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Contents

2021 Number 4

Messages from Irish Tax Institute

Regular Features

Feature Articles

Irish Tax Institute News

Editor's Pages

Julie Burke
Editor

Feature Articles

President Biden's Proposed US Tax Reform (Build Back Better Act)

» **Louise Kelly** and **Anthony O'Halloran** consider the US tax reform proposals being considered by the Democratic Party, as President Biden seeks to act on his election proposals regarding a retooling of the US federal tax system.

Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules

» **Anne Gunnell** and **Clare McGuinness** examine the position adopted by Ireland towards the OECD July Statement, the subsequent public consultation on the proposals, and the rationale for the change in Ireland's position in October, as well as summarising the key components of the two-pillar solution.

The e-Commerce Boom: Navigating the Customs and VAT Challenges

» **John P. O'Loughlin, David Lusby** and **Avril McDowell** discuss the indirect tax challenges for businesses stemming from the new EU VAT e-commerce package and Brexit.

Tax Compliance and the Capital Taxes

» **Amanda-Jayne Comyn** and **Theresa Ryan** explains the filing requirements for CGT and CAT, outlines the implications of failure to file a return or failure to disclose the requisite information.

Online Inland Revenue Affidavit (CA.24): One Year On

» **Tina Quealy** and **Clare Foley** review the SA2 CAT form since its inception in September last year.

Perrigo and the €1.6 Billion Assessment

» **Kieran Binchy** provides a case report on *Perrigo Pharma International DAC v McNamara* [2020] IEHC 552, setting out why Perrigo's claim for legitimate expectation was unsuccessful.

After *Uber*, Are We Any Clearer About What It All Means?

» **Ursula Mathews** and **Pat Mahon** look at recent developments in Ireland and abroad after the Uber case in the UK and consider where we now stand in the employed vs self-employed debate.

The Principal Non-Tax Legal Issues Pertaining to Share Schemes

» **Michael Shovlin** provides an overview of some of the main non-tax legal issues that arise when advising on the establishment and operation of share schemes in Ireland.

Local Property Tax: Back to Basics

» **Ingrid O'Gorman** and **Cian O'Donovan** review the changes to the local property tax regime introduced by the Finance (Local Property Tax) (Amendment) Act 2021.

Assisted Decision-Making (Capacity) Act 2015: Matters Arising in Legal and Financial Services

» **Áine Flynn**, Director of the Decision Support Service, highlights the key features of this significant reforming Act, the commencement of which is imminent, and outlines the likely impacts on the legal and financial services sectors.

Cybercrime: Know Your Enemy

» **Jacky Fox** outlines the steps required by firms of every size to measure their security capabilities against increasingly sophisticated cyber threats.

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 7 August 2021 to 31 October, providing a comprehensive overview of key developments and policy news. A summary of recent TAC determinations is also included.

Direct Tax Cases: Tax Appeals Commission Determinations

Fiona Carney

Tax Appeals Commission Determinations

» 93TACD2021 related to Revenue's denial of interest relief claimed by under s248 TCA 1997, as extended by s250 TCA 1997, in respect of loans drawn down in Turkish lira to subscribe for new shares in two Irish investee companies

» 94TACD2021 concerned Revenue's denial of capital allowances for grid connection costs on the construction of a power station

» 114TACD2021 related to the operation of Irish dividend withholding tax (DWT) by two Irish-resident companies on dividends paid to two individual shareholders residing in the United Arab Emirates

» 115TACD2021 concerned the taxation of a settlement payment received by the appellant from his employer

» 92TACD2021 considered who is liable for capital gains tax (CGT) on a forced sale of shares that had been used as security for a loan – the debtor whose shares were sold or the creditor who disposed of the shares

» 106TACD2021 related to a refusal by Revenue to accept the appellant's assertion regarding the rate of stamp duty payable on the conveyance to the appellant of agricultural land

» 127TACD2021 examined Revenue's refusal of the appellant's claim for "roll-over" relief under s536(2) TCA 1997 in respect of a disposal of land arising from a CPO

» 128TACD2021 concerns the non-disclosure by the appellant in his tax returns of the existence of a number of Jersey and Isle of Man trusts

Direct Tax Cases: Decisions from the UK Courts and Other International Cases

Stephen Ruane and **Patrick Lawless**

UK Cases

» In *Shinelock Ltd v HMRC* [2021] UKFTT 320 (TC) the First-tier Tribunal determined that an amount paid to a former shareholder of a company was neither a distribution nor an amount that qualified for relief under the loan relationship regime in the UK.

