor dining available to those who are vaccinated against Covid-19 or hold an EU Digital Certificate.

Throughout the pandemic, the Government has made amendments and extensions to Covid-19 business support measures. It has committed to there being no "cliff edge" scenario for business supports, and the Act seeks to provide clarity and certainty on support measures for businesses as they reopen. These supports include the extension of the Employment Wage Subsidy Scheme (EWSS), the extension of the Covid Restrictions Support Scheme (CRSS), a new Business Resumption Support Scheme (BRSS) which has been introduced in September, retention of the reduced 9% VAT rate for the hospitality sector and changes to tax debt warehousing. This article outlines those extensions and changes to existing measures, along with details of the new supports introduced in the Act.

Employment Wage Subsidy Scheme

The EWSS since its inception has assisted businesses adversely affected by Covid-19 by providing a wage-related subsidy payment to employers and applying a reduced rate of employer PRSI, at 0.5%. Thise support measure was aimed at encouraging employment and maintaining the employer and employee link. It has been key part of the support packages introduced, and estimated figures to 5 August indicate that over €4.9bn in EWSS payments and employer PRSI forgone has been provided. The EWSS replaced the Temporary Wage Subsidy Scheme (TWSS), and s2 of the Act amends s28B of the Emergency Measures in the Public Interest (Covid-19) (No. 2) Act 2020 by extending the EWSS until 31 December 2021.

The Act provides for a number of key EWSS measures:

- the extension of the EWSS until 31 December 2021,
- the continuation of the existing subsidy rates until 30 September 2021,
- the retention of the 30% reduction in turnover or customer orders eligibility test and
- the widening of the reference period to assess eligibility for the scheme with effect from 1 July 2021 to a 12-month period from the previous 6-month period.

The qualifying criteria for the subsidy with respect to quarter 4 2021 was expected to be determined around the end of August/early September 2021 and, as of writing, we await such criteria. The Government is considering the introduction of a required employer contribution towards employee wages. This may apply where, for example, an employee's gross weekly wage is €300 and the EWSS payment fully reimburses the employer for such wage expense, in which case the Government may require the employer to contribute an amount towards the wage cost.

Before the enactment of the Act, Revenue were operating these EWSS changes on an administrative basis and had prepared guidance in this regard. Existing guidelines have been updated, now known as the "Main Guidelines on the Operation of the Employment Wage Subsidy Scheme", and new guidelines – "Guidelines on Eligibility for the Employment Wage Subsidy Scheme from 1 July 2021" – have been published on eligibility conditions from that date. The new guidelines introduce a real-time employer eligibility reporting requirement via an employer EWSS Eligibility Review Form (ERF).

EWSS subsidy rates to apply until 30 September 2021

The Act extends the current subsidy payment rates from 30 June 2021 until 30 September 2021, which are:

Employee gross weekly wage	Weekly subsidy payment
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	Nil

A Revenue concession whereby an employer could retain an employee and pay him or her a gross wage equivalent to the pandemic unemployment payment (PUP) (when the employee was either partially or not fully occupied), and in turn the employer claimed a wage subsidy payment, would not be considered by Revenue to be abuse of the scheme. Revenue guidance now confirms that this concession will remain in place for existing employees until 1 September 2021, and thereafter employers should revert to paying employees their contractual rate of pay.

Employer eligibility criteria: 30% turnover/customer order reduction test

An employer must be able to demonstrate to the satisfaction of Revenue that the business is expected to experience a 30% reduction in turnover or customer orders and that this disruption to normal operations is as a result of the Covid-19 pandemic. The Act widens the reference period for this 30% reduction test for pay dates on or between 1 July and 31 December 2021 when assessing this reduction, as follows.

Date trade commenced	2021 turnover/customer order analysis	Comparison period
Before 1 January 2019	1 January to 31 December 2021	1 January to 31 December 2019
Between 1 January and 31 October 2019	Commencement day/month in 2021 to 31 December 2021 Example for illustrative purposes business commended trading on 1 April 2019 then for 2021 it would be 1 April 2021 to 31 December 2021.	Date of commencement to 31 December 2019
On or after 1 November 2019	1 January (or date of commencement, if later) to 31 December 2021	2021 projections as if the pandemic had not occurred

Childcare businesses registered in accordance with s58C of the Child Care Act 1991 are not required to meet the reduction in turnover or customer order test.

Requirement to complete an Employer Eligibility Review Form

An important requirement was introduced by Revenue on foot of the widening of the reference period concerning eligibility whereby employers will be required to complete an online ERF through ROS on a monthly basis. The ERF consists of a declaration and an input of data pertaining to actual monthly VAT-exclusive turnover or customer order values for 2019, along with actual and projected details for 2021 for all relevant businesses.

The initial ERF for the June period, which will be used to assess eligibility for pay dates from 1 July 2021, needed to be completed and submitted online between 21 July and 15 August 2021. Thereafter, the ERF must be submitted via ROS, by the 15th day of the following month, and should be updated with details of the actual results for the previous month, along with reviewing projections to ensure that they remain valid.

The submission of data through the ERF will allow Revenue to undertake a systematic check to determine adherence to the 30% reduction test. Employers should retain their evidence/basis for entering and remaining in the scheme for potential review by Revenue at a future date. Should an employer fail to complete and submit the EWSS Eligibility Review Form, this will result in the suspension by Revenue of EWSS payments.

Where actual turnover/customer order data has been input, this cannot be altered online via the ERF once it is submitted. If an error has occurred, the employer should contact Revenue using MyEnquiries for corrections to be made.

As projected turnover/customer orders are required to be reviewed to ensure that they remain valid, such data may be altered online via the ERF. Revenue expects assumptions that underpin the projections to be reliable and reflect the operation conditions of the business.

Covid Restrictions Support Scheme

The CRSS provides businesses that are carrying on a trade or trading activities the profits of which are chargeable to tax under Case I of Schedule D with an advance credit for trading expenses (ACTE) payment. The payment is referenced to a business premises that is located in a region subject to Covid-19-related restrictions in line with the Government's "Plan for Living with Covid-19". The business must be required to prohibit or considerably restrict customers from accessing its business premises. Section 4 of the Act amends s485 of the Taxes Consolidation Act 1997 to extend the CRSS to 30 September 2021. The power for the Minster for Finance to extend the scheme further, until December 2021, by order, is included in the provisions of s484(2)(a)(ii).

Along with the extension of the CRSS to 30 September 2021, the Act provides for "restart week" payments to assist businesses that cease to claim the weekly CRSS payments and are reopening.

"Restart week" payments

The Act provides for enhanced "restart week" payments whereby a business reopens after a period of restrictions. This measures aims to incentivise businesses to exit the scheme and assist them financially as they reopen. The ability of the business to claim the "restart week" payments or continue in the CRSS will depend on the business's position in relation to the eligibility conditions of the scheme. The eligibility conditions of the scheme are, broadly, two-fold:

- a business must be prohibited, or significantly restricted, from allowing the public access to the business premises by reference to the Covid-19 restrictions and
- the turnover from the relevant business activity must be no more than 25% of the average weekly turnover of the business (2019 for established businesses).

Each business must consider "significant restriction" in the context of CRSS eligibility with respect to the recent permitted reopening of certain businesses. Where a business continues to be "significantly restricted", it may be eligible to continue to receive CRSS support. Existing CRSS claimants that can now reopen and are not "significantly restricted" would need to cease their CRSS claim and seek to claim a "restart week" payment.

The level of "restart week" payments depends on the date that the business reopens, as follows.

Restart week period	CRSS restart week payment
On or after 29 April 2021 and before 2 June 2021	Restart payment will be at a rate of two weeks' payments at double the normal rate of CRSS. This payment is, however, restricted to a weekly maximum of €5,000.
On or after 2 June 2021 and before 30 September 2021	Restart payment will be at a rate of three weeks' payments at double the normal rate of CRSS. This payment is, however, restricted to a weekly maximum of €10,000.
All other cases	Restart payment will be at a rate of one week's payment at the standard rate of CRSS. This payment is, however, restricted to a weekly maximum of €5,000.

Claims must be made no later than eight weeks from the date on which the restrictions to which the restart week claim relates are lifted.

Revenue's latest guidance on the CRSS, dated 26 July 2021, provides examples of when to claim the "restart week" as provided for in the Act.

Business Resumption Support Scheme

Section 5 of the Finance (Covid-19 and Miscellaneous Provisions) Act 2021 introduces the BRSS by inserting section 485A in Chapter 2 of Part 15 of the Taxes Consolidation Act 1997. The BRSS provides a once-off payment to businesses significantly affected by the Covid-19 pandemic even after an easing of public health restrictions and irrespective of whether they have previously qualified for other Covid-19-related Government schemes. A business must make a BRSS claim between 1 September 2021 and 30 November 2021 (the "application period"), and any claim outside of this period will not be accepted.

The scheme is open to self-employed individuals, partnerships, companies carrying on a trade the profits from which are taxable under Case I of Schedule D ("relevant business activity"). Certain charities and sporting bodies that carry on a trade the profits from which would be chargeable to tax under Case I of Schedule D but for the available charity and sports body tax exemptions may qualify for the BRSS. Although the BRSS has similar qualifying characteristics to the CRSS, it should be noted that the BRSS is not tied to a business premises. In Revenue's "Guidelines on the Operation of the Business Resumption Support Scheme", dated 1 September 2021, examples of businesses that may qualify for the BRSS include pubs, sporting clubs and charity shops.

BRSS qualifying criteria

To qualify for the scheme, a business must demonstrate that its turnover is adversely effected during the period from 1 September 2020 to 31 August 2021 ("specified period"), i.e. turnover during the specified period did not exceed 25% of the reference turnover amount being the actual average weekly turnover (VAT exclusive) for the relevant business activity in the comparative reference period, as follows:

Commencement of business	Comparative reference period
Before 26 December 2019	Period commencing on 1 January 2019 (or actual commence date, if after 1 January 2019) and ending on 31 December 2019
After 26 December 2019 but before 10 March 2020	From date of commencement to 15 March 2020
After 10 March 2020 but before 26 August 2020	From date of commencement and to 31 August 2020
After 26 August 2020	BRSS not available

Although supporting documentation will not be required to demonstrate eligibility at registration, documentation must be retained and made available at a later date to substantiate any claim at a future point. Revenue has stated that it will verify the turnover data provided at registration against information available to it.

To make a claim for the scheme, a business must meet a number of conditions, including:

- having an up-to-date tax clearance certificate,
- having complied with its VAT obligations,

- not being entitled to make a claim for the CRSS in respect of any week that includes 1 September 2021, and
- actively carrying on its trade and having an intention to continue to do so.

Therefore, with reference to the last point above, any seasonal business meeting the qualifying criteria must be open and carrying on its business trading activity as at 1 September 2021 and must intend to continue to do so to make a claim for the BRSS.

The claimant must register for the BRSS through ROS and make a declaration that it satisfies the conditions to qualify for the scheme. A person who meets the eligibility criteria of the scheme will be referred to as a "qualifying person". Similarly to other support schemes, the names of claimants will be published on Revenue's website. Any clawback of over-claimed BRSS will attract interest and penalties from the day the unauthorised claim was paid.

BRSS payments

Qualifying businesses will be able to make a claim for a single payment equal to three times the amount as derived from:

- 10% of the average weekly turnover during the reference period up to a maximum weekly turnover of €20,000 plus
- 5% of any excess average weekly turnover over €20,000

(subject to a maximum BRSS single payment amount of €15,000)

Where a business has more than one relevant business activity, the BRSS payment will be related to the trade and not the business premises, as is the case for CRSS payments. For example, where a single trade is carried out from two premises, a single BRSS payment may be claimed where eligibility conditions are met. Conversely, where two trades are carried out from a single premises, a BRSS claim may be made for both relevant business activities such that a maximum of €15,000 may be claimed for each trade.

Definition of turnover for BRSS

Turnover includes any amount recognised as such in line with the correct rules of commercial accounting, and where applicable, the Revenue guidance notes that regard should be taken of the meaning given to turnover in the Companies Act 2014 (s275(1)), being:

> *"turnover" in relation to a company, means the amounts of revenue derived from the provision of goods and services falling with the company's ordinary activities, after deduction of –*
>
> *(a) trade discounts,*
>
> *(b) value-added tax, and*
>
> *(c) any other taxes based on the amounts so derived,*
>
> *and, in the case of a company whose ordinary activities include the making or holding of investments, includes the gross revenue derived from such activities."*

For established businesses, accounts for the period ending on 31 December 2019 will provide data for the comparative reference period. Where accounts end on another date, Revenue will expect to see a pro rata analysis spanning two accounting periods. However, Revenue accepts that for certain businesses the pro rata analysis may not appropriately reflect the business's turnover for the BRSS comparative reference period. Taxpayers may choose to use the actual turnover figures for the comparative reference period, e.g. actual turnover in the period 1 January to 31 December 2019. Evidence supporting the comparative reference period data must be retained and made available to Revenue if required.

Should a claimant be in receipt of grants and public funding, whether such amounts are included in turnover will depend on the nature and terms of the funding, having regard to the applicable accounts standards and required recognition treatment.

BRSS tax treatment

The BRSS payment will be treated as an advance credit for trading expenses (ACTE), similar to the CRSS payment. The ACTE will not be considered taxable income but will be taken into account when calculating taxable trading profits. The BRSS amount received will reduce the amount of deductible expenditure.

Fig. 1: Example of ACTE tax treatment. Source: Revenue, "Guidelines on the Operation of the Business Resumption Support Scheme" (Version 1), dated 7 July 2021, example 8.1.

	Profit Making Company	Loss Making Company
Income	€	€
Turnover from operations	100,000	50,000
Expenses		
Rent	25,000	25,000
Rates	5,000	5,000
Insurance	25,000	25,000
Utilities	10,000	10,000
BRSS Payment	(1,000)	(1,000)
	64,000	64,000
Profit / (Loss) per accounts	36,000	(14,000)
Corporation Tax Charge:	4,500	NIL

Extension of 9% VAT Rate for Tourism and Hospitality Sectors

The hospitality and tourism sectors have been severely impacted by the pandemic and the lockdowns imposed under the Government's "Plan for Living with Covid-19". To support an economic recovery in these sectors, the Minister for Finance announced an extension to the reduced VAT rate of 9% for hospitality- and tourism-related services and goods. Section 6 of the Act extends the 9% VAT rate from 31 December 2021 until 31 August 2022 by amending s46(1)(cb) of the Value-Added Tax Consolidation Act 2010.

The 9% VAT rate will continue to apply to catering and restaurant supplies; guest and tourist accommodation; cinemas; theatres; museums; historic houses; fairgrounds; sporting facilities; open farms; amusement parks; certain printed matter such as brochures, maps and programmes; and hairdressing.

Debt Warehousing Scheme

The debt warehousing scheme provides the ability to defer, or "park", certain tax liabilities and is available where taxpayers, as a consequence of Covid-19, are unable to pay their relevant tax. Section 7 of the Act extends the relevant tax covered to EWSS overpayments received by employers, which must be refunded to Revenue; thus the tax liabilities now available for warehousing are:

- VAT,
- employer PAYE liabilities,
- TWSS liabilities (arising from the reconciliation process or where it has been determined that a repayment of TWSS is due to Revenue),
- EWSS overpayments, and
- certain income tax liabilities.

The scheme operates under three phases: the relevant tax accumulation period, a 0% interest period with respect to the relevant tax and a repayment period at a reduced annual interest rate of 3%. The Act simplifies the beginning and end of the three periods of the scheme, as follows:

Period 1: Covid-19 restricted trading period (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.
Period 2: zero interest period	From 1 January 2022 to 31 December 2022.
Period 3: reduced interest period (3% interest p.a.)	Period 3 starts on 1 January 2023 and runs until such time as all of the warehoused liabilities have been discharged.

There is the continual condition of filing all relevant tax returns for the restricted periods so that the tax debt is quantified. Businesses that fall within SME criteria and who's affairs are looked after by the Personal or Business divisions of Revenue automatically qualify, whereas larger businesses must apply for the scheme. Taxpayers should contract Revenue before 31 December 2022 to discuss their repayment plan with respect to warehoused debt.

Conclusion

There is still a large amount of uncertainty about the trajectory of the pandemic and how this will impact on businesses in the future. The extensions to the wage subsidy scheme and to other business support measures and the introduction of the new Business Resumption Support Scheme in the Finance (Covid-19 and Miscellaneous Provisions) Act 2021 are welcomed by businesses. The challenge into the future will be managing a careful balance on the withdrawal of Government supports to ensure a smooth transition back to normality.

Lynn Cramer
Partner, Maples Group
Grainne O'Loughlin
Associate, Maples Group

New Stamp Duty Charge on Bulk Acquisitions of Residential Units

Introduction

The Finance (Covid-19 and Miscellaneous Provisions) Act 2021 ("the Act") introduced a 10% rate of stamp duty on acquisitions of certain residential property, following political debate concerning investors acquiring large numbers of Irish residential properties. In this article we discuss these changes, how the legislation operates and highlight some points of uncertainty regarding the new legislation.

Stamp Duty on Bulk Acquisitions of Residential Units

The stamp duty changes were initially introduced through a Financial Resolution, published on 19 May 2021. Financial Resolutions can have the same statutory effect as a measure contained in an Act of the Oireachtas. The provisions must be enacted within a statutory timeframe set out in the Provisional Collection of Taxes Act 1927. As a result of this, the measures introduced have largely taken effect from 20 May 2021.