» In *Knights and others v Townsend Harrison Ltd* [2021] EWHC 2563 (QB) the High Court rejected a damages claim lodged by clients of an accountancy firm that had introduced them to promoters of a tax scheme that had ultimately failed.

» In *Ingenious Games LLP and others v HMRC* [2021] EWCA Civ. 1180, the Court of Appeal reversed the decision of the Upper Tribunal in relation to the question of whether a UK LLP was trading, and if so, whether that trade was being carried on with a view to a profit.

» In *HMRC v Professional Game Match Officials Ltd* [2021] EWCA Civ. 1370 the Court of Appeal delivered its judgment in a case concerning the employment status of professional football referees.

» In *Centrica Overseas Holdings Ltd v HMRC* [2021] UKUT 200 the Upper Tribunal (UT) reversed the decision of the First-tier Tribunal, in finding that expenditure incurred by an investment company in connection with a sale of the businesses of a subsidiary was deductible as expenses of management under the UK equivalent of s83 TCA 1997.

» In *Heather Whyte v HMRC* [2021] UKFTT 270 (TC) the First-tier Tribunal determined that six building plots sold from the grounds of a Grade I listed building had been appropriated to trading stock under the UK equivalent of s596(1) TCA 1997.

International Cases

» A preliminary reference was made by the French Supreme Administrative Court to the Court of Justice of the European Union. The reference relates to whether Article 8ab of the consolidated DAC6 (Directive on Administrative Cooperation) is compatible with the right to a fair trial, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, and the right to respect for private life, as guaranteed by Article 7 of the Charter.

» Argentina's Supreme Court delivered its decision in the case of *Molinos Río de la Plata v Dirección General Impositiva* (CAF 1351/2014 /CA1–CS1; CAF 1351/2014/1/RH1) in relation to whether Argentina's domestic general anti-abuse rules (GAAR) could be applied to deny the benefits of an income tax treaty that does not contain anti-abuse rules itself.

Compliance Deadlines

» **Helen Byrne** details key tax-filing deadlines for 1 January to 31 March 2022.

International Tax Update

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

» Developments relating to the OECD/BEPS project

- On 8 October 2021 the G20/OECD Inclusive Framework on BEPS published a statement on the components of global tax reform, agreed by 136 of its members. The Inclusive Framework countries that have not yet agreed to the proposals are Kenya, Nigeria, Pakistan and Sri Lanka.

- On 7 October 2021 the Minister for Finance, Paschal Donohoe TD, issued a statement on the decision that Ireland would enter the OECD International Tax Agreement on Pillars One and Two.

» US tax reform

- US Senate Finance Committee Chair along with Senate Democratic tax-writers Sherrod Brown and Mark Warner, has unveiled draft legislation for international tax reform that provides additional detail on proposed changes within the high-level "framework" that the trio released in April 2021.

- Draft proposals for US tax reform were published by the Ways and Means Committee of the US House of Representatives.

» EU tax developments

- European Union Finance Ministers approved a decision by the Council of the European Union to remove Anguilla, Dominica and the Seychelles from the EU list of non-cooperative jurisdictions for tax purposes (Annex I, referred to as the "black list").

- The European Commission officially announced updates to the EU list of non-cooperative tax jurisdictions and the inclusion of Hong Kong on the EU watchlist on tax cooperation.
- A provisional agreement had been reached on the proposed public country-by-country reporting (CbC) Directive.

» The Czech Republic approved a Bill transposing the One-Stop Shop (OSS) system and other, related changes into its domestic VAT legislation.

» The Polish Government submitted a Bill representing comprehensive tax reform, containing tax measures supporting the Budget Law for 2022.

» India has amended its income tax law to clarify that gains arising from the sale of shares of a foreign company are taxable in India if such shares, directly or indirectly, derive value substantially from the assets located in India ("indirect transfer provisions").

» The German Ministry of Finance published a draft decree that aims to provide additional guidance on the recently introduced option for partnerships to be taxed as corporate entities.

VAT Cases & VAT News

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

» *Balgarska natsionalna televizia v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na NAP* C 21/ concerned the interpretation of Articles 2(1)(c), 132(1)(q) and 168 of the EU VAT Directive in the context of a dispute over the scope of input VAT recovery between the Bulgarian tax authority and Bulgarian National Television.

» *G. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Bydgoszczy* C 855/19 concerned the requirement for G. sp. z o.o. to make an early payment of VAT on the intra-Community acquisition of motor fuel

» *Icade Promotion SAS, formerly Icade Promotion Logement SAS v Ministère de l'Action et des Comptes publics* C 299/20 where Icade Promotion SAS sought a reclaim of VAT that it had paid in respect of sales of building land to private individuals, and the claim was refused by the French tax authority.