Before 20 May 2021, stamp duty at a rate of 1% applied to the acquisition of residential property with a value of up to €1m and at a rate of 2% where the value of the residential property exceeded €1m.

Section 13 of the Act inserts a new s31E into the Stamp Duties Consolidation Act 1999 (SDCA 1999). The section imposes a 10% rate of stamp duty on the acquisition, on or after 20 May 2021, of ten or more "relevant residential units" within a 12-month period.

The Explanatory Memorandum accompanying the Bill introducing the measure notes that it is intended to disincentivise the purchase of multiple residential units by a single corporate entity or individual. Helpfully, Revenue published detailed guidance with examples in relation to new s31E on 2 September 2021.

Relevant Residential Unit

The legislation contains a number of new definitions. A residential unit is firstly defined as a residential property situated in Ireland comprising an "individual dwelling". The concept of a "dwelling" has attracted its own share of analysis and litigation. As noted in a recent Tax Appeals Commission determination on local property tax (09TACD2019), there is no statutory definition of the word "dwelling". It is possible that interpretational issues will arise in relation to properties intended for use as student housing, institutional accommodation and co-living arrangements.

Section 31E(5) SDCA 1999 then proceeds to define a "relevant residential unit". These are the units that are subject to the new 10% stamp duty charge. If one has acquired a relevant residential unit, then, subject to certain exemptions, the new charge will arise.

A unit can be a "relevant residential unit" if it is acquired on or after 20 May 2021 (the date of the Financial Resolution). If the sum of that unit (which we refer to as the "reference unit") and any other units acquired by the person (or a person connected with that person) within a period of 12 months immediately preceding the date on which the reference unit was acquired is equal to or more than ten, then each unit comprised in that total shall be a "relevant residential unit".

The date of acquisition is a primary issue in the legislation, and s31E(2) makes provision for the specific dates on which a unit is acquired. For example, where s29(2) SDCA 1999 applies, in the case of a sale of land with a connected building contract, the date is the date of execution of the instrument pursuant to which such sale is effected.

Although the legislation references 20 May 2021, the fact that the 12-month period is the one preceding the acquisition of a reference unit means that the legislation has to be considered in the context of residential property acquisitions that took place from 20 May 2020. Previous acquisitions are taken into account for the purposes of the ten-unit test, so buyers do not benefit from a clean slate for their activities before 20 May 2021. However, the units acquired before 20 May 2021 should not, themselves, become liable for the higher rates by virtue of s31E(21).

The legislation also incorporates a "connected-person" anti-avoidance rule. This provides that in determining when the ten-unit threshold has been breached, account must be taken of any residential units acquired by connected persons in the relevant period. There is some relaxation of this rule for acquisitions by connected individuals who are not acting in concert. Connected for these purposes is as defined in s10 TCA 1997. In the context of banks lending to purchasers, one can see this issue being a point of due diligence to ensure that the correct stamp duty is paid.

Sub-sections 31E(20) and (21) set out the rules for aggregating acquisitions. If a person acquired nine residential units after 20 May 2021, then normal stamp duty rates will apply on each acquisition. However, when a tenth unit is acquired, additional stamp duty is payable on the tenth unit and each of the prior acquisitions. In a connected-party context, this rule has the potential to result in one person's becoming subject to the higher rate of duty when another, connected, person acquires additional residential properties. The additional stamp duty is payable (i.e. the difference between 1%/2% and 10%) when the stamp duty becomes payable on the later acquisition.

Exclusions

There are a number of exclusions from the new charge. Residential units in respect of which binding contracts for acquisition were entered into before 20 May 2021 are exempt provided such acquisitions are concluded before 20 August 2021. The provisions of s31E(2) do not make any explicit reference to the interaction of the new s31E with the existing s31A, which leaves some uncertainty about whether residential units acquired after 20 May 2021 under a contract executed before 20 May and stamped under s31A would be subject to the increased rate of stamp duty.

The Revenue guidance notes that Revenue take the view that the anti-avoidance provisions in s31E take precedence over certain other relieving sections within SDCA 1999, including s79 and 80. However, Revenue is prepared to allow the s79 exemption to apply to conveyances and transfers of shares deriving value from residential units between group companies. The same treatment will not be applied to reconstructions or amalgamations that might otherwise qualify for relief under s80. Given both those sections are subject to bona fide requirements, it is possible that this differing approach will be subject to challenge.

No account is taken of a unit in an "apartment block" for the purposes of determining whether the ten-unit threshold has been met. The intention is to ensure that the funding and development of apartments for the private rental sector are not impeded. An apartment block is defined as a multi-storey residential property that comprises, or will comprise, not less than three apartments with grouped or common access. The Explanatory Memorandum notes that the new 10% rate is intended to apply to the acquisition of residential units such as houses and duplexes but not apartments. However, in the legislation, the exemption applies to residential units "in an apartment block", not "apartments". The drafting means that there may be some uncertainty over the treatment of a development that consists of both apartments and other forms of dwellings attached to, or connected with, the main apartment block. The Revenue guidance acknowledges this point in noting that here may be apartments in an apartment block with own door access that might not come within the definition. Any such issues will be dealt with on a case by case basis by Revenue.

Residential units that are leased to a housing authority may be exempt from the 10% rate. This was the focus of media and political commentary.

Exemption

The exemption applies where (1) the lease is entered into on the same day as the residential unit is acquired and (2) the lease is entered into by the housing authority for the purpose of the provision of social housing support to a qualified household. Although those requirements are restrictive, the legislation also introduces a refund scheme. Where a person acquires residential units to which the 10% rate applies and, within two years, enters into a lease with a housing authority or body for a term of at least ten years, a stamp duty refund may be claimed. If the lease is terminated before the expiry of the ten-year term, a clawback of the amount refunded applies.

Indirect Acquisitions

The 10% rate will also apply to shares, units in an IREF (Irish real estate fund) or interests in a partnership that derive value, directly or indirectly, from "residential units". Similar to the position introduced by s31C SDCA 1999, there must be a change in more than 50% of the ownership of the entity, which results in a change in the person having control over a residential unit. The Revenue guidance states that control should be treated as having "its normal meaning" but also points to s432 of the Taxes Consolidation Act, 1997 and s7 of the Companies Act 2014 as useful in determining whether a change of control has occurred.

The section references interests "that derive value" from residential units, rather than interests that derive "the greater part of their value". The latter is generally understood as meaning more than 51%. The provisions of s31E(12) suggest that any part of the value (including less than 51%) that is derived from residential units is subject to the 10% rate. This means that a sale of shares in a company that owns a commercial unit with ten residential units attached would attract 10% stamp duty on the portion of the value attributable to the residential units. The Revenue guidance confirms this approach setting out that the 10% rate will apply to the part of the value of the interest that is derived from residential units. Practically, there may be cases where operating companies have staff accommodation or other residential property that could attract the higher rate.

Anti-avoidance provisions are included in the legislation to prevent structuring that seeks to ensure that the value in such interests is derived from something other than the residential units (e.g. by the transfer of cash or assets to the company, IREF or partnership from a connected person before any sale of the interests).

There is some debate about how these indirect acquisitions interact with the definition of a relevant residential unit. As set out in s31E(12), where there is a relevant sale of shares deriving their value from residential units, the conveyance shall be chargeable to stamp duty under the new charging provisions "as respects that part of the value of the stocks... that is derived from a relevant residential unit". A relevant residential unit is a unit acquired after 20 May 2021. Therefore the question arises as to whether, where a company had acquired its property before that date, any of the property is a "relevant residential unit". In the authors' view, the provisions of s31E(15) are intended to answer that question. Section 31E(15) provides that if a person acquires control of the residential property-owning company, they are treated as acquiring the residential units on the date of the relevant contract or conveyance. Therefore, a person acquiring control of a company in June 2021 is treated as acquiring any residential units held by that company in June 2021. The fact that the company may have acquired the property in 2019 is irrelevant.

Charges

To the extent the 10% stamp duty rate chargeable in respect of a residential units is unpaid, it shall be a charge on the relevant residential units. This is a significant enforcement step as lenders will be keen to ensure that any unpaid stamp duty, particularly in the case of indirect acquisitions, does not disrupt their own security position.

Capital Taxes Directive

The impact of the Capital Taxes Directive (Council Directive 2008/7/EC) on the new provisions is an area of interest. Section 31D SDCA 1999 introduced a stamp duty charge on "schemes of cancellation" in respect of Irish companies. This was the subject of the recent appeal in determination 08TACD2021. The transaction at issue was AbbVie's acquisition of Allergan Plc. The appellant argued that s31D was contrary to the Capital Taxes Directive in that it imposed indirect taxes on restructuring operations and transactions involving shares and securities. The Directive prohibits such measures on the basis that such duties interfere with the free movement of capital in the EU. Ireland is in breach of its obligations to transpose the Directive into Irish law, but the Directive and its predecessor (Directive 1969/335) have been found to have direct effect.

In the appellant's submission, it proposed that either s31D be read in conformity with Directive 2008/7 or, if that is not possible, s31D must be disapplied in respect to the transaction. The Tax Appeals Commissioner decided that s31D should be interpreted in conformity with the Directive. This meant that, because the Directive has direct effect, the TAC was obliged to consider the purpose of the Directive in interpreting s 31D. In doing so, the TAC asserted its right to insert wording into the legislation to ensure conformity with the EU legislation was upheld. That resulted in the transaction being treated as falling within the definition of restructuring operations within the meaning of the Directive and the tax assessment being reduced to nil. The statement and analysis of the Commissioner in the case would support a view that certain aspects of s31E may be susceptible to similar challenges. The decision is understood to be subject to an appeal by Revenue and, it is likely that the High Court will be required give its view on the issue.

Conclusion

At 10%, the new stamp duty rate represents a significant disincentive to the acquisition of large numbers of houses or entire housing estates. Its introduction, outside of the normal budgetary cycle of legislation, illustrates the political desire to act in this area. If the legislation alters behaviour and raises very little tax, it may be judged a success. Given the technical points outlined above, including the application of the Capital Taxes Directive, and the sums involved in the sector, it would not be surprising to see the issues being litigated over coming years.

Emer Dowling
Tax Director, Grant Thornton

Tax Implications of Insolvency Procedures including the Small Companies Administrative Rescue Process

Introduction

Ireland has experienced unprecedented economic disruption as a result of the Covid-19 pandemic. It was expected that the pandemic would lead to an increase in the number of corporate insolvencies. However, to date, this increase has not materialised – the number of corporate insolvencies during the first six months of 2021 was actually 38% lower than the corresponding 2020 figure. The downward trend in the number of corporate insolvencies is partly due to the fact that companies' cash-flow positions are being subsidised by the Government Covid-19 support measures and forbearance arrangements with their banks. This level of support is unsustainable. Once

Government supports and lender forbearance cease, it is inevitable that some companies will face insolvency.

This article provides a brief overview of some of the mechanisms for dealing with corporate insolvency in Ireland and discusses the direct tax aspects of each. The mechanisms considered are:

- receivership;
- liquidation;
- examinership; and
- small company administrative rescue process (SCARP).

Recap on Insolvency Measures

Receivership

A receiver is a person appointed by a lender to enforce its security over assets of the company. A receiver can be appointed over specific assets of the company pursuant to a fixed charge or, where the lender holds a floating charge, a receiver manager can be appointed with the power to manage and trade the company's business. The receiver acts as agent of the lender. The function of the receiver is to take possession of the charged assets and realise value from them to repay the loan.

Tax issues on appointment

The appointment of a receiver does not have any immediate tax consequences. The receiver should obtain a new tax reference number for each receivership. If a mortgagee appoints the same individual as receiver over a number of assets of the same borrower, a single tax reference number may be used for the receivership.

CGT on the disposal of assets by a receiver

Section 571 TCA 1997 provides that the CGT liability arising on the disposal of an asset by a receiver is chargeable on and payable by the receiver. The tax due is payable out of the disposal proceeds.

The CGT liability is calculated as if the company had sold the asset. In particular, the base cost of the asset is the original base cost of the asset to the company, and any capital losses available to the company may be used to reduce the CGT liability. Available losses are apportioned between the chargeable gains arising on the disposal of assets by the receiver and any other chargeable gains of the company for the period when the asset is sold.

Although s571 sets out clearly how the receiver's liability is calculated, there can be practical problems. Often, the directors of the company are not cooperative and will not provide the information needed to compute the liability. The receiver will have to explore alternative avenues to obtain the information needed, including carrying out a review of the property title documents and publicly available financial statements. The receiver may also consider requesting information from Revenue to assist with the calculation of the CGT liability. Section 851A TCA 1997 allows Revenue to disclose taxpayer information to another person in certain circumstances, including where the information is necessary to establish the "…tax, interest, penalty or other amount that is or may become payable by another person, or any refund or tax credit to which the other person is or may become entitled,..". In section 5 of its Tax and Duty Manual Part 04-00-01, "Guidelines on Tax Consequences of Receivership and Mortgagee in Possession (MIP)", Revenue states that it is prepared to share available information for the sole purpose of assisting in the determination of tax liabilities.

Where insufficient information is available to the receiver, assumptions may need to be made to determine the tax position. Revenue has acknowledged these difficulties and confirmed that it will not seek to challenge a computation provided that:

- reasonable endeavours are undertaken to determine the CGT liability; and
- the underlying assumptions are documented.

The tax due from the receiver is collected by way of an assessment to income tax under Schedule D, Case IV. The amount of income to be included in the return is an amount which, when subjected to income tax at the standard rate equals the CGT liability. For example, if a CGT liability of €100,000 arises, income of €500,000 should be included on the Form 1 (T&E). As the receiver is assessed to income tax, the income tax pay and file deadlines apply.

The application of s571 TCA 1997 was the subject matter of a recent Tax Appeals Commission determination.[1] A French bank had enforced its security and disposed of shares in a French company held by the taxpayer. The bank failed to discharge the CGT liability arising on the disposal of the shares in accordance with s571 TCA 1997. Revenue sought to pursue the taxpayer for the CGT and raised amended assessments on the taxpayer for the CGT liability. It was Revenue's view that while the CGT liability is recoverable from the bank under s571 TCA 1997, Revenue is not precluded from recovering the tax from the taxpayer. The taxpayer argued that the bank was accountable for the discharge of the CGT liability. The Appeal Commissioner agreed with the taxpayer's position and reduced the amended assessments to nil. The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court.

Tax treatment of rental income: s96(3) TCA 1997

Under s96(3) TCA 1997, where a receiver has been appointed or a mortgagee is in possession, the property is "...deemed for the purposes of this Chapter to be vested in the mortgagee, and references to a lessor shall be construed accordingly...". As a result of this provision, the lender, and not the receiver or taxpayer, is the accountable person for tax on rental profits. It is Revenue's view that the deeming provision of s96(3) TCA 1997 includes the tax due on any balancing charge or clawback of "s23-type" relief arising on the disposal of property by the receiver.

The taxable rental profit is calculated as if the company were still in possession of the property. Similar to the CGT position, this can pose practical difficulties for the lender where the information needed to accurately determine the taxable rental profit is not available to the lender, e.g. details of capital allowances available, rental losses forward. The lender should include the rental income on the Form CT1 that it files for its MIP activities.

The lender needs to calculate the taxable rental profit of each borrower separately. It is not possible to use rental losses in one receivership to reduce the taxable rental profits of an unconnected receivership, nor can the taxable rental profits be reduced by trading losses of the lender. In 22TACD2020, the Appeal Commissioner agreed with the latter assertion and determined that the lender was not entitled to offset the losses from its trading activities against the deemed rental income arising from the properties where it acts as MIP.

Tax treatment of other income

TCA 1997 does not contain any provision for the collection of corporation tax due by a company in receivership. This was confirmed by the High Court in *Wayte Holdings Ltd (in receivership) and Burns v Hearne* [1986] III ITR 553. In this case, Revenue argued that, due to the provisions of s105 ITA 1967 (now s52 TCA 1997), the receiver was required to discharge the corporation tax payable on interest income earned on funds placed on deposit by the receiver.

In his ruling, Justice Costello noted that s105 ITA 1967 had not been made part of the Corporation Tax Acts by s11 CTA 1976 (now s76 TCA 1997) or any other provision. Accordingly,

1 92TACD2021.

Revenue could not rely on that section, and the receiver was not personally liable for the corporation tax liability.

Despite Revenue's focus on the tax implications of receiverships during the previous economic downturn, there has been no change to the legislative provisions since the *Wayte Holdings* case. A receiver is still not liable for the corporation tax arising on income or trading profits earned during the receivership. The receiver may pass the full proceeds of income earned during the receivership to the debenture holder. This could result in the company's not having sufficient funds to discharge the relevant tax liability.

For completeness, it is worth highlighting that a different analysis applies where the other income falls within the charge to income tax rather than corporation tax. This scenario could arise where, for example, a receiver is appointed over property held as trading stock of a land dealing trade carried on by an individual. Section 52 TCA 1997 states that:

> *"Income tax under Schedule D shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under that Schedule is directed in the Income Tax Acts to be charged.."*

It is Revenue's view[2] that this section makes the receiver liable to pay income tax on income other than rental income. As the receiver is acting in a fiduciary or representative capacity, the standard rate of tax i.e. 20% applies.

Receiver reporting obligations

Sections 890 and 894 TCA 1997 impose an obligation on receivers to provide details of income received by them. To comply with this obligation, a receiver should submit an annual Form 8-2 for each receivership. This form should be submitted by 31 October of the following year.

Liquidation

Liquidation is the final stage in the life cycle of a company. It is a process used to wind up and dissolve a company. There are three types of liquidation:

- Members' voluntary liquidation – used to wind up solvent companies that have ceased trading or are dormant.
- Creditors' voluntary liquidation – a process initiated by the directors of a company where the company cannot pay its debts as they fall due.
- Court liquidation – the High Court can put an insolvent company into liquidation after hearing a winding-up petition. The petition for winding-up can be taken by a creditor of the company or the company itself.

After the appointment of the liquidator, the company ceases to be the beneficial owner of its assets. The liquidator realises the company's assets and uses the proceeds to settle the company's debts. The surplus, if any, is distributed to the shareholders.

Tax issues of appointment

The appointment of a liquidator has a number of tax consequences.

Pay and file deadlines

Section 27(7) TCA 1997 provides that the date that the resolution to wind up the company is passed is the end of an accounting period for tax purposes. Thereafter, accounting periods will end every 12 months or, if earlier, on the completion of the winding-up.

The corporation tax return for the period ended on the appointment of the liquidator is due for filing within three months of the period end, subject to the usual "not later than the 21st of the month" proviso.

The rules regarding the corporation tax payment deadlines continue to apply where a company is in liquidation. Therefore, any

2 This position is set out in section 3.2 of Revenue Tax & Duty Manual Part 04-00-01.

balance of corporation tax is payable with the corporation tax return for the period, i.e. within three months. Furthermore, preliminary tax is payable by the 21st/23rd of the penultimate month of the accounting period, even though the decision to wind up the company may not have been made at that time.

Corporation tax and stamp duty groups

When a liquidator is appointed, the company ceases to be the beneficial owner of its assets. In particular, where a liquidator is appointed to a holding company, the company ceases to be the beneficial owner of the shares in its subsidiary companies. This breaks the corporation tax and stamp duty group relationship between it and its subsidiary companies.

Ordinarily, there is a clawback of any stamp duty relief claimed under s79 SDCA 1999 where the companies cease to be associated within two years of the date of transfer. However, under s79(7A) SDCA 1999, a clawback will not be triggered where the companies cease to be associated due to the liquidation of the transferor company and for the two years from the date of transfer:

- the transferee company continues to hold the asset; and
- there is no change in the shareholders of the transferee company.

CGT position

From first principles, the appointment of the liquidator would also break the group relationship for CGT purposes. However, s616(4) TCA 1997 specifies that the winding-up of a company shall not be regarded as the occasion of that company or of any effective 75% subsidiary of that company ceasing to be a member of a group of companies. Consequently, CGT group relief will continue to apply to intra-group transfers of assets by or to the company during the course of the liquidation.

Under s623 TCA 1997, there may be a clawback of CGT group relief previously claimed where a company leaves a group. Where a company leaves a group as a result of the liquidation of that company or another company's going into liquidation, there will not be a clawback provided the winding-up is effected for bona fide commercial reasons (s623(1)(d) TCA 1997).

Disposals of assets by the liquidator during the winding-up are subject to CGT. The gain on the disposal is calculated as if no liquidator were appointed. CGT losses carried forward may be offset against gains arising on the disposal of assets by the liquidator.

Section 571 TCA 1997 also applies to disposals by a liquidator. Thus, the liquidator will be required to discharge any CGT liability arising on the disposal of assets. This includes any CGT liability arising on the distribution of assets to the shareholders of the company.

Close company surcharge

A distribution of assets to the shareholders on liquidation is not a distribution for corporation tax purposes (s130(1) TCA 1997). Therefore, a close company cannot use such distributions to reduce the close company surcharge on its pre-winding-up income.

Section 434(7) TCA 1997 confirms that a close company surcharge will not arise where a company cannot legally make a distribution. When a company is in liquidation, it cannot legally make a distribution, and so a close company surcharge should not arise in respect of investment income earned during the winding-up. There is one exception to this general rule – voluntary liquidations. It is possible for a company in voluntary liquidation to apply to the High Court to be removed from liquidation, thereby removing the legal impediment to paying dividends.

Cessation of trade

Although any trade carried on by the company will inevitably cease at some point during the liquidation process, the date of cessation is not necessarily the date of appointment. It is possible that the liquidator will continue to carry on the trade for a period of time. It should be noted that a number of tax cases, including *CIR v The Old Bushmills Distillery Co Ltd (in liquidation)* [1930] 12 TC 1148, have confirmed that the mere realisation of assets by the liquidator is not trading. The usual tax consequences will arise on the cessation of the trade, i.e. terminal loss relief, balancing allowances and charges.

Examinership

Examinership was introduced by the Companies (Amendment) Act 1990. A company in difficulty may apply to the court for protection from its creditors. The court may appoint an examiner to the company where it is satisfied that there is a reasonable prospect that the company as a whole, or any part of its undertaking, has a reasonable prospect of survival as a going concern. Examinership is not suitable for companies that are "on life support with no prospect of survival".[3] Once appointed, the examiner has a period of up to 150[4] days to investigate the affairs of the company and formulate a scheme of arrangement. The scheme of arrangement may include the following elements:

- agreement that part of the company's debt is written off;
- capital investment by third-party investors;
- a capital injection by the existing shareholders;
- the surrender/termination of onerous leases; and
- a restructure of the company or business.

The scheme of arrangement must be approved by at least one class of creditor and confirmed by the court.

Despite its many success stories, the examinership process is underused in practice. This is largely due to the procedural complexity and related costs of the process. In an effort to reduce the costs of the process, the legislation was changed in 2014[5] to allow SMEs to apply to the Circuit Court rather than the High Court. This change did not result in an increase in the number of examinerships; only three examinership events were recorded in the first half of 2021 from a total of 169 corporate insolvencies.

Introduction of New Measures

SCARP

The pandemic brought the need for a simplified process for the rescue of SMEs into the spotlight once again. In October 2020 the Company Law Review Group recommended the establishment of a new corporate rescue procedure for SMEs. After a public consultation process, the Companies (Rescue Process for Small and Micro Companies) Act 2021 was signed into law on 22 July 2021. This legislation introduces the small company administrative rescue process (SCARP). SCARP mirrors key aspects of the examinership process but without the need for court approval (subject to no creditor's objecting to the proposal). The process is, broadly, as follows.

3 The words of Mr Justice Kelly when dismissing a petition for examinership by the Zoe Group in 2008.

4 Increased from 100 days by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020.

5 The Companies (Miscellaneous Provisions) Act 2013 was signed into law in December 2013, but the changes only became effective from July 2014 on the passing of a Ministerial Order.

Fig. 1: The SCARP process.[6]

Pre-appointment	• The directors prepare a statement of affairs. • The process adviser reviews the statement of affairs and issues a report confirming whether the company has a reasonable prospect of survival.
Day 1	• The directors meet to formally appoint the process adviser and commence the process.
Days 2 - 42	• The process adviser investigates the company's affairs and consults with creditors to prepare a rescue plan. • Excludable creditors are identified and notified. The excludable creditors (primarily Revenue, State and Department of Social Protection debts) can be excluded from the rescue plan but only on limited grounds.
Day 42 & subsequent	• A meeting of the shareholders and creditors is held. If at least one class of impaired creditor approves the plan, based on a majority (greater than 50%) in value, then the plan is approved, unless a creditor objects within 21 days of creditor approval and files a formal objection to the rescue plan. • If the rescue plan is not approved at the meeting, the process adviser must apply to the court to have the rescue plan confirmed. The plan will be approved by the court where it is satisfied that the rescue plan is fair and equitable and does not unfairly prejudice the objecting creditor.

Tax issues on appointment of examiner or process adviser

The mere appointment of an examiner or a process adviser under SCARP does not affect the tax status of the company. In particular, the appointment does not result in an automatic cessation of the trade, nor does it trigger the end of an accounting period for tax purposes. The company is required to discharge any tax liabilities that arise and file tax returns in the normal manner.

Tax implications of debt release

A successful scheme of arrangement or rescue plan will most likely include a reduction in the company's debts. The following provisions need to be considered when determining the tax implications of a write-off of a company's debts:

- Section 87 TCA 1997 – Debts set off against profits and subsequently released;

6 The rescue plan sets out the framework for the survival of the company.

- Section 76A TCA 1997 – Computation of profits or gains of a company; and
- Section 552(1B) TCA 1997 – Release of debts used to fund the acquisition of capital assets.

Under s87 TCA 1997, a trading receipt will arise where a debt is written off and a corporation tax deduction was previously taken for the expense that created the debt. In the event that the write-off occurs after the trade has ceased, the amount written off is treated as a post-cessation receipt and taxable under s91 TCA 1997.

The application of s87 TCA 1997 is relatively straight forward where a trade creditor is written off: such write-offs clearly fall within the scope of the section. The treatment of the write-off of loans used for working capital purposes is more complex. For example, consider the scenario where a company takes out a loan to pay its trade creditors. The company has taken a deduction for the payments made to its suppliers and not for the amount borrowed. As a corporation tax deduction was not taken for the loan itself, the write-off of the loan is not treated as a taxable receipt under s87 TCA 1997.

The tax treatment of the write-off of loans needs to be determined from first principles. Section 76A(1) TCA 1997 provides the basic rule that taxable profits are computed in accordance with generally accepted accounting principles and practice "subject to any adjustment required or authorised by law in computing such profits or gains for those purposes". This means that where the debt written off is credited to the company's profit and loss account, the default position is that the amount written off will form part of the taxable trading profits for the period.

In a 2016 tax appeal[7] the Tax Appeals Commission considered whether PAYE/VAT liabilities written off as part of a successful scheme of arrangement should be subject to corporation tax. The amounts written off were credited to the company's profit and loss account. Revenue agreed that:

"if the sums were capital in nature, it would be incorrect to include them in the computation of profits for corporation tax purposes".[8] In this appeal it was found that the PAYE and VAT amounts were revenue in nature and thus taxable. Although this appeal went against the taxpayer, the analysis presented as part of the appeal puts forward the argument that the write-off of debts that are capital in nature does not create a taxable receipt.

Due to the provisions of s552(1B) TCA 1997, the write-off of a debt that is capital in nature may still have tax consequences for the company. Section 552(1B) TCA 1997 applies where:

- a capital loss arises on the disposal of an asset;
- any of the cost of acquisition as set out in s552(1)(a) or expenditure referred to in s552(1)(b) was defrayed, either directly or indirectly, out of borrowed money; and
- the debt in respect of that cost of acquisition or expenditure is released either in full or in part (whether before, on or after the disposal of the asset).

Where the debt write-off occurs before or during the same accounting period as the disposal of the asset, the allowable loss arising on the disposal is reduced by the lower of the amount written off and the loss arising on the disposal. Section 552(1B) does not convert an allowable loss into a chargeable gain. Where the debt write-off occurs in a later year, a chargeable gain is deemed to arise to the person who made the disposal. This deemed gain is equal to the amount of the reduction that would have applied had the write-off

7 14TACD2016.

8 Paragraph 32, 14TACD2016.

occurred in the same year of assessment as the asset disposal.

Finally, we consider the CAT implications of a debt write-off. By virtue of s5(1) CATCA 2003, a person is deemed to take a gift where:

> *"......under or in consequence of any disposition, a person becomes beneficially entitled in possession, otherwise than on a death, to any benefit (whether or not the person becoming so entitled already has any interest in the property in which such person takes such benefit), otherwise than for full consideration in money or money's worth paid by such person".*

A debt write-off is clearly a benefit to a company. In the absence of any Revenue concession, a CAT liability could arise for the company (or its shareholders, in the case of a private company) on the debt write-off. By concession,[9] a CAT charge will not arise where:

- a financial institution enters into a debt restructuring, forgiveness or write-off arrangement with a customer; and
- the arrangement is for bona fide commercial reasons.

As noted previously, the company is required to discharge any tax liabilities arising during the examinership or SCARP in the normal manner. This includes any tax liabilities arising as a result of debt write-offs negotiated. Therefore, the examiner or process adviser should be mindful of the tax consequences when preparing the scheme of arrangement or rescue plan.

Conclusion

The appointment of an examiner, receiver or liquidator can have various tax consequences for the company and the insolvency practitioner. The insolvency practitioner and the directors should take appropriate advice to ensure that the tax position is managed to the extent possible and that all obligations are complied with.

9 The concessionary treatment is set out in Revenue's Tax and Duty Manual "CAT Part 19 – Miscellaneous Provisions".

Fiona Carney
Director, Tax Solutions Centre, PwC

DAC 6: Recent Revenue Guidance Updates

Introduction

In issue 4 of 2020 of *Irish Tax Review*, Directive 2011/16/EU on information exchange, known as "DAC 6", which was transposed into Irish law in a new Chapter 3A of Part 33 TCA 1997, was discussed in light of the published Revenue guidance at that time (see David Fennell, "EU Mandatory Disclosure: Crunch Time for DAC 6 Filings", *Irish Tax Review*, 33/4 (2020)).

Revenue subsequently made several significant updates to Tax and Duty Manual Part 33-03-03 ("EU Mandatory Disclosure of Reportable Cross-Border Arrangements") ("the manual"). These include the addition of new guidance on the hallmarks in Category C. A number of updates were also made to address practical interpretation and reporting matters raised by practitioners with Revenue, through the DAC 6-focused subgroup of the TALC BEPS Implementation Sub-committee meetings. Meetings were held in December 2020 and, more recently, in February 2021 after the first wave of return filings which took place in January 2021. Some guidance was also removed from the manual.

In this article I will give an overview of important updates made. At the time of writing, the published manual was last updated in March 2021.

Background

DAC 6 introduced a new disclosure regime under which intermediaries and, in certain cases, relevant taxpayers are required to file returns of information with Revenue regarding reportable cross-border arrangements. A "reportable cross-border arrangement" is a cross-border arrangement that bears a specific characteristic called a "hallmark". First reporting in Ireland commenced earlier this year, and we are now in the "live" reporting period, where returns must be filed within 30 days of the reporting obligation's being triggered.

Section 2: Reportable Cross-Border Arrangements

Several additions and amendments have been made to section 2 of the manual on the application of the hallmarks and the main-benefit test.

Main-benefit test

Several of the hallmarks are subject to the "main-benefit test", which is satisfied "if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage".

The guidance on the application of this test in section 2.5.3 has been expanded to emphasise the fact that this test focuses on what a person "**may reasonably expect** to derive from the arrangement". The word "reasonably" is based on the common law "reasonable man test". It is an objective test that asks what a "reasonable person of ordinary prudence" would do in a given situation. The word "expect", in this context, is a verb that means to regard something as likely to happen.

Thus the particular facts or circumstances of the participants are not important in the context of this test, as that would be a subjective test. Rather, what is important is whether a hypothetical reasonable person could expect to obtain tax benefits from the arrangement and that such benefits would be a main benefit of that arrangement. It involves asking a hypothetical question of what a reasonable person would reasonably expect, given the facts of a particular arrangement.

Similar updates have been made to the guidance on what a person "could be reasonably expected to know" in the context of the definition of "intermediary" (see below).

Hallmarks in Category C

New guidance on the application of the hallmarks in Category C was added to section 2.8. Guidance had not previously been provided on these hallmarks.

C.1: Deductible cross-border payments

This hallmark refers to arrangements that involve:

> "...deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:
> (a) the recipient is not resident for tax purposes in any tax jurisdiction;
> (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
> (i) does not impose any corporate tax or imposes corporate tax at a rate of zero or almost zero, or
> (ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative;

(c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;
(d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes".

Helpfully, the guidance confirms that, in circumstances where the recipient is a transparent or disregarded entity for tax purposes, it may be "looked through" for the purpose of determining whether this hallmark is met. Having done so, the guidance notes state that where it is found that more than one jurisdiction regards the payment as having been received by an entity that is resident for tax purposes in each of those jurisdictions, the hallmark is met only if one or more of the above conditions is satisfied in each of those jurisdictions. Where it is found that there is more than one recipient of the payment, the hallmark is met if one or more of the conditions occur for at least one of the recipients.

In applying the various conditions, the following guidance has been added to the manual:

- Condition (a) applies to "stateless entities", an example of which is an entity that is established in a jurisdiction that determines tax residence based on effective management and is effectively managed in a jurisdiction that determines residence based on establishment.
- A rate of "almost zero" referenced in condition (b)(i) is taken to mean a rate of less than 1%. The guidance also notes that it is the corporate tax rate in the jurisdiction itself and not the treatment of the payment that is relevant.
- In applying condition (b)(ii), the EU list of non-cooperative jurisdictions for tax purposes is currently updated twice yearly. A table giving the composition of this list for all periods since June 2018 is now included in appendix III to the manual. The guidance notes that, at the date of publication, there is no list of jurisdictions assessed within the framework of the OECD as being non-cooperative.
- In applying condition (c), the focus is on the payment rather than the recipient. The guidance cites an example of a dividend that is deductible for tax purposes for the payer but is tax-exempt in the hands of the recipient due to a participation exemption in the recipient's home jurisdiction. By contrast, the condition should not apply to a payment received by a tax-exempt pension fund that is tax-exempt because of its status as a pension fund and not due to the characterisation of the payment.
- In applying condition (d), the guidance notes that a "preferential tax regime" means a regime that offers some form of tax preference in comparison with the general principles of taxation in the relevant country. It notes that the hallmark applies to all preferential tax regimes, not just those that are considered harmful. Ireland's Knowledge Development Box and Tonnage Tax regimes are cited as preferential tax regimes that are not considered harmful. The author understands that these are the only Irish regimes that Revenue currently considers to be preferential.