» The TAC issued its determination in case 116TACD2021. The matter at appeal was whether the Appellant was acting as a principal in relation to the provision of passenger transport (in this case taxi and hackney services) and providing exempt services or whether the Appellant was acting as an agent and providing VATable services.

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 the Revenue Update on Share-Based Remuneration.

President's Pages

Karen Frawley
Irish Tax Institute President

Introduction

Historic is an over-used adjective, but as a description of developments in international tax over the last quarter, it is entirely apt. After a decade of intensive negotiation and detailed work by the OECD, 137 governments have agreed a radical overhaul of an international tax framework that has been in force since the 1920s.

The agreement reached on 8 October and ratified by the G20 leaders at their summit in Rome at the end of October fundamentally changes the rules governing the taxation of the world's largest multinational businesses and introduces, for the first time, a global minimum tax to apply to companies with revenue of more than €750m per annum.

For all the drama that attended this historic development, the details of how the new rules will operate and their impact on the Irish economy will take some time to emerge. The hard and detailed work to give effect to the new rules is now under way, and there are several moving parts that give rise to continuing uncertainty.

Importantly, we still do not know if the Biden administration's tax reforms will be enacted in an increasingly fractious Congress and, if they are, how they will interact with the OECD's implementation plan. If the US reforms fall, can the OECD agreement be implemented globally and, if not, what will the EU do?

As I observed in an op-ed article published in *The Irish Times*, a fortnight after the agreement was ratified, many imponderables remain, but one thing is certain: a new international tax order has dawned, and Ireland needs to sharpen its edge if we are to compete with larger economies for our fair share of global investment.

While we can be confident that the multinationals that are embedded here will remain, we don't know what impact the global minimum rate will have on the flow of further investment into Ireland. Our multinational sector has been an extraordinarily resilient force in our economy throughout the pandemic. The level of corporation tax revenue received by the Exchequer – a record €13.5bn for the first 11 months of this year – will fall as a consequence of the global tax reforms. But the fact remains that these are strong, profitable businesses selling products and services the demand for which is only going to increase.

We need to retain this powerful stabilising sector as we transition to a carbon-neutral economy in the coming decades. There is no doubt that the new order will significantly reduce the scope for competition in corporate tax, but there are other ways in which the Government can make Ireland an attractive location for mobile investment.

Making Ireland a good place to live and work is certainly a priority, and our effective personal tax rates on average salaries and above need to be more competitive. But a key factor in attracting investment is ease of doing business and, as tax advisers, we know just how cumbersome our tax system has become in recent years. Our interest limitation rules, which now run to nearly 50 pages in the legislation, is just the most recent example.

It doesn't have to be this way, and the Commission on Taxation and Welfare offers a real opportunity to simplify our corporate tax code. The Institute will be making this point strenuously in its submission to the Commission early in the new year. A simple, user-friendly tax system for business could be a real differentiator for Ireland, and we need to start the process now.

The Institute has been beating the drum on the need to review how our tax system incentivises innovation and investment in our domestic SME sector for many years. Over the next two years, the international tax changes will come into effect and the risks associated with our over-dependence on foreign direct investment will begin to materialise.

The success of the Minister for Finance, Paschal Donohoe TD, in securing the 12.5% rate for our indigenous sector is a considerable achievement. But the case for action on our overall tax treatment of domestic business has never been more compelling.

Budget 2022

The Budget was announced within days of Ireland's signing up to the OECD-brokered global tax agreement and, for drama, it was a hard act to follow. There is a lot to be said for steadiness and predictability when it comes to budgets, and we were all grateful that there were no surprises this year.

The decision to continue the Employment Wage Subsidy Scheme (EWSS) (albeit in a graduated form) until the end of April 2022 has proven a prudent move as the pandemic takes yet another turn in its uncertain path, The Government has been very effective in reacting at speed during the health crisis, and a sector-specific approach for hospitality and the events sector, is appropriate.

Another issue that the Institute had repeatedly raised was the position of directors and employees working in family businesses who faced the prospect of having their income substantially eroded because of the interaction between the debt warehousing scheme and the application of the anti-avoidance provision, s997A Taxes Consolidation Act 1997. Their difficulty was that they could not claim a credit for PAYE deducted from their pay during 2020 that had been warehoused by their employer because the section allows a credit only for PAYE that has been fully paid to Revenue.

We were delighted with the announcement in the Budget that the debt warehousing scheme would be expanded to address this issue. This was an anomaly that could not have been foreseen when the section was originally enacted, and we welcome the sensible approach adopted by the Minister to put it right.