In assessing whether an arrangement bears hallmark C.1, the guidance states that it is "necessary to examine its characteristics at the following points in time:

(a) when the arrangement is made available for implementation,
(b) when the arrangement is ready for implementation,
(c) when the first step in the implementation of the arrangement has been made."

If, at any of these points in time, it can be established that the arrangement meets one or more of the conditions of hallmark C.1, it will come within the definition of a reportable cross-border arrangement.

The author understands that this approach is necessary to take account of factors such as changes to tax regimes or to the list of non-cooperative jurisdictions. This places an additional obligation on intermediaries to make the assessment of whether the hallmark is met at the earliest of the three trigger dates as normal and to reassess the position at the later dates, tracking the client's implementation status.

C2: Deductions for the same depreciation on an asset are claimed in more than one jurisdiction

C3: Relief for double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction

The updated guidance addresses Hallmarks C2 and C3 together, noting that they apply to cross-border transactions that give rise to a conflict in ownership of an asset, which result in taxpayers in more than one jurisdiction claiming tax relief for depreciation or amortisation on the same asset (hallmark C2) or claiming relief from double taxation for the same item of income (hallmark C3). It notes that ownership means the economic owner of the payment flows, for tax purposes, on the underlying asset rather than the legal ownership of the asset itself.

Helpfully, the guidance clarifies that arrangements where there is no conflict in ownership of the underlying asset, and the income against which the deduction is claimed is included in both jurisdictions, will not be within scope of the hallmark. An example is cited where the profits of a foreign branch of a company are taxed both in the foreign jurisdiction and in the head office jurisdiction by virtue of the operation of a worldwide taxation system and deductions for depreciation on branch assets are claimed in both jurisdictions. Although not specifically cited, similar situations would be expected to include the application of the controlled foreign company (CFC) rules.

C4: Arrangement that includes transfers of assets where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved

The guidance notes that, in applying this hallmark, it is the amount treated as payable in consideration for the assets for tax purposes in the relevant jurisdictions that is relevant. Examples can include cross-border mergers. The guidance also notes that the hallmark can apply even in circumstances where the domestic provisions operate to deem no disposal to have occurred, such as in the case of a share-for-share transaction under s584 TCA 1997.

Guidance is also added on the interpretation of "material difference". It is stated that "a difference will be 'material' where, taking into account all relevant facts and circumstances, it is reasonable to expect that the difference would affect decisions being made by the participants involved in it". The author understands that what is relevant is whether the difference influences the choice being made in relation to, for example, how to structure the arrangement.

It is worth noting that this hallmark is broad in scope and could apply in circumstances where the mismatch in consideration arises purely as a result of the application of local tax provisions in the normal manner. It is also worth noting that different Member States have adopted different approaches to assessing what is "material difference", with some applying a *de minimus* amount or percentage threshold.

Hallmark A.2: Contingent fees

The guidance on hallmark A.2 was updated[1] to remove the statement that:

> "A person may link their fee to the obtaining of a tax advantage without hallmark A.2 being met. This could apply, for example, where a service provider is engaged by a participant in a cross-border transaction to apply for a withholding tax repayment on their behalf. Unless it is reasonable to conclude that the withholding tax repayment is itself the main benefit or one the main benefits that was expected to be obtained from the cross-border transaction, then this hallmark will not be met."

1 This was excluded from a previous version of this manual which was last updated December 2020.

The author understands that this change was necessary as there was a risk that certain arrangements involving withholding tax schemes would not be reported.

It still remains the case that the hallmark is subject to the main-benefit test, meaning that it will not apply unless a tax advantage is the main benefit or one of the main benefits that a person may reasonably expect to derive from an arrangement.

Hallmark A.3: Standardised documentation and/or structure

An addition was made to the guidance on hallmark A.3, which states that the hallmark will not be met unless there is a link between the documentation and/or structure in question and expected tax advantage. A helpful clarification is added, in the context of group lending arrangements, that "while a group may use standard documentation for all group loans, there is unlikely to be a link between the fact the documentation is standardised and any tax benefit that might arise meaning the Hallmark is unlikely to be met".

Hallmark B.3: Circular transactions

A footnote was added to the guidance in relation to whether the arrangement involves "interposed entities without other commercial function". It notes that:

> "it is possible for an entity to have a general commercial function but be interposed into a transaction to facilitate a circular flow of funds (and in turn a tax advantage when analysing the main benefit test). An example of this would be a back to back circular transaction arranged through a third party regulated bank. Although the regulated bank itself will have clear commercial function, in the context of the specific arrangement it does not."

"Cross-border arrangement"

A "cross-border arrangement" is an arrangement that concerns an EU Member State and any other jurisdiction where at least one of the conditions set out in sub-parts (a) to (e) of s817RA(1) TCA 1997 is met. Sub-part (d) applies where "one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction".

The guidance as initially drafted included a statement that when applying the condition referred to in point (d), "it will not come within the definition of a cross-border arrangement unless it forms part or the whole of the activity carried on in the other jurisdiction".

The author understands that this change was necessary as there was a risk that the original guidance could unintentionally exclude certain arrangements that should be reported. This amendment brings the guidance into line with the wording of the Directive, which makes no reference to the arrangement's needing to relate to the activity. It would appear to broaden the scope of "cross-border arrangement" in certain circumstances. However, it still needs to be borne in mind that the arrangement must meet a hallmark in order to be reportable.

Section 3: Filing a Return

Revenue made several updates to section 3.1 of the manual outlining its expectations in relation to the "specified information" to be reported by intermediaries and relevant taxpayers in accordance with s817RA(3) TCA 1997.

(a) Information in relation to the identity of each relevant taxpayer

A "relevant taxpayer" is defined in s817RA(1) TCA 1997 as:

> "...any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement".

The guidance as initially published included a confirmation that:

> "Where an intermediary makes a reportable cross-border arrangement available to a person but, by the applicable filing date, the person has indicated that they will not be proceeding with it, information regarding that person should not be included in the information that is returned to Revenue."

This confirmation is now removed. The author understands that this change was necessary on the basis that the Directive requires disclosure of arrangements that have been made available to relevant taxpayers. From 1 July 2020 onward, it is not relevant whether the arrangement is actually implemented or not.

In circumstances where an arrangement involves a number of steps and a number of participants, a question can arise as to which of these participants is a "relevant taxpayer", given the broad definition of the term. The author understands it is Revenue's expectation that any Irish participant in the arrangement would be classified as a relevant taxpayer. This essentially means that the duties of a relevant taxpayer set out in s817RD TCA 1997 will apply, including the requirement to disclose the Arrangement ID assigned to the arrangement in their tax returns for the relevant chargeable period.

(c) A summary of the content of the arrangement

The guidance has been expanded to confirm that the requirement to summarise the content of the reportable arrangement is a reference to its tax content. The outline should:

- include sufficient information so as to allow an officer in a competent authority to understand how the complete arrangement operates (or is intended to operate),
- set out how the hallmark is triggered and the various tax implications of the arrangement, including how any expected tax advantage arises,
- explain each of the steps involved and how any statutory provisions apply (or do not apply) in the context of the transaction,
- summarise in abstract terms the broad business environment in which the parties operate, setting out any relevant business activities and/or arrangements (without leading to the disclosure of sensitive information), and
- disclose the nature of the group or commercial relationships between the parties, where relevant.

Revenue points towards the maximum 4,000-character parameters as being indicative of the level of content expected.

(e) Details of the national provisions that form the basis of the arrangement

The guidance has been expanded to confirm that it is necessary to disclose the key legislative provisions (whether tax or otherwise) that form the basis of the arrangement. This includes any provision relevant to the tax treatment of the arrangement and not just those provisions relevant to the conclusion that the hallmark is met.

It also includes any provision that would be expected to apply to the arrangement but for certain steps executed as part of the arrangement to prevent its application. The guidance cites the example of a situation where a dividend is re-characterised to prevent certain dividend withholding tax (DWT) provisions from applying. The relevant DWT provisions should also be disclosed.

Disclosures are generally expected to cover the relevant statutory provisions in an EU Member State. However, statutory provisions in third countries should also be disclosed where they have a bearing on the tax treatment in a Member State. The guidance cites examples of third-country entity classification rules or third-country transfer pricing safe-harbour provisions.

It is understood that the reference to non-tax provisions is intended to cover any provisions that are connected to a hallmark's applying, such as the legislation under which a foreign entity is established where its classification is relevant to the assessment.

Section 4: Intermediaries

Second category of intermediary

Similarly to the guidance updates on the "main-benefit test", the same principles in terms of "reasonably expect" have been added to section 4.3.1 in relation to the test of whether a person is within the second category of intermediary because that person "knows or could be reasonably expected to know" that they have undertaken to provide reportable services in relation to a cross-border arrangement.

Again, it is emphasised that what is important is whether a hypothetical service provider, given the relevant facts and circumstances, the available information, and the relevant expertise and understanding required to provide such services, would be expected to know that it provided reportable services.

Multiple reporting

DAC 6 provides for some exemptions from reporting that take account of the fact that there may be more than one intermediary with a reporting obligation involved in the same arrangement. An intermediary may be exempt from the obligation to file a return with Revenue where another intermediary files a return of the specified information either with Revenue or with the tax authorities of another Member State and provides the first-mentioned intermediary with the evidence of this specified in s817RC(6)/(6A) TCA 1997.

The guidance in section 4.9 of the manual has been updated to make it clear that an intermediary will not be exempt from the obligation to file a return with Revenue unless the return filed by the other intermediary contains **all of the specified information** that it is required to return to Revenue. The onus is on the first-mentioned intermediary to ensure that this requirement is fulfilled.

An example is included of a situation where the other intermediary is based in France and files a return with the French tax authorities. However, that return did not include details of the Irish tax provisions that form the basis of the arrangement, as this information was unknown to the French intermediary. The Irish intermediary must therefore make a return to Revenue of all of the specified information known to it, quoting the Arrangement ID provided by the French intermediary.

It can be the case that multiple reporting cannot be avoided due to the fact that intermediaries involved in the same arrangement can have different filing deadlines, depending on their category and when they provide the relevant service.

A person coming within the first category of intermediary is required to file a return with Revenue within 30 days beginning (a) on the day after the arrangement is made available for implementation, (b) on the day after the arrangement is ready for implementation or (c) when the first step in the implementation of the arrangement is taken, whichever occurs first. By contrast, a person coming within the second category of intermediary is required to file a return within 30 days of providing, directly or indirectly, the relevant aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of the arrangement.

An example to illustrate this is added to the guidance. An Irish adviser (first category of intermediary) is engaged to provide advice to a company in relation to a transfer of activities from Ireland to Portugal. The Irish adviser seeks advice from a Portuguese adviser (second category of intermediary) on the local tax implications of the arrangement. This advice is provided several weeks before the arrangement is made available to the taxpayer by the Irish intermediary. Although the Portuguese intermediary may have expected to be able to rely on the reporting of the Irish intermediary leading the engagement, this is not possible as the Portuguese intermediary's filing deadline is before that of the Irish intermediary. The Portuguese intermediary must therefore file the limited specified information that it is aware of. As this does not contain all of the specified information known to the Irish intermediary, the Irish intermediary must subsequently make a return to Revenue quoting the Portuguese Arrangement ID.

Legal professional privilege

Section 817RC(9)(b) TCA 1997 confirms that an intermediary is not required to report any information with respect to which a claim to legal professional privilege could be maintained by the intermediary in legal proceedings. In this situation, the intermediary must notify the relevant taxpayer that the taxpayer is required to report this information.

Section 4.10 of the manual has been updated to clarify that, in circumstances where an exemption from disclosure applies to part of the specified information only, the intermediary should file a return of the specified information that is not legally privileged with Revenue, marking the exempt fields in the return as "information legally privileged". The intermediary must share the Arrangement ID assigned with the relevant taxpayer within the specified time limits and notify them of their obligation to file a return of information with Revenue. The relevant taxpayer must file this return within 14 days of receiving the Arrangement ID.

Section 5: Relevant Taxpayers

Multiple reporting

In circumstances where the reporting obligation rests with the relevant taxpayer under s817RD(1) TCA 1997, the legislation also makes provision that they may be exempt from the obligation to file a return with Revenue where they have received the necessary evidence that a return of the specified information has been filed with Revenue by another relevant taxpayer or by an intermediary.

Although the legislation contained in s817RD(5) TCA 1997 limits the exemption to circumstances where the other person has filed the return with Revenue, the guidance in section 5.5 was updated to confirm that the exemption can also apply where another relevant taxpayer has filed a return of all of the specified information either with Revenue or with the tax authorities of another Member State. It is therefore hoped that an amendment will also be made to s817RD by Finance Act 2021 to put this aspect of the guidance on a statutory footing. A similar amendment was made to the provisions of s817RC TCA 1997 by Finance Act 2020 to extend the exemption for intermediaries to circumstances where the intermediary has received the appropriate confirmations that the specified information has been filed by another intermediary with the competent authority of another Member State.

Conclusion

The updates made to the guidance have been largely helpful in assisting intermediaries and relevant taxpayers in navigating through these new provisions. Further guidance on hallmark E.3, which applies to intra-group cross-border transfers of assets, functions or risks, would also be welcome, as this is a hallmark that is encountered frequently and some uncertainties exist in relation to its scope and interpretation.

Patrick Duggan
Tax Director, Business Tax Advisory and Transactions, EY Belfast

Relevant UK Budget and Finance Act 2021 Measures: Sowing the Seeds for Reform?

UK Budget: Overview

The UK Chancellor, Rishi Sunak, presented his Budget to the House of Commons on 3 March 2021. In it he sought to balance the need to provide continuing support and to encourage investment with cranking the gears into motion to a return to "sustainable" public finances in a post-Covid-19 world.

Accordingly, we saw the Chancellor recommitting to his flagship Covid-19 support measures. Businesses, employees and the self-employed have continued to receive support beyond March and, indeed, beyond the end of the original Covid-19 Roadmap period. As part of this support, the Chancellor is seeking to avoid sharp "cliff edges" as the range of support starts to wind down. This means that support is being given for a longer period but comes with an extra layer of complexity, given the changing levels of support as the economic stimulus packages wind down.

To assist the UK public finances, these support measures were accompanied by tax increases in a number of guises, with a common underlying theme that the tax in question is not payable just yet. Among these increases is the 25% UK corporation tax rate (for larger companies) from 1 April 2023, returning rates to the level of ten years ago. The corporation tax rate comes with an associated rise in the rate of diverted profits tax to 31%, but with a commitment to review the level of the bank surcharge rate during 2021 to protect the banks from an uncompetitive level of taxation.

Perhaps more unexpected was the repeal of the EU interest and royalties provisions with effect from 1 June 2021 (introducing a withholding tax on certain payments out of the UK where the treaty rates in question do not reduce the withholding to zero). We also saw the freezing of a number of personal tax allowances and thresholds, as widely touted before the Budget, but with a few twists – the freeze of personal allowances and higher rate threshold was deferred by a year but then will last up to 2026.

To compensate for these tax "rises" and to encourage investment in the short term, there is a time-limited "super-deduction" of up to 130% on new plant and machinery and the announcement of new consultations on research and development (R&D) reliefs, for example.

For the next two years, there is also additional flexibility to allow a three-year carry-back of up to £2m of losses and a new small-profits corporation tax rate so that only businesses with taxable profits of over £250,000 will pay the 25% rate. The Chancellor spoke in his Budget about being honest with the British people, and this Budget was pretty much what he had led the British to expect. The 25% corporation tax rate was at the top end of (or even beyond) expectations, but the Budget also delivered on support in the short term.

There are certain other announcements from the UK Budget that may be of interest to Irish businesses that currently have operations in the UK, trade with the UK or are considering an expansion into the UK market. A selection of these announcements is elucidated below. It should be noted that there were a number of other announcements made in the 2021 UK Budget that have not been referred to in this article.

The Finance Bill 2021 received Royal Assent and became Finance Act 2021 on 10 June 2021. As such, the measures referred to in this article, with the exception of consultations, have broadly been implemented by Finance Act 2021 and are now either in force or will come into force on the stipulated commencement date.

Freeport Tax Sites

The Chancellor announced the locations of eight chosen freeports in England – special economic zones with tax incentives to help stimulate regional growth. The Government is in discussions with the devolved administrations in Scotland, Wales and Northern Ireland about establishing freeports in the rest of the UK attracting similar tax reliefs. Freeport tax sites are designated zones in which favourable customs and VAT rules may apply, as well as a number of other tax incentives.

Customs and VAT

Businesses operating in freeport tax sites will receive customs tariff benefits, including duty deferral while the goods remain on site and duty inversion if the finished goods exiting the freeport attract a lower tariff than their component parts.

Businesses may also be able to take advantage of customs duty exemption on goods that are imported into a freeport, processed into finished goods and subsequently re-exported, although this depends on the specific terms of the relevant UK trade agreements, but it should apply to the EU–UK free trade agreement.

They will also be able to suspend import VAT on goods entering the freeport. In addition, businesses operating in freeports will be authorised to use simplified import procedures. This model expands on existing customs facilitations and procedures available to business.

Stamp duty land tax

There will be a relief from stamp duty land tax (SDLT) on the purchase of real estate that is situated in a designated freeport site in England. However, to qualify, the real estate must be purchased and used for a qualifying commercial purpose, and the exemption will be subject to a clawback period of three years. Generally, the relief will not apply to residential properties (or properties that are to be developed or redeveloped into residential property). At least 10% of the consideration must relate to property that meets the conditions. The exemption applies from the date that the freeport tax sites have been designated until 30 September 2026.

Capital allowances

Businesses constructing or renovating non-residential structures and buildings in freeport tax sites will receive tax relief for their capital expenditure in the form of a 100% first-year allowance on qualifying plant and machinery expenditure (which would have ordinarily qualified for main pool and special rate expenditure at 18% and 6%, respectively) and 10% straight-line relief on qualifying structures and buildings expenditure over ten years (compared to the 3% standard structures and buildings allowance (SBA) rate that applied from 1 or 6 April 2020). These reliefs are available on expenditure incurred up to 30 September 2026, and to qualify for the SBA the site must be brought into use on or before this date.

Business rates

There will be full business rates relief in freeport tax sites in England, once designated. Relief will be available to all new businesses, and certain existing businesses where they expand, until 30 September 2026. Relief will apply for five years from the point at which each beneficiary first receives relief.

National Insurance Contributions

The Government intends to enable employers operating in an eligible freeport site to pay 0% employer NICs on the salary of any new employee working in the freeport tax site. This 0% rate would be applicable for up to three years per employee on earnings up to a £25,000 per annum threshold. Employees will be deemed to be working in the freeport tax site if they spend 60% or more of their working hours in that freeport tax site.

The relief is intended to be available for up to nine years from April 2022 (or, if a site is designated as a freeport tax site at a later date, from such later date). The Government intends to review this relief to assess whether it should be continued up to its publicised end date in 2031, but it has committed that the relief would end no earlier than April 2026.

Plastic Packaging Tax

There were a number of measures introduced with the main aim of supporting the "Building Back Better" agenda and net-zero carbon emissions targets. In keeping with green tax policy and creating a new revenue stream for UK Treasury, the new plastic packaging tax (PPT) will take effect in the UK from 1 April 2022. This was trailed before the Budget, but further detail on this new regime was announced.

PPT will apply to plastic packaging manufactured in, or imported to, the UK where the plastic used in its manufacture is less than 30% recycled. The rate of the tax will be £200 per metric tonne of plastic packaging, and businesses will need to keep records and, in most cases, register for the tax, even if all of the packaging manufactured or imported contains more than 30% recycled plastic.

PPT is expected to affect approximately 20,000 manufacturers and importers of plastic packaging in the UK, so many businesses are starting to consider the registration, systems, invoicing, commercial, pricing, contractual and tax implications of the new tax. PPT has been introduced, or is being introduced, in other countries, with Italy and Spain currently planning to implement PPT from January 2022.

Residential Property Developer Tax

The Government announced on 10 February 2021 that it would introduce a new residential property developer tax (RPDT) as part of its “Building Safety Package”. RPDT is intended to be used to help pay for the costs of cladding remediation works. This new, time-limited tax would be in addition to a new Gateway 2 levy, which will be applied when developers seek permission to develop certain high-rise buildings in England. The Government is now consulting on the design of RPDT ahead of its inclusion in the 2021–22 Finance Bill, with effect from April 2022. The consultation closed on 22 July 2021 and covered:

- the definition of residential property and development activity, together with two potential models for the tax;
- approaches to setting the rate and allowance;
- the interaction with the new Gateway 2 levy;
- reporting, payment and compliance; and
- potential impacts of the tax, including on housing supply and provision of affordable housing.

The intention is to tax the development profits of the largest corporate undertakings that carry out UK residential property development activities on their own behalf – whether or not they develop in-house or use a third-party contractor. The Government proposes that the charge would apply to the profits of a company or group that exceed an annual allowance of £25m.

The definition of “residential properties” is far-reaching. Although communal dwellings (including hotels, hospitals, residential homes for children) are to be excluded from the tax, the Government has consulted on whether the tax should extend to purpose-built student accommodation (whether halls of residence or self-contained flats). Retirement accommodation that is not reliant on care provision will also be subject to the tax, as will “Build to Rent” properties and the provision of affordable housing.

The detail of how profits would be calculated will also be of interest to businesses that may be within the scope of the tax. In particular, the Government suggests that losses incurred before the introduction of RPDT should not be capable of reducing profits subject to RPDT and that interest and other funding costs would not be allowed as a deduction against RPDT profits.

The consultation does not propose a rate of tax, and this is expected to be announced at a future fiscal event. Consideration is still being given to whether businesses should make RPDT payments according to the same payment schedule they use for corporation tax.

UK Research and Development Tax Relief for SMEs

The UK Government has published a consultation document on the effectiveness of the current UK R&D tax relief schemes for both SMEs and larger companies. The results of this will be combined with the July 2020 consultation regarding the inclusion of data and cloud computing costs within claims to ensure that the relief encompasses all policy options and priorities.

After the delay last year to the introduction of the PAYE cap on the payable tax credit for the SME R&D scheme, the new rules are that for accounting periods starting on or after 1 April 2021, SMEs seeking to make an R&D claim may be subject to a new cap for refundable credits. The amount of R&D tax credit that an SME can receive is capped at £20,000 plus 300% of its total PAYE and National Insurance Contributions liability for the period (pro-rated where the accounting period is less than 12 months).

A company is exempt from this new cap if:

- its employees are creating, preparing to create or managing intellectual property; and
- it does not spend more than 15% of its qualifying R&D expenditure on sub-contracting R&D to connected parties or on the provision of externally provided workers by connected parties.

Extension of Reduced VAT Rate in Hospitality and Tourism Sectors

The Chancellor confirmed that the 5% reduced rate of VAT in the hospitality and tourism sectors continues to apply for a further six months to 30 September 2021. Thereafter, the VAT rate will be 12.5% for the next six months before increasing to the standard 20% rate in April 2022.

What Could Lie Ahead?

Looking further ahead, the Chancellor will hold another mini-Budget event this autumn, at which time the global fight against the Covid-19 pandemic might hopefully be in a significantly better place. We could thus potentially see him setting out much more of his long-term strategy for the recovery and growth of the UK economy and how taxpayers might be expected to fund all of the Covid-19 support that has been provided thus far.

Although speculation was rife at the end of 2020 that UK capital gains tax rates for individuals could rise, the Chancellor notably left this alone for now: the UK CGT rates remained at a headline rate of 20%, with 28% being payable on gains from residential property and carried interest. The annual exemption amount of gains has remained unchanged at £12,300 and will be frozen at this level until April 2026. It will be interesting to see whether the Chancellor also goes retro on UK CGT rates and reintroduces the old approach that UK CGT rates are effectively set at the individual's highest marginal rate of income tax.

Given the higher level of tax consultations this year, the expectations are that this could well lead to a fuller than usual Autumn Statement as conclusions are drawn later in 2021.

Planning for major tax changes in the current environment is still likely to represent a serious challenge for UK businesses and UK-tax-resident individuals, given the scope of potential reform that could lie ahead. However, we have visibility of some of the new measures that are expected to make it onto the statute books in the coming 12 months, as the Chancellor considers when to begin his mammoth task of rebalancing the books for UK plc.


Shane Wallace
Partner, Deloitte Ireland LLP
Jessica Hayes
Senior Manager, Deloitte Ireland LLP
Brian Mullane
Assistant Manager, Deloitte Ireland LLP *(not pictured)*

Irish Capital Gains Tax Treatment of Foreign Taxpayers Can Be Such a Toll

Introduction

Capital gains tax ("CGT") was introduced in Ireland as far back as 1975, replacing the far more limited death duties that previously existed. Persons who are tax resident in Ireland became liable to CGT on all gains realised on the disposal of chargeable assets wherever the assets were situate. In recognition of the need to preserve the taxing rights of the State, the charge to CGT was extended to non-residents but only in respect of the disposal of certain specified assets, including land and mineral rights or shares that derive their value from such assets.

In recent times there has been some uncertainty around the scope of this charge to CGT for non-residents, and almost 46 years after the introduction of the charge, the Irish Tax Appeals Commission recently published a determination that should bring some welcome certainty to this area. This welcome is, however, tempered by the fact that the determination has been appealed by Revenue, and the uncertainty therefore remains for a while longer.

In this article we summarise the comprehensive determination of Appeal Commissioner in

75TACD2021, focusing on some of the main arguments presented by the appellant taxpayer and by Revenue and the determinations in respect of such arguments.

Main Issue

This tax appeal concerned the application of s29(3) of the Taxes Consolidation Act 1997 (TCA 1997) and whether a non-Irish-resident company was within the charge to Irish CGT on the disposal of shares in an Irish company that built and operates a motorway in Ireland under a public–private partnership (PPP) contract with Transport Infrastructure Ireland (TII). Key to this determination was the issue of when the shares in an Irish company may derive their value directly or indirectly from land in the State. This may appear a straightforward issue; however, as you will appreciate from the case, it proved anything but.

Section 29(3) TCA 1997 provides that:

> *"Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the State shall be chargeable to capital gains tax for a year of assessment in respect of chargeable gains accruing to such person in that year on the disposal of – (a) land in the State...".*

By virtue of s29(1A)(b) TCA 1997, a disposal of land in the state".... includes the disposal of shares deriving their value or the greater part of their value directly or indirectly from those assets"[land in the State].

Background Information

The facts presented to the Appeal Commissioner were, in general, not disputed and can be summarised as follows:

- The appellant in the case was a non-Irish tax resident company that entered into a contract in February 2016 to sell shares in an Irish company ("IrishCo").
- The principal activity of IrishCo was to design, build, maintain, operate and finance a motorway in Ireland and to operate tolls on that motorway on behalf of TII. IrishCo had entered into a PPP contract with TII and holds a non-exclusive licence for the duration of the PPP contract to enable it to perform its services thereunder, and at no time had it held a proprietary interest in land in the State.
- Before completion of the share sale, the appellant applied to Revenue for confirmation that a CGT clearance certificate under s980 TCA 1997 was not required in respect of its disposal of the shares in IrishCo on the basis that it was a non-resident company and the shares did not derive their value from Irish land. Revenue declined to provide such confirmation. The purchaser withheld 15% of the sales consideration and paid it over to Revenue.
- Revenue subsequently raised an assessment to CGT on the appellant for the amount of €868,388 after completion of the share sale. Revenue was of the opinion that a chargeable gain of €2,631,479 arose for the appellant under s29(3)(a) TCA 1997 on the basis that the shares disposed of derived their value directly or indirectly from land in the State.
- The appellant appealed against the CGT assessment received from Revenue.

Summary of Main Arguments

The parties to the case took diametrically opposing views of the meaning of "land in the State" and when shares could be considered to derive their value "directly or indirectly" from such land. The appellant was of the view that a proprietary interest in land was required for shares to fall within the charge to CGT under s29(3)(a) TCA 1997. It argued that IrishCo was a service company that at no time held an interest in land in the State. The value of IrishCo was derived from personalty, being the PPP contract. Accordingly, the appellant argued that as the shares in IrishCo did not derive their value directly or indirectly from land in the State, their disposal did not fall within the charge to Irish CGT under s29(3)(a).

Revenue took a far broader interpretation of s29(3)(a) and submitted that a proprietary interest in land is not required. In Revenue's view, land is necessary for a road, the road is necessary for a toll and a toll is collected (and the majority retained) by IrishCo. Accordingly, the value of the shares in IrishCo was intrinsically linked to the land and was derived from the use of land in the State, which meant that the shares derived their value directly or indirectly from land in the State.

The Appeal Commissioner did not accept Revenue's arguments and found for the appellant. He determined that:

- "Land" for the purpose of s29(3)(a) TCA 1997 is determined under the interpretive provision of s5 TCA 1997 and means a freehold or leasehold estate in land or one of the lesser interests in land formerly recognised by the common law and now codified in the Land and Conveyancing Law Reform Act 2009.
- The limited and non-exclusive licence granted to IrishCo under the PPP contract was not "land" for the purpose of s5 and was therefore not '"land in the State" for the purpose of s29(3)(a).
- The IrishCo's shares did not derive their value directly or indirectly from land in the State, and therefore the appellant does not come within the charge to Irish CGT on their disposal.

The determination is lengthy and a number of arguments on behalf of both parties were explored, but there are two key issues, in the authors' view, that were at the core of the determination and that warrant further exploration:

- What is meant by "land" for the purposes of s29(3)(a) TCA 1997.
- What is meant by "deriving value **directly or indirectly** from land".

Meaning of "Land"

Land is defined in s5 TCA 1997, which is the interpretation section for the capital gains tax provisions of TCA. The section provides that "in the Capital Gains Tax Acts, except where the context otherwise requires…'land' includes any interest in land". Revenue submitted this the definition of land in s5 is inclusive and non-exhaustive and should be given a very wide interpretation. It should be read in conjunction with the broader definition contained in the Interpretation Act 2005 (also open-ended and inclusive), which provides that "land includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land".

The Commissioner disagreed with Revenue and accepted the submissions of the appellant. He determined that s5 is a stand-alone section, which is in effect a dictionary for capital gains tax purposes. There is nothing in s29 or the rest of Chapter 3 of Part 2 TCA 1997 that amounts to a contrary intention such that definition of land in s5 should not apply. He also did not accept that the definition of land in the Interpretation Act 2005 should apply when interpreting land for the purposes of s29(3)(a). Having carefully considered the wording of s29 in the broader context of the capital gains tax provisions and having regard to the interpretive provisions relating to land contained in s5, The Commissioner accepted the submission by the appellant that the definition of land in s5 was included to ensure that not only the major estates of freehold and leasehold but also the lesser interests recognised in common law (such as easements, freehold covenants, incumbrances, profits à prendre and rent charges) were captured by the charging provision.

In summary, the Commissioner determined that for a non-resident to be chargeable pursuant to s29(3)(a), there was a requirement that there be a proprietary interest in land and that a licence over land such as held by IrishCo for the purposes of the PPP contract did not suffice in this regard.

Interpretation of "Directly or Indirectly"

As mentioned above, s29(1A) TCA 1997 extends the charge to CGT under s29(3)(a) for non-residents to include the disposal of shares that derive their value "directly or indirectly" from land in the State. Accordingly, the meaning of directly or indirectly is a core consideration in the interpretation of the charge to CGT for non-residents. Again, Revenue and the appellant took very different views of the meaning of this phrase.

Revenue took a very broad interpretation of the phrase, arguing that the legislation does not require a nexus with land because the words "directly and indirectly" were very widely drawn by the legislature. Revenue contended that the shares derived their value from the tolls, which represented cash-flow coming from the use of the land, and therefore the value of the shares in IrishCo is derived indirectly from land in the State – the land is necessary for a road, the road is necessary for a toll, the toll was collected by IrishCo and majority of the toll was retained by IrishCo.

The Commissioner disagreed with Revenue and stated that accepting the construction contended by Revenue would give the phrase an overly broad meaning and would not reflect the true intention and will of the Oireachtas in enacting the legislation. He agreed with the appellant in concluding that the intention of the words "directly or indirectly" is to ensure that a non-resident could not hide behind a corporate structure to avoid paying CGT on the disposal of relevant assets through the sale of shares. He also agreed with the appellant that the underlying asset from which the shares derive their value must itself have the quality of being within the charge to CGT on disposal. Put simply, the Commissioner found that the words "directly and indirectly" were chosen by the Oireachtas to ensure that the State's right to tax Irish real estate or minerals was preserved even if the assets are held by company owned by the taxpayer or a subsidiary or sub-subsidiary of that company.

Conclusion

The determination of the Appeal Commissioner is significant and provides much-needed clarity in relation to the application of Irish CGT to non-resident taxpayers. He determined that for a charge to Irish CGT under s29(3)(a) TCA 1997 to apply to a disposal of shares, the company being sold must have an estate or interest in land (which in itself could come within the charge to CGT), and the concept of value being derived indirectly from land through the use of land alone will not suffice.

The intent of s29(3) is to preserve Irish taxing rights in respect of the disposal by non-residents of certain specified assets. When taxing a person or company that otherwise would not fall within the charge to Irish tax, it is important that the provisions are clear and ensure that the taxpayer can understand with certainty whether or not they will be liable to such foreign tax. In this regard, the Commissioner's determination concerning the concept of shares "directly or indirectly" deriving their value from specified assets is particularly important. Revenue's broad interpretation of this phrase could, in the authors' view, lead to confusion and uncertainty and would make this section (as well as other provisions, such as s980 TCA 1997) is very difficult to interpret in practice. As a very extreme example to illustrate the point – would one consider a company that is employed to clean/paint/renovate an office block to derive its value from Irish land? The initial and perhaps obvious view would have to be no; but using the broader interpretation of "directly or indirectly" that has been outlined in this case, can we be sure? The building sits on the land; the contract relates to cleaning/painting etc. the building (with no building, there is no cleaning/painting contract); therefore, is the value of the company indirectly derived from the land?