Commission on Taxation and Welfare

The Institute is currently working on its submission to the Commission on Taxation and Welfare, which is due early in the new year. As I said above, there is a real opportunity now to have a fundamental review of our business tax code taking into account the OECD tax reform agreement.

For example, do we need a worldwide corporation tax system now that a global minimum tax rate has been agreed and that we are adopting extensive ATAD measures to protect against base erosion risks? The Institute has urged the Government to proceed with the promised consultation on changing to a territorial corporate tax system with a participation exemption for dividends and foreign branches.

As part of its remit to have regard to economic prosperity, the Commission should consider how our tax code could be changed to enhance our competitiveness. For example, is now the time to remove Ireland's different corporation tax rates? The headline rate of capital gains tax, at 33%, is high by international standards, and as this is the rate that matters for potential investors, should we reduce it for active business assets?

We look forward to engaging with the Commission on these and other issues.

Climate Action Webinar

It was my pleasure to welcome the Minister for the Environment, Climate, Communications and Transport, Eamon Ryan TD, as keynote speaker at our recent webinar on the role of tax and business in achieving the targets set out by Government in its updated Climate Action Plan. The Minister provided an update on COP26, which he said had achieved more than is acknowledged in terms of setting down a rulebook for the way forward. He referred to the need for a realignment of global finance towards decarbonisation and mentioned the recently adopted global corporate tax agreement as evidence that business internationally is responding to the need for change.

He also said that our carbon tax is here to stay, despite the political opposition to the tax: "It's a critical tool and I think removing it would be a key loss and I don't think that future governments could afford to take it out".

Among the panel of expert speakers were Rodolfo Lacy, Environmental Director of the OECD, and Quentin Dupriez, Policy Analyst at the European Commission. The webinar struck a positive and hopeful tone, all very helpful as we prepare to climb the mountain ahead.

Conferring

I was delighted to take part in the recent online conferring ceremonies for our CTA and our Revenue students. It goes without saying that an online conferring is a poor substitute for the real deal; nonetheless, there was a sense of possibility and optimism about the occasion. And, as a profession, we should also be buoyed up by the numbers coming through: 272 new CTAs graduated this year – not bad in the middle of a pandemic.

Festive wishes

As we reach the end of a year few will ever forget, it is hard to believe that this time last year none of us had been vaccinated. We have made enormous progress since then, even if it sometimes feels like one step forward, two steps back.

The fact is that we are all much safer now and our economy, which has shown enormous resilience, has bounced back much stronger than the most optimistic projections. Although the pandemic has given us another kick over the last month, there is every reason to have faith in the ability of human endeavour finally to defeat this virus.

I wish all of you a happy, restful and healthy Christmas, and may we go from strength to strength in 2022.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

"Winter is coming" is a phrase associated with *Game of Thrones*, yet it aptly applies to the work of tax advisers. In the last three months alone, Ireland has signed up to the OECD's international agreement on corporation tax, Budget 2022 and the Finance Bill 2021 were announced, and the pay and file deadline has come and gone. Nonetheless, together you managed to weather the array of developments and make it to the end of another year.

Welcoming the Class of 2021

After weighing up the options, we decided to mark our newly qualified CTAs' achievements with a virtual conferring ceremony. There is no doubt that each of us would have preferred to be in O'Reilly Hall under the twinkle of festive lights but the ongoing concern around the pandemic put paid to that. Yet from the safety of their homes, our 272 CTA conferees and 28 recently qualified Tax Technicians were welcomed as Associates by our President, Karen Frawley, while sharing the moment with family and friends.

On the same evening, with Revenue, we congratulated the 243 Revenue officials receiving Certificates and Diplomas. Karen Frawley and Revenue Chairman, Niall Cody, shared words of wisdom and acknowledged the hard work that each recipient had put in throughout the year. We look forward to continuing this partnership between Revenue and the Institute in the years to come.

We are extremely proud of our 2021 CTA winners, who excelled in their performance – a testament to their determination and hard work. We had the pleasure of inviting each of our winners and the 11 sponsoring firms to our offices to celebrate their incredible achievements in a small way. I would like to extend my thanks to the sponsoring firms for their generosity and continued support of our Chartered Tax Adviser programme.

We wish all the conferees the very best in the future and look forward to working with them throughout their careers.

Education

The Autumn 2021/22 courses are well under way, with healthy numbers participating in each programme. The courses continue to be delivered online, with several supports in place to help students through their studies.