The determination of the Appeal Commissioners is therefore very welcome; however, as the decision has been appealed by Revenue, the uncertainty in this area remains. It is hoped that the High Court considers and clarifies this matter in the very near future.

Marie-Claire Maney *(not pictured)*
Chairperson, Tax Appeals Commission

Reflections on the First Year as Inaugural Chairperson of the Tax Appeals Commission

Introduction

As I sit staring at the screen on a hot July day when temperature records are broken, I look back on the past year. *Irish Tax Review* asked me for a personal reflection on this last year and to outline the Commission's plans for the next year (all within a particular word count!). It has been a unique year for us all, and for me that was magnified by a new role and responsibilities as the first Chairperson of the Tax Appeals Commission.

A few weeks ago, on 8 July, I was in front of the Public Accounts Committee. That forces one to recollect the last year in a unique way and account for all the decisions made. The Public Accounts Committee meeting was extremely positive for the Commission and confirmed the soundness of the decisions made during the past year. As with most meetings since the Covid-19 pandemic, that Committee meeting was conducted remotely. That adds different pressures in terms of "cameras, lights, action". But we have all adjusted and adapted, and that is what the Commission has also done.

The advice of the poet Maya Angelou came to mind when the camera went on: "I come as one, but I stand as ten thousand". I thought of all those women and men who due to gender, class, creed and colour never had the opportunities afforded to me and my generation. So when that camera went on and I started to speak, I spoke for those "ten thousand" who never got the chance. I hope I did them justice.

For those who do not know, I commenced as the first Chairperson on 1 July 2020 – on the wettest day – with an empty office, all of the staff working remotely, and less than optimal information technology. I started against the backdrop of the O'Donoghue Report of 2018 and the C&AG Report of 2019, which were properly critical of the Commission. They highlighted significant issues with the functioning of the Commission and made a number of important recommendations.

One year on, I was pleased to announce at the Public Accounts Committee meeting that all of the recommendations for the Commission in both reports have now been implemented. In addition, there has been a notable, and noticed, improvement in performance. The Public Accounts Committee's appreciation of the Commission's work and the progress that the Commission has made confirmed that the "tough days and nights" of the last year were worthwhile. The Public Accounts Committee explained that its role, in addition to oversight, is to assist and support public bodies through its recommendations. The Committee concluded the session by indicating that it would be making recommendations to assist our progress. I nearly heard those "ten thousand" cheer.

The Quantitative Achievements and "the Numbers"

As those in business and the field of tax know, your life is dominated by and predominantly about numbers. My role is also about "the numbers". The Commission's quantitative achievements have been:

- In 2020 the quantum of appeals determined increased by over 900% from the previous year to €610m. In 2021 we are set to determine appeals of the same magnitude.
- In 2020 we scheduled hearings to a value of €1.5bn. In 2021 we have to date scheduled hearings to a value of nearly €2bn.
- The backlog of awaited determinations has reduced by 80%, and the remaining 20% will issue before the end of the year.
- Since our reopening in August 2020, all appeals heard are decided within measurable deadlines, and we issued 54% more determinations in 2020 than the previous year.
- We contributed to the settlement and withdrawal of appeals worth over €200m in 2020.
- Since January 2020 and the C&AG Report, our appeals on hand have reduced by 14% – 460 appeals – and there are now 2,845 appeals on hand.
- At any time a significant proportion of appeals, currently 40%, cannot be progressed because there is a lead case in the courts or parallel proceedings connected to an appeal, such as a judicial review. They are proactively managed once the parallel proceedings conclude.
- Since 2016 the Commission has closed 6,100 appeals to a value of €2.7bn tax in dispute.
- The top 20 appeals on hand amount to €3bn and are actively managed, and the top 10 appeals by quantum amount to €2.8bn and involve just five appellants.
- At the other end of the spectrum of the appeals case base, 1,100 appeals have a value of less than €10,000 each and amount to €3m in total.

Qualitative Achievements

- We reopened the Commission on 4 August 2020 with anchor, rota and remote teams.
- Staffing was realigned and administrative staff were recruited.
- The Government's IT department, the OCGIO, assumed the Commission's IT systems support.

- Investment was made in new IT to support digitisation. This included the use of robotics for processing Notices of Appeal.
- Capability for remote and blended hearings was introduced.
- A simpler Notice of Appeal and Statement of Case was published.
- A modern website with search capability was launched.
- The tender specification for a Case Management System was completed, and the Commission has received sanction from the Digital Oversight Unit to go to tender.
- A Governance Framework, Service-Level Agreements and an actively managed Risk Register are now in place, together with all appropriate policies.
- A Recovery and Resilience Plan, an Annual Business Plan and an accessible three-year Statement of Strategy were completed.
- The Annual Report issued to the Minister for Finance in March and was published in April 2021.
- Timelines for issuing determinations have been introduced and monitored.
- Communication with stakeholders is a priority.

The Future Plans

The future plans of the Commission are set out in the Statement of Strategy. We are currently working on streamlining our procedures and practices in order especially to assist individuals and the SME sector. We intend to publish our scheduling policy in the near future so that there is more transparency on how appeals are scheduled and what criteria are used to expedite hearings. It was not feasible to publish that policy at the height of the pandemic, given that so many discretions had to be extended to all parties in light of the unique circumstances that prevailed.

Although these are important in themselves, they do not address the structural challenge that impedes increased throughput of appeals and coverage of the case base. An examination of the case base since the establishment of the Commission and the ever-expanding spectrum of appeals – ranging from hundreds to hundreds of millions of euro –indicates that the Commission to function optimally requires a new, tiered commissioner structure.

There is currently no other quasi-judicial body, or even court, dealing with such a range – from the volume of the Small Claims Court to the complexity and quantum of cases of the Commercial Court, and everything in between. The future therefore rests on a new, tiered commissioner structure to match the appeals case base. Recruitment for the first of the new tiers will commence in the next few months. This expansion of the commissioner structure based on the complexity and quantum of appeal can only assist in more coverage of the case base.

In addition, a legal change could assist in the resolution of the appeals case base. The O’Donoghue recommendation for the State to consider mediation and alternative dispute resolution, as occurs in the UK, has considerable merit, and that could also help in resolving appeals.

The Commission has made progress that is notable and noteworthy. However, I recognise that there is some way to go before the Commission has the required throughput and output relative to the case base, contributing to the economy and the Exchequer. I am committed to that endeavour.

I am fortunate to have been appointed as the first Chairperson of the Tax Appeals Commission. I am also fortunate that July 2021 is sunnier than July 2020 – in so many ways!

Ken Hardy
Partner, R&D Incentives Practice Leader, KPMG
Damien Flanagan
Partner, KPMG
Stephen Brennan
Senior Scientific Consultant, KPMG *(not pictured)*

Digital Gaming Tax Credits/ Incentives: It's All in the Game

IntroductionWhilst draft legislation is awaited for Ireland's new digital gaming tax credit (DGTC), the credit was first mentioned in the 2021 Budget Speech (in October 2020) by the Minister of Finance. In anticipation of its implementation, the authors will examine similar schemes in other jurisdictions and explore Ireland's implementation options as an up-and-coming hub for digital gaming.

The likely availability of a DGTC may come as a surprise to some. With an ambition to be a significant hub for the digital gaming industry, Ireland provides an attractive combination of world-class research institutions, a large technical talent pool and artistic talent. A strong track record of hosting some of the world's largest tech companies gives Ireland further points on an already impressive report card.

But what is digital gaming? What will Ireland's version of a DGTC look like? And how have DGTCs been implemented elsewhere?

What Is Digital Gaming?

Digital gaming (DG) describes using PCs, consoles or portable devices to play software-based games. The field of DG covers a wide array of different game types and delivery methods. Traditionally, digital games were almost exclusively sold as playable entertainment products, but over the years, as the field developed and technology advanced, DG has become ubiquitous in a range of industries, from digital marketing to gambling.

The global digital gaming market generated approximately US$120bn in revenue in 2020 and is currently experiencing significant annual growth. Recent data from 2016 suggests that Ireland employs roughly 2000 people working in the game development sector. Contrast that with recent UK information reports that there almost 2300 game development companies in the UK. This is big business and Ireland are currently a small player.

Background: The DGTC

DGTCs are tax-based incentives targeted at a creative industry and designed to encourage growth of the DG sector. Such credits have been in existence for a number of years in countries such as France, Germany, Canada and the UK. Although the core principle of the credit is to encourage economic growth in the sector, the specific implementation, level of incentivisation and qualifying criteria vary from jurisdiction to jurisdiction.

In this article the authors will take a deep dive into some of the most well-established gaming tax credit regimes, exploring their similarities and differences, and they will highlight in their views the elements of each credit that work particularly well and perhaps exposing some shortcomings.

The authors will also look at how Ireland might fit into this landscape. Will Ireland follow the same approach as our neighbouring countries? Or will Ireland be more creative, pioneering a new approach to incentivising the DG sector?

France: Tax Credit for Video Games

History

The French tax credit for video games (TCVG)[1] aims to support innovative and creative projects, contributing to the implementation of ambitious projects in France that offer new career opportunities.[2]

The TCVG was introduced with effect from January 2008. It was improved in December 2014, with a widening of the eligibility criteria, resulting in a more competitive incentives scheme. In August 2017 a second review of the credit was carried out and the rate cap was raised from 20% to 30%, with the annual maximum threshold doubled from €3m to €6m.

Incentive

The TCVG consists of a 30% credit rate on eligible expenses with a maximum threshold of €6m per project.

Qualifying company criteria

To avail of the TCVG, the claimant company must be subject to corporation tax.

Qualifying video game criteria

To qualify for the TCVG, a game is rated against a cultural test, which assesses the cultural aspects of the game, including originality, innovation, narration and distribution of expenses. These are examined to ensure that the game can be considered culturally significant.

The project must cost, in development alone, more than €100,000, and the game should be for commercialisation.

Finally, the game cannot include any form of inappropriate or violent imagery.

1 See https://jointhegame.fr/pdf/Tax-credit-for-video-games-(TCVG).pdf; https://mediawrites.law/french-government-increases-tax-credits-for-video-game-industry.

2 See https://www.entreprises.gouv.fr/en/entrepreneurship/financial-support/tax-credit-video-games-tcvg.

Qualifying expenditure

- Certain property-related expenses.
- Remuneration of artists that have participated in the creation of the game and salaries of personnel directly related to the creation of video games, along with administrative and technical personnel.
- Some functional expenses together with some outsourcing costs to European organisations with a limit of €2m per game title.

Refund type

The TCVG is deducted from taxes due by the business. Any remaining, non-deducted TCVG can be offset against taxes owed for the subsequent three years and is immediately refundable for small and medium enterprises.[3]

Germany: Development Tax Credits for the Games Industry ("DGTC")

History

The original incarnation of the German DGTC was motivated by the need to compete with other countries supporting digital game development, combined with recognition of the digital games industry as an economic and cultural asset.[4]

Incentive

- Funding is staggered from a minimum of 25% to a maximum of 50%.
- In the case of prototypes, the maximum share of funding is 50%.
- For productions, development costs of between €100,000 and €2m are funded at a maximum of 50%.
- Development costs of between €2m and €8m are funded on a degressive scale, from 50% to 25%.
- Development costs of more than €8m are funded at a maximum of 25%.
- Projects with development costs of more than €40m are separately assessed.

Qualifying company criteria

To qualify for the credit, the headquarters or business premises of the game company must be in Germany. Furthermore, the entity must be a legal corporate structure such as a GmbH or UG.

Qualifying video game criteria

Projects must pass a cultural test, which seeks to establish the cultural significance of the game. Additionally, to qualify, the security of the project's overall financing must be proven. The project must also enable one or more of the following: more games produced from Germany, more jobs in the games industry, an increase in sales of German-produced games on the domestic market. Finally, proof of the necessity of the credit must be presented, e.g. only by means of the credit can the game reach new market segments and target groups.

Qualifying expenditure

- Prototype development.
- Production expenditure.

Refund type

The refund comprises 25% of wages and salaries, together with tax-exempt social insurance contributions, to be offset against the annual tax liability, with any unused credit available for a refund.

Ontario, Canada: Ontario Interactive Digital Media Tax Credit

History

Originally introduced in 1998 with exceptionally broad eligibility criteria to encourage rapid growth of the digital media industry in Ontario, the Ontario Interactive Digital Media Tax Credit (OIDMTC)

3 See https://lafrenchtech.com/en/how-france-helps-startups/credit-dimpot-recherche-en/.

4 On the current operation of the German DGTC, see https://www.game.de/wp-content/uploads/2020/09/funding-guideline-of-computer-games-by-the-German-Federal-Government-English-translation-by-game-Sept-2020-1.pdf; https://www.game.de/en/german-games-funding/; https://www.gamesindustry.biz/articles/2020-08-28-german-games-fund-to-offer-government-support-for-up-to-50-percent-of-dev-costs.

grew in cost by more than 40% between 2003/04 and 2014/15. A review was undertaken in 2015 to modernise support to the industry.

Incentive

- 40% of labour and marketing and distribution expenses for companies that develop, own and market their products. These expenses are capped at CA$100,000 per game title.
- 35% of labour costs for game titles.
- No limits on eligible Ontario labour expenditures, nor are there limits on per-project or annual corporate expenditure.

Qualifying company criteria

Companies must be incorporated in Canada, with an office in Ontario where the interactive digital media products are developed. The OIDMTC is offered to the company that has developed/made the product.

Qualifying video game criteria

To claim the OIDMTC, the primary purpose of the game must be to entertain users or to educate children under the age of 12 through the presentation of information in at least two of the following forms: text, sound, images.

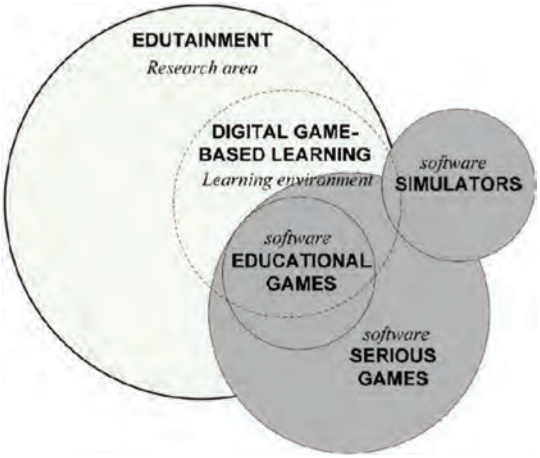


Fig. 1: Venn diagram showing the use of gaming from an education standpoint.

Amendments made to the credit in 2015 introduced exclusions for the development of certain products, including most websites, with the exception of websites that contain digital games, content related to film or TV IP, VR/AR (virtual reality/augmented reality) and/or educational products for children.

In addition to the above, the product being claimed must not be used primarily to present or promote the company or its products and services, nor to sell the products or services of the company. Furthermore, products must have a revenue-generating stream, such as third-party advertising, in-app purchases or fees for use.

Refund type

The OIDMTC can be used only to reduce the Ontario corporate income tax payable.

United Kingdom: Video Game Tax Relief ("VGTR")

History

The VGTR tax incentive system[5] was introduced in April 2014 and has had a steadily rising number of applications each year, with the most recent figures, as of 2019/20, indicating that 150 British video games completed, with a total expenditure of £355m. These games range from small, indie games developed by independent studios to triple-A title productions developed by some of the largest companies in the industry. The VGTR system was also the first to introduce the cultural test, a test that aims to establish whether a video game can be considered "culturally significant" based on a set of criteria. The concept of a cultural test has been reused by several other countries for the purposes of evaluating the suitability of games for the credit.

Although exact figures on the success of the UK credit are not available, the significant number of claims and the high pay out indicate that the credit has been instrumental in the growth of the industry. In 2019-20, 350 claims were made for a total of £121 million, which

5 See https://www.gov.uk/guidance/claiming-video-games-tax-relief-for-corporation-tax.

represented 605 games, and since the VGTR was introduced, a total of £444 million has been paid out to 1,460 claims.

Incentive

- The video game development company (VGDC) can claim a tax credit equal to 25% of the core expenditure that is "used or consumed" in the UK (and pre-Brexit, the EEA), to a cap of 80% of total core expenditure.

Qualifying company conditions

To qualify for the VGTC, the VGDC must pay corporate tax in the UK and it must be the company most actively engaged in designing, producing, testing, planning and negotiating contracts.

Qualifying video game conditions

To receive the VGTC, the video game must pass the cultural test and be considered a British video game. Additionally, at least 25% of the core expenditure must be incurred in the UK (or, pre-Brexit, the EEA). Finally, the game must be intended to be supplied to the general public. Games created solely for advertising purposes or gambling real money are non-qualifying.

Qualifying expenditure

- Designing-, producing- and testing-related activity.
- Staffing expenditure included if the staff are qualifying (i.e. resident of the UK or pre-Brexit, an EEA state).

DGTCs Comparison: Potential Drawbacks

Having considered the principal DG credit regimes currently in operation, the authors set out below the important factors that in their view should be considered when developing Ireland's DGTC.

The cultural test: friend or foe?

The cultural test is a key factor of many DG credit systems and is the primary test for identifying qualifying vs non-qualifying products. It is important to note that the approval of video game tax credit regimes must be carried out by the European Commission. The cultural test helps to satisfy the argument that video games are cultural products (similar to film) and so merit support.

The cultural test as it is implemented in the UK must be carried out by a third party (in this case, the British Film Institute). Ireland has no dedicated video game review board, so the task of qualifying projects based on their cultural significance will have to fall to either an existing institution in a tangential industry or a newly created video game review panel. In any event, it is likely that accreditation systems will need to be put in place.

Per-title claim basis: who is missing out?

The DG credit schemes described above have a "per-title" claim basis, that is, one claim can be made per year on a particular game title. As the DG industry has evolved, the infrastructure and systems that are critical to the industry and required to enable modern features such as online play or VR/AR incur significant spend and, yet, are unrecognised by some of the existing DG tax incentive regimes.

In Ireland there are companies investing heavily in VR/AR hardware systems development, gaming engine development and low-latency online infrastructure development. These technologies are critical to the success of the digital gaming industry but fly under the radar of the traditional format of digital gaming credits. Although some of this work might be captured by other tax incentives (i.e. the R&D tax credit), the introduction of a digital gaming credit that specifically captures this work in the author's view would remove any ambiguity surrounding the qualification of this work and streamline the process of claiming.

A DG credit system that recognised the effort required in designing products such as anti-cheat systems, online streaming platforms or 3D gaming engines would be attractive to many technology companies.

What Couldl the Irish DGTC Look Like?

Ireland could follow other jurisdictions that have implemented a DGTC. If this were the case, the authors might expect a scheme similar to, but perhaps more attractive than, the UK credit.

Classic model

Incentive

- >20–30% of total core expenditure as a tax credit against corporation tax.
- >€1m equivalent per-game sub-contractor core expenditure.

Qualifying conditions

- A certain percentage of core expenditure must be spent in Ireland or another EEA state.
- List of qualifying activities (development etc.). The eligibility/cultural significance of a game could be verified by an appropriate body such as the Irish Film Institute.

Cultural test

There are two potential options for the cultural test:

- Selection or creation of a third-party certification board and adoption of a cultural test to qualify titles as culturally significant.
- Removal of certain aspects of the cultural test, resulting in reduced overheads, while still ensuring that the game is predominantly developed in Ireland/the EEA.

A new approach: per-project basis

Alternatively, in the author's view there is an opportunity to be more innovative and to use the new DGTC to attract sub-sectors of the gaming industry that fall between the cracks of some of the existing regimes. A key differentiator could be in the way in which claimable activities are defined. In a traditional VGTC format, credit is granted on a per-title basis, meaning that each game title is claimable. For example, if a video game developer develops three games, all three games would be claimed separately on condition that they meet the cultural test and other qualifying criteria. However, the per-title claim system overlooks many sectors of the DG industry – for instance, work on the development of critical supporting systems, such as low-latency servers, gaming hardware and anti-cheat systems, is not claimable. Rather than a per-title basis, pivoting to a per-project basis in the author's view could be significantly more attractive to a larger number of companies involved with DG, making Ireland a more attractive hub for DG in general.

Incentive

- >20–30% of total core expenditure as a tax credit against corporation tax.

Qualifying conditions

- A certain percentage of core expenditure must be incurred in Ireland/the EEA.
- The project must contribute to the improvement/development of the DG industry as defined in a list of "qualifying activities".

Conclusion

In this article the authors have discussed the characteristics of some of the more notable DG credit regimes around the world, and have explored how these may inform the type of GDTC that Ireland could consider introducing.

Unlike many other technology-centric industries, the DG sector is extremely broad, including creative designers, artists, musicians and engineers, to name a few. By extension, a DG tax incentive can encourage growth across these fields, leading to the creation of new, high-paying roles in industries (particularly, creative) where such roles can be hard to find. The DGTC has the potential to have a significant positive impact on Ireland's creative economy, similar to what has transpired in other jurisdictions. The only question that remains is how Ireland will choose to implement it. Will Ireland play just to take part, or play to win?


Anna Holohan
Director, Deloitte Ireland LLP
Séamus Kennedy
Director, Deloitte Ireland LLP

The Reform of the Irish Investment Limited Partnership

Introduction

The Irish investment limited partnership (ILP) was launched as a fund vehicle in 1994 and was welcomed as an important step in the development of the Irish funds industry, which at the time directly employed approximately 600 people and had approximately €16 billion of assets under management. Currently, Irish-domiciled investment funds manage approximately €3.5 trillion of assets and the industry employs more than 16,000 people in Ireland.[1]

Over that time, however, only a small number of ILPs were launched, due in the main to the ILP legislation not having kept pace with the development of similar Irish and foreign fund products. For example, the ability of

1 https://www.irishfunds.ie/about

limited partners to participate actively in the business of the partnership was restricted, and the mechanics of amending the partnership agreement were burdensome.

After some delays to the progress of amending legislation over recent years, the Investment Limited Partnerships (Amendment) Act 2020 was enacted in December 2020. It is widely anticipated that as a result of these legislative reforms the ILP will become a far more attractive option to investment managers seeking a flexible private fund product regulated as an alternative investment fund (AIF).

Overview of the ILP

What is the ILP?

The ILP is a common law partnership structure. It is constituted as a limited partnership agreement that is entered into by one or more general partners (GPs) and an unlimited number of limited partners (LPs). The ILP does not have separate legal personality. Broadly, the GP is responsible for the management of the ILP, can enter into contracts on behalf of the ILP and is liable for the debts and obligations of the ILP. The LP is typically liable for the debts and obligations of the ILP only up to the value of their committed or contributed capital. All assets and profits are owned by the partners in the proportions agreed in the limited partnership agreement.

The ILP is a regulated structure and must be authorised by the Central Bank of Ireland (CBI); however, it benefits from the CBI's 24-hour approval process. In addition, the GP is subject to the fitness-and-probity regime of the CBI, and therefore any directors of the GP will need to be approved by the CBI to perform pre-approval controlled functions.

What can an ILP be used for?

The ILP provides a structuring offering for the domiciling and servicing of private equity, private credit, infrastructure and other real asset strategies. Although a private-type fund can be established as a corporate structure – e.g. an ICAV – investors in private funds tend to prefer a limited partnership-type structure. In addition, the ILP allows for the management of separate groups of assets under an ILP umbrella and therefore is attractive to private equity and real asset structures.

In recent years, jurisdictions such as Luxembourg have offered new fund structures such as the Luxembourg Société en Commandite (SCS), and the modernisation of the ILP regime will make Ireland attractive as a location by offering a comparable Irish alternative.

What are the changes introduced?

The long-awaited modernisation of the ILP regime in December 2020 has allowed this structure to become more fit for purpose. The changes strengthen Ireland's position as an attractive location for domiciling an investment fund and can be summarised as follows:

- **Introduction of "safe harbour" rules.** Broadly, such rules allow the LPs to undertake certain activities while maintaining the limited liability status of the ILP. Typically, an LP cannot participate in the management of the ILP; however, these rules allow LPs to undertake some activities, e.g. participate in the boards of advisory committees relating to the ILP and approve changes to the limited partnership agreement.
- **Approval of amendments to the limited partnership agreement.** It will now be possible to make amendments to a limited partnership agreement with the approval of a majority of the LPs and a majority of the GPs rather than the consent of all LPs being required.
- **Ability to establish an umbrella fund.** An ILP can be established as an umbrella fund with sub-funds with segregated liability. The assets and liabilities of the sub-funds are ring-fenced.
- **Relaxation of rules on the withdrawal of capital.** This update brings the process relating to the withdrawal of capital in line with the process applicable to partnership vehicles in other jurisdictions.

- **Ability to register a dual foreign/translated name for the ILP.** This will enable the ILP to have official recognition of a translated name when operating in a non-English-speaking jurisdiction.
- **Extension of anti-money-laundering beneficial-ownership requirements to ILPs.**
- **Re-domiciliation of ILPs.** The updated legislation provides for the migration into and out of Ireland by ILPs. Migrating non-Irish LPs can apply to be registered as an ILP in Ireland by way of continuation.
- **Updating of existing legislative references.** The Act updates references to the Alternative Investment Fund Managers Directive (AIFMD), the Directive on Markets in Financial Instruments repealing Directive 2004/39/EC) (MiFID II) and other EU legislation that applies to Alternative Investment Fund Managers (AIFMs) and other providers of services to ILPs.
- **Introduction of provisions to replace a GP.** The Act includes a statutory vesting event to transfer all assets and liabilities to a new GP from an existing GP.

What are the effective dates?

The majority of the provisions of the Act took effect from 1 February 2021. However, the provisions relating to beneficial ownership for ILPs and common contractual funds did not take effect until 1 March 2021. The Department of Finance noted that this was to ensure that the Central Bank had sufficient time to set up the appropriate registers of beneficial ownership.

Tax Regime Overview

Traditionally, the vast majority of Irish alternative investment funds have been structured using fund vehicles that take a tax-opaque (i.e. non-transparent) form, such as an ICAV, PLC or authorised unit trust. From an Irish tax perspective, the legislation is clear that such fund vehicles are not chargeable to Irish tax on their investment income and gains. Under the investment undertaking tax (IUT) regime, these fund vehicles are not required to deduct withholding tax on payments to non-resident investors, provided that valid non-resident declarations are in place and that the Irish real estate fund regime does not apply. This tax regime ensures that the fund remains tax-neutral and does not penalise investors for choosing to pool assets in a fund vehicle.

The ILP tax regime achieves the same end result, but because of the ILP's legal characteristics, it does so in a different way – the IUT regime does not apply to the ILP.

The principles of taxation of partnership arrangements have existed in tax law for many years, equally so in Ireland. The main provision that sets out the current Irish tax treatment of the ILP (s739J TCA 1997) was introduced in 2013 and was updated in Finance Act 2019 in preparation for the 2020 non-tax reforms.

Section 739J TCA 1997 is, by Irish tax law standards, a relatively short provision and confirms that an ILP is not chargeable to Irish tax on its income and gains. The tax regime respects the legal characteristics of the ILP (i.e. the absence of legal personality and that beneficial ownership of the underlying assets rests instead with the partners) – the income, gains and losses of an ILP are treated for Irish tax purposes as arising or accruing to each partner in accordance with the terms of the partnership agreement as if they had arisen directly to the partners without passing through the hands of the ILP. Put simply, s739J confirms the Irish tax-transparent (or "look-through") nature of the ILP.

Why is tax transparency important for investors?

Tax transparency can be important to fund investors so that, for the purposes of the tax rules in their jurisdiction of residence, income and gains that arise to the ILP retain their original character and source and are not "blocked" by an opaque entity. Tax transparency can also help to ensure that investors can access the double taxation treaty between their home jurisdiction and the jurisdiction in which income/gains arise, provided the investor qualifies as a treaty country "resident" and supplies the appropriate documentation, e.g. tax clearance forms, certificates of tax residence.

Tax at the portfolio level

In establishing and maintaining any fund structure, all levels of taxation must be considered and monitored, i.e. the fund, its investors and the fund's investment portfolio. One of the key features of the reformed ILP is its versatility from both an investor and an asset-holding perspective – it is expected to be widely used in private equity/credit, real asset and other private fund strategies. For legal or commercial reasons, an ILP may be structured to hold one or more asset-holding subsidiaries with underlying investment assets held by a subsidiary. In this scenario, it is important to consider the tax characteristics of the structure as a whole (not just at the fund level). For example, the recognition of the ILP as a tax-transparent or tax-opaque vehicle under investor and investment tax rules can affect the taxation treatment of income flows (withholding tax) and gains arising (capital gains tax) from the investment source jurisdiction to the investor jurisdiction.

In the event that tax arises at the portfolio level due to the unfavourable domestic tax treatment of the ILP at an investor level, the ILP partnership agreement has the flexibility to ring-fence the economic impact to investors resident in that jurisdiction. This distinguishes the ILP from other Irish fund vehicles, where the economic impact of a portfolio-level tax would typically be borne by all investors.

ILPs and the reverse hybrid rules

With effect from 1 January 2022, Ireland will implement the reverse hybrid tax rules contained in Council Directive (EU) 2017/952 (ATAD 2). A reverse hybrid mismatch arises where an entity is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person by some, or all, of its investors such that some, or all, of its income goes untaxed.

Article 9a(1) of ATAD 2 addresses reverse hybrid mismatches by providing that where one or more "associated" investors regard the hybrid entity as a taxable person, the hybrid entity shall be regarded as a resident of the Member State in which it is established and taxed on its income to the extent that the income is not otherwise taxed under the laws of the investor jurisdiction.

The impact of the Irish implementing legislation will need to be considered where an "associated" investor's domestic tax rules do not respect the tax transparency of the ILP, or where the investor has elected to treat the ILP as a tax-opaque vehicle. Although the reverse hybrid rules contain an exemption for a collective investment vehicle (CIV), the exemption applies only where (*inter alia*) the vehicle is "widely held" and "holds a diversified portfolio of securities". The definition of such terms in the Irish implementing legislation when introduced, as well as the Irish charging provisions to neutralise a reverse hybrid mismatch, will need to be reviewed on a case-by-case basis for each ILP.

Conclusion

The reform of the ILP legislation is a key milestone in the ongoing growth of the Irish funds industry. It adds to the Irish fund product offering and is expected to be a catalyst for significant further growth of the €800+ billion of assets already under management in Irish alternative regulated funds[2]. Investment managers pursuing opportunities in private equity/credit and infrastructure investments, in particular, will welcome these reforms.

2 https://www.irishfunds.ie


Aileen Daly
Tax Partner, EY
Joanne O'Sullivan
Tax Manager, EY

An Update on Revenue's Co-operative Compliance Framework

Introduction

It has been nearly five years since Revenue relaunched its Co-operative Compliance Framework (CCF) for taxpayers in the Large Cases Division (now the Large Corporates Division, LCD). To date, the feedback from both Revenue and taxpayers has been broadly positive, with 125 corporate groups having signed up – equating to approximately 25–30% of those eligible. Although this number may seem quite modest, the authors understand that the uptake is in line with Revenue's expectations, and undoubtedly there would have been capacity constraints in LCD had additional taxpayers signed up. In particular, there has been strong participation among larger multinationals where their tax affairs tend to be more complex or additional support from Revenue may be required.

In December 2020 Revenue updated its Tax and Duty Manual (TDM) to encompass the CCF programme (see "Large Corporates Division: Co-operative Compliance Framework"). For the most part, the TDM does not contain any new information but seeks to clarify certain aspects of the programme and consolidates previous eBriefs into a single source.

Recap: What Is CCF?

In essence, the CCF is intended to establish a relationship between Revenue and large corporates based on mutual "trust and co-operation", where both parties work together to achieve the highest level of voluntary tax compliance, thereby reducing the need for Revenue intervention. The CCF recognises that tax law is complex and that subtle nuances can lead to unintentional errors or legitimate divergences of opinion. The CCF seeks to mitigate areas of disagreement by promoting open discussion with Revenue and encouraging taxpayers to self-review their tax affairs on a regular basis.

Participation in the CCF is entirely voluntary and is open to taxpayers within LCD subject to certain eligibility criteria. A taxpayer may also opt out of the programme at any stage by informing its Branch Manager that it no longer wishes to participate.

Benefits and Obligations of the CCF

When Revenue relaunched the CCF in 2017, to gain traction, it was careful to make a clear distinction between the benefits of being "in" the CCF versus the downsides of being "out" and to apply that differentiation consistently across LCD.

In general, in the experience of the authors the feedback from taxpayers participating in the CCF suggests they see its value (which includes access to a dedicated Case Manager, reduced levels of Revenue intervention, a streamlined process for tax refunds, together with an annual meeting at which a risk review plan is agreed).

Conversely, Revenue asserts that taxpayers that are not in the CCF are more likely to be selected for audit and other compliance interventions – which can be a time-consuming and costly exercise. The other major drawback of remaining outside the CCF is the lack of a dedicated Case Manager. Instead, taxpayers must channel their queries or submissions through the general LCD customer services team.

For many taxpayers, the availability of a Case Manager has proven to be the decisive factor in choosing whether to participate, particularly where that taxpayer may require support from Revenue on time-sensitive business issues – customs being a case in point!

The benefits of CCF participation come at a cost, however, by imposing additional responsibilities (and burdens) on taxpayers, including commitments to:

- Undertake self-reviews, notify Revenue of any risks or errors identified and take steps to remedy them.
- Participate in the annual risk review meeting with Revenue (which often requires significant pre-work and preparation).
- Maintain a robust tax control framework.
- Keep Revenue informed of industry trends and insights.
- Consult before undertaking major restructurings or transactions. This clearly envisages taxpayers' having open dialogue with Revenue before executing material transactions. From a confidentiality perspective, this may well prove challenging.

These responsibilities are not enshrined in law and, instead, originate from the spirit of the framework, which is based on a high degree of trust, cooperation and transparency. Where a taxpayer fails to meet its obligations, Revenue can withdraw from the CCF.

Joining the CCF

The opportunity to join the CCF is available to corporate taxpayers managed by LCD. Entry is governed by an application process operated by way of "self-review" and centred on the taxpayer's having a good compliance record in the preceding three years and having the broad principles of a tax control framework in place.

Where the taxpayer is part of a wider group, the application to participate must encompass the entire group, i.e. it is not possible for certain group members to opt in while others stay out. On an exceptional basis, a non-resident company trading in the State through a branch or agency may be excluded from the CCF where that non-resident entity has no (or very minimal) interaction with the rest of the Irish group.