September and October were busy for our Education team as the Institute continued to promote the career in tax to third-level students at career fairs. We attended 11 college fairs and hosted the first virtual Career in Tax Graduate Fair. Our fair was open to all final-year students across Ireland and from all disciplines, providing them with the opportunity to meet our member firms and discuss the ins and outs of working in tax. It was well attended, and over 1,200 chats took place between the 16 firms and the students.

Judging is under way in our Fantasy Budget competition, with the winners to be announced early in the new year. The Third-Level Scholarship winner was decided and the recipient was congratulated by our Director of Educational Strategy, Martina O'Brien. We are delighted to be able to support this promising young student throughout their college studies and on their journey to becoming a Chartered Tax Adviser.

Professional Services

The Budget is a staple event for our members, and our two Budget events were well attended. The Institute's Budget 2022 Panel Discussion was streamed live on the night of the Budget from our offices. The Institute's President, Karen Frawley, was joined in studio by the chair, Shane Coleman of Newstalk, and fellow panellist, Lolly Strahan of Lolly and Cooks. The panel was completed with Fergal O'Brien, Ibec, and Fergal Cahill, Cahill Taxation Services, joining remotely. The discussion was informative, with a high level of engagement from the audience who tuned in.

The following day, the technical webinar was presented by Cian Liddy of KPMG and Mark Barrett of Ronan Daly Jermyn. The presentation was followed by questions from the audience. Both webinars were well received and highly rated by participants.

For most practitioners, the following week had more influence over their work, with the publication of Finance Bill 2021. Our Finance Bill & Act 2021 Webinars are under way and the comprehensive package includes two webinars – Finance Bill 2021 and Finance Act 2021 – and a print copy of *Finance Act 2021 – The Professional's Guide*. Our Finance Act 2021 webinar takes place on Thursday, 3 February 2022.

After a slight break for the pay and file season, our winter programme has hit the ground running, with a range of technical events and our ever-popular CPD bundles. The Institute is here to support and keep you up to date on developments across all tax heads while ensuring that you can meet your CPD requirements.

You will have seen the "save the dates" e-flyer for our Global Tax Policy Webinars in association with Harvard Kennedy School on 17 and 18 May 2022. We are looking forward to hearing from our unique international speaker line-up, including keynote addresses from the Minister for Finance, Paschal Donohoe TD, and Pascal Saint-Amans of the OECD. The full programme will be available in the coming weeks.

In these persistently challenging times, we have been working closely with our Professional Services Committee to develop the programme for Annual Tax Summit 2022 next spring. Designed by CTAs, for CTAs, the sessions will provide you with an essential round-up of the domestic and international tax changes that you need to be aware of as a CTA practitioner. The programme will be launched early next year.

With the enactment of Finance Bill 2021 fast approaching, our legislation editors are busy collating updates and preparing to consolidate the new changes. We will be printing our leading legislation titles again next year for availability in spring 2022, together with our popular tax commentary series.

Policy and Representations

The Institute continues to represent you and your clients at TALC and the Branch Network, including in the months leading up to the ROS pay and file deadline by drawing attention to the pressure on practices and the ongoing compliance work. The extension of the deadline granted by Revenue was well received by members and helped alleviate some of the pressure members were under.

We held a joint ITI/Revenue Branch Network Webinar where over 560 members were updated on matters relevant to those advising the self-employed and SMEs. Senior personnel from Revenue's Business, Collector-General's, Medium Enterprises and Personal Divisions delivered a presentation on current developments and participated in a panel discussion framed around questions submitted by you. For those who couldn't attend, a summary of the issues discussed was included in TaxFax on October 1.

The Policy and Reps team consulted several member firms to help inform the Institute's response to the Department of Finance's consultation on new taxation measures to apply to outbound payments, which was due on 20 December. A working group on the Commission on Taxation and Welfare has been formed and is chaired by Council member

Brian Brennan. The first piece of work for the group is to consider the consultation paper and formulate a response by 17 January. You can see all our submissions on www.taxinstitute.ie.

Climate Action Plan 2021: the Role of Tax and Business

On 1 December, over 500 people registered to hear from our expert speakers about the role that tax and business can play in the very urgent issue of climate action. It was the Institute's first online climate event, and we were delighted to have the Minister for the Environment and Climate, Communications, Eamon Ryan TD, as our keynote speaker.

After the Q&A with the Minister, we were joined by Rodolfo Lacy, Director of Environment, OECD, and Kelly de Bruin, ESRI, to discuss how business and the tax system could help achieve the targets set out in the Climate Action Plan 2021. After a short break, the second panel discussed the opportunities and challenges of decarbonisation – Deirdre Hogan of EY gave the tax adviser's perspective