Certain companies are specifically excluded from joining the CCF, including "Section 110" companies, certain investment funds and partnerships, on the basis they are already dealt by specialist divisions in Revenue. However, in this instance, the remainder of the group is still permitted to participate.

Annual Risk Review Meeting

A key feature of the CCF is the annual risk review meeting held between the taxpayer and its Case Manager and other Revenue personnel. In practice, the LCD Branch Manager will also be in attendance. Revenue's preference is for these meetings to take place in person and on site. However, with the Covid-19 pandemic, meetings have temporally moved to a virtual setting.

The first meeting will usually differ in format from subsequent meetings and will involve a high degree of scene setting and fact finding. Revenue will seek to gain an in-depth understanding of how the business operates – an overview of its supply chain, group structure, management structure, remuneration models and tax control framework. Certain taxpayers may also offer a site tour, which can be useful in providing an understanding of the business. Subsequent meetings tend to be more focused on the year in review and any changes to the group structure or business model.

The Case Manager will issue a draft agenda before the meeting, with the taxpayer being given the opportunity to add further items. As of late, in the authors experience the agendas have become more uniform and generally contain three distinct sections. Section 1 addresses any changes to the structure vis-à-vis prior years. Section 2 highlights specific risk areas on which the taxpayer will be asked to carry out a self-review and report the findings to Revenue. The selected area will typically carry an industry focus based on Revenue's experience with other taxpayers in that industry and may cover topics such as IP capital allowances, R&D tax credits, employee share schemes, contractors, and customs and duties. Section 3 usually contains specific queries arising from Revenue's review of the group's corporation tax computations (which it will request before the meeting), PAYE or VAT returns.

Tax Control Framework

As part of the CCF, taxpayers are expected to have the broad principles of a tax control framework (TCF) in place. A formal TCF is not required on application, but taxpayers should be in a position to provide Revenue with comfort that appropriate controls are in place to ensure compliance with tax legislation and to minimise the risk of errors arising. This is a key factor for Revenue!

Revenue has indicated that the TCF should be comprehensive and appropriate for the size of the business but need not be excessive. The TCF should document the group's attitude to risk, its approach to identifying and managing tax risks, the testing performed, and the internal controls and governance structures in place to minimise those risks. In practice, many taxpayers will already have their own internal controls in place (e.g. directors' compliance statement, SOX controls, global tax strategy, internal and external audit, risk procedures), which they can use to build a TCF. Therefore, for many, the requirement to create and maintain a broad TCF should not be overly burdensome.

Transfer Pricing and the CCF

When the CCF was relaunched, there was initially some confusion about whether transfer pricing fell within the CCF. The TDM clarifies the position, with the answer being that it is both "in" and "out". Transfer pricing may form part of the annual risk review meeting, and the Case Manager may decide whether a Revenue transfer pricing specialist should join the meeting.

However, transfer pricing interventions may still take place outside of the formal CCF process. Revenue notes that it reserves the right to select any taxpayer from its LCD database for a transfer pricing audit at any time, including both CCF and non-CCF participants.

In the authors experience, transfer pricing is becoming an increasingly prominent feature of the annual risk review meeting and, given the new local file requirements, one would expect this trend to continue. To date, Revenue has been keen to understand how the taxpayers' supply chain works, how it interacts within global organisation, the inter-company agreements in place and the transfer pricing policies adopted.

Group Acquisitions

After an increase in M&A activity, the TDM has sought to clarify the position where a group in the CCF acquires a taxpayer that is not in the CCF (or vice versa). In the case of the former, the pre-existing CCF participant must apply the CCF rules to the entities acquired and make a new application to Revenue for the expanded group within 12 months. During that transition period, the entire group will be treated as if all formed part of CCF. However, if the application is not made with 12 months, Revenue reserves the right to withdraw the entire group from the CCF.

In the latter case, where a non-CCF group acquires a CCF group, the new expanded group will be asked if it intends to bring the entire group within the CCF.

- If yes, the whole group is treated as if it is in the CCF and given a 12-month transition period to make a new application.
- If no, the whole group is to be immediately removed from the CCF. However, the acquired group will be given the opportunity to complete any previously agreed self-review items.

Revenue has indicated that a renewed application is necessary only in the context of "material" acquisitions and not in the context of, say, a single legal-entity acquisition.

Conclusion

We are now five years into the refreshed CCF programme, and the general consensus seems to be one of positivity. Although the programme brings certain benefits, it also presents challenges, and on occasion some taxpayers in the authors view may have struggled to see any meaningful benefit. That being said, early and frequent engagement with Revenue combined with access to dedicated Case Manager is generally seen as outweighing the increased time and cost of compliance. From Revenue's point of view, enhanced transparency helps to support higher levels of tax compliance and provides it with visibility on what might otherwise be challenging interventions.

Institute Representatives meet annually with the management teams of each Revenue Division as part of the Institute's Branch Network engagement with Revenue. A Branch Network Meeting with Revenue's Large Corporates Division (LCD) was held in March 2021, where the CCF and a range of other matters relevant to LCD taxpayers were discussed. A Summary Note of this meeting is available on our website here. https://taxinstitute.ie/wp-content/uploads/2021/04/Final-Summary-Note-of-Meeting-between-the-ITI-and-LCD-on-3-March-2021.pdf

Revenue Highlights the Importance of Data Quality in Payroll Reporting

Revenue's PAYE Information and Modernisation Branch

Since 1 January 2019, as a result of PAYE Modernisation, employers and pension providers are reporting details of employees' and pension recipients' pay and statutory deductions to Revenue every time they are paid. The receipt of real time payroll information enables Revenue to secure the right amount of tax at the right time and to provide extended online services to PAYE taxpayers.

PAYE Modernisation delivered the most significant reform of the PAYE system since it was first introduced in 1960. This transformation combines technological advances with efficient business processes to provide a transparent, streamlined interface of employment pay and deductions and employers' reporting obligations with Revenue services. The ongoing success of the modernisation programme has been due to the collaboration and commitment of all the stakeholders involved. For example; Revenue has positive ongoing and extensive engagement with payroll software providers and tax agents. Employers are reporting timely and accurate payroll data, employees are managing their own records via enhanced online services, and Revenue is analysing payroll data with a view to improving data quality and targeting areas of risk in real time.

Without this modernised system of real-time reporting, the effective implementation of the Temporary Wage Subsidy Scheme (TWSS) and Employment Wage Subsidy Scheme (EWSS) would not have been possible, end of year P35 processing would still be an administrative requirement, and employers would still be providing each of their employees with a P60 every year. A Revenue survey of employers indicated that 78% of those surveyed found that PAYE Modernisation has led to payroll now taking less time to administer, while 89% of employers have found it easier to submit tax returns and payments in respect of their employees to Revenue since PAYE Modernisation was introduced.[1]

By providing accurate and high-quality data to Revenue at the right time, an employer is not just complying with their ongoing obligations, he or she is also increasing the transparency of payroll information for their employees. This reduces the likelihood of the employee needing to contact both Revenue and/or their employer. Complementary online services for employees, such as the range of PAYE Services available in myAccount, are dependent on employers providing this data to Revenue accurately and on time. As many employers are providing their payroll data correctly, these services are used extensively by employees to access, view, manage and maintain their records.

The receipt of real time data enables real time data analysis and examination and, where needed, facilitates early intervention to mitigate emerging risks and/or the development of trends that impact data quality. The reporting of timely and accurate data reduces an employer's likelihood of being contacted by Revenue or being selected for a Revenue intervention.

As the real-time reporting system evolves, Revenue will continue to engage and collaborate with key stakeholders with a view to identifying new approaches and further enhancements that facilitate both timely compliance and the provision of high-quality services for employers and employees.

Revenue will also continue to deliver on its responsibility to assess the payroll data being reported. As employers continue to meet their obligations to provide timely and accurate submissions, the importance of getting it right first time is paramount and benefits all stakeholders. With that in mind, Revenue has provided an outline of the types of data analysis currently carried out on payroll submissions and practical advice on how employers can address the common errors and issues identified. This advice will assist employers in operating efficiently, particularly given the current challenging environment.

Revenue's data quality analysis

Revenue has had a comprehensive programme of data analysis in place since the launch of PAYE Modernisation in January 2019. This data analysis is used for several activities including:

- assisting employers directly to resolve data quality issues, such as in 2020 following the introduction of the TWSS to limit the impact of these issues on subsidy payments;
- liaising with stakeholders, such as the Payroll Software Developers Association (PSDA), to provide regular statistical updates and to

1 Revenue Survey of Employers 2019 https://www.revenue.ie/en/corporate/documents/research/employer-survey-2019.pdf

collaborate with them in identifying solutions to known issues;

- identifying sectors of high risk in respect of PAYE reporting and PAYE obligations;
- risk profiling of employer payroll data across an extensive case base.

Revenue expects to have a renewed focus on data quality interventions based on this data analysis, as the economic recovery continues. Engagement with employers and agents will focus on identifying and rectifying data quality issues in real time.

To assess the quality of the payroll data being reported, Revenue runs several data tests across some key measures, including for example:

- Amount of Gross Pay relative to Amount of Pay for Income Tax
- Amount of Gross Pay relative to Pay for USC
- Pay for USC relative to Pay for Income Tax
- Pay for USC relative to Pay for Employee PRSI
- Emergency Tax Basis being indicated but with no Income Tax paid
- Absence of a Personal Public Service Number (PPSN) with Income Tax < 40%

Analysis of data reported in 2021 so far indicates that there is still some inaccurate reporting across some of these measures.

Common causes of payroll data quality issues

Revenue's analysis indicates that payroll data quality issues commonly stem from how employers process their employee payroll, employers' adoption of new tax requirements when they are introduced, and employers not applying the latest Revenue Payroll Notification (RPN). In particular, it is extremely important that the RPN should be requested every time a payroll is run. These issues and root causes are illustrated in the following scenarios.

- Before PAYE Modernisation was introduced, employees on Emergency Tax were granted a rate band and tax credits for the first 4 weeks. Since 1 January 2019, employers are authorised to only apply a rate band. However, some employers are still granting tax credits, causing data quality issues and underpayments of tax for employees.
- If an employee does not provide a valid PPSN when commencing employment, they are not entitled to any rate band or tax credits. However, some employers continue to grant both, even in the absence of a PPSN. In addition to the impact to the employer's compliance situation, this can lead to an incorrect tax position for the employee, whereby the employee may not receive their full entitlement to tax credits and cut-off points. When making a payroll submission for any employee where the PPSN is not available, the employer is required to create an Employer Reference Number and include it on the payroll submission. An Employer Reference Number is a unique identifier which the employer is required to provide for any employees that do not have a PPSN.
- Some employers incorrectly either include or omit certain pay items from the charge to tax. For example, employee pension contributions (excluding Additional Superannuation Contribution (ASC)) are deductible for the purposes of calculating Income Tax but are not deductible for USC and PRSI purposes. These contributions should not be included in Pay for Income Tax. Conversely, if an employee pension contribution is refunded, it should only be included in Pay for Income Tax, and not in any other pay field. ASC contributions are deductible for the purposes of calculating Income Tax but are not deductible for USC and PRSI purposes.
- The employer is responsible for registering employments with Revenue. The only exception to this is when it is the employee's first employment in Ireland. To ensure that the employment is correctly recorded on

Revenue's records, employers are required to take all necessary steps to obtain a valid PPSN from the employee on commencement of the employment. The PPSN, the employment commencement date and the Employment Identifier should all be notified to Revenue promptly. Where **no RPN** is provided, following a request to Revenue, use the correct Emergency Tax procedures to calculate the employee's statutory deductions. The current emergency tax and USC rates can be found on www.revenue.ie. Employers should note that different rates apply depending on whether the employee has provided a PPSN on commencement of employment or not.

- Some sole traders report pay for themselves or as part of a partnership, causing data quality issues. You cannot be employed by yourself or your partnership.

Revenue encourages employers to consult the Tax and Duty Manual on Employer's Guide to PAYE or www.revenue.ie if they are unsure of the tax implications of any item.

Issues identified in COVID-19 support schemes data

Revenue has identified several additional data quality issues from analysing data related to the TWSS and the EWSS. These include:

- Incorrect PRSI class reported
- Incorrect PRSI insurable weeks reported
- Incorrect Pay Period reported
- Using Employer's tax number instead of employee's PPSN
- Submitting duplicate payslips

These data quality issues caused by incorrect reporting can also cause inaccuracies in an employee's Revenue and Department of Social Protection (DSP) records. This may result in the employee paying incorrect tax or being denied access to DSP benefits. Employers should review these data errors and correct them as soon as possible.

Inaccuracies in return of Insurable Weeks

Employers are responsible for ensuring that the correct amount of social insurance contribution (PRSI) is deducted from their employees' gross salaries. It is important that the PRSI details of employees are accurate and up to date for the purposes of claiming social insurance entitlements. Analysis of employer returns by the Department of Social Protection has shown these common errors:

- Some employers return 52 contributions instead of 1 for each insurable week (e.g. AX (52)), leading to the total contributions for the year being returned being in excess of 2,500.
- Some employers enter the pay week number instead of the number of insurable weeks for that week's payslip (e.g. AX(1), AX(2), AX(3)......AX(52)), leading to the total contributions for the year being returned being in excess of 1,000.
- Some employers return the cumulative number of insurable weeks for each payslip (e.g. payslip 1: AX(4), payslip 2: AX(4), AX(4), payslip 3: AX(4), AX(4), AX(4)). This error may occur unbeknownst to the employer if they copy or duplicate the previous submission.
- If holiday pay is reported on the same payroll submission as normal pay, the number of insurable weeks should align with the period being paid and the correct number of cumulative weeks. Some employers do not ensure this alignment.
- Some employers do not ensure that the number of Insurable weeks matches the number of employment weeks in that pay period only.

Further information can be found in DSP's PRSI Employer Guide or on www.revenue.ie.

Practical suggestions for employers

Revenue recommends that employers refer to this checklist regularly, to ensure the employee payroll information is correctly recorded and reported.

- Obtain a valid PPSN from each employee prior to them commencing employment. When making a payroll submission for any employee where the PPSN is not available, the employer is required to create an Employer Reference Number and include it on the payroll submission. An Employer Reference Number is a unique identifier which the employer is required to provide for any employees that do not have a PPSN.
- Validate the PPSN provided by using the Revenue PPSN checker[2] in ROS to ensure it belongs to the employee who has provided it. This facility is available under 'Additional Services' on the 'Employer Services' tab on ROS.
- Report the employee pay and statutory deductions to Revenue, on or before the date of payment, using the employee's PPSN and unique Employment ID.
- Ensure all relevant pay items are included in Gross Pay, Pay for Income Tax, Pay for USC and Pay for PRSI purposes, as appropriate.
- Correct payroll errors in a timely manner. To assist employers in following the correct procedure, Revenue has provided the PAYE Modernisation-Line Item Correction Rules document, available on www.revenue.ie.
- Provide correct PRSI class and Insurable Weeks for the relevant period.
- Always obtain the most up to date RPN from Revenue for your employees. Employers are required to operate payroll using the RPN provided, even if an RPN shows zero credits. Employers can advise employees to check their tax credit allocation on the employee's 'myAccount'.
- Where **no RPN** is provided, following a request to Revenue, use the correct Emergency Tax procedures to calculate the employee's statutory deductions. The current emergency tax and USC rates can be found on www.revenue.ie. Employers should note that different rates apply depending on whether the employee has provided a PPSN on commencement of employment.
- Once an employer reports an employment cessation date to Revenue, a new Employment ID should be used if the employee is rehired within the same year. Otherwise, the rehired employee's RPN may have an incorrect allocation of the employee's tax credits. Employers are required to ensure that any corrections or deletions reported relate to the relevant Employment ID. Changes to an employee's Employment ID in the employer's payroll software can result in an additional employment being created on the employee's tax record which may result in the incorrect allocation of an employee's tax credits.

Further extensive guidance and information to assist employers with fulfilling their reporting obligations can be found on Revenue's website, www.revenue.ie.

The National Employer Helpline provides information and support to employers. The quickest way to contact the helpline is via the MyEnquiries portal as follows:

MyEnquiries: Select 'Employers PAYE' in the 'My Enquiry Relates To' box.

2 Employers and agents may only use the PPSN checker to check a PPSN when they are processing an employee's payroll and it cannot be used for any other purpose. Usage of the PPSN checker is monitored and misuse may result in withdrawal of the facility from an employer or agent.

News and Moves

BDO Appoints Cian O'Sullivan as Tax Director

Cian O'Sullivan (CTA) has joined BDO as a Tax Director in its Private Clients Tax team. Cian has a wealth of experience in advising entrepreneurs, business owners and their families on all taxation matters. He brings his vast practical sporting experience to the BDO team, which also leads the firm's dedicated Sports & Entertainment advisory unit.

Deloitte Ireland appoints James Smyth as Tax Partner

Deloitte Ireland has appointed **James Smyth (CTA)** as a partner in Tax. James advises a range of large, Irish-headquartered businesses with an international footprint. He has significant corporate and international tax advisory experience across a number of areas, including M&A, business model optimisation and cross-border financing, with a proven track record in leading cross-border teams on a number of high-profile transactions and global engagements for large clients. He re-joined Deloitte in 2019, having spent two years working in industry. James holds a Bachelor's Degree in Commerce from University College Dublin, is a member of Chartered Accountants Ireland and the Irish Tax Institute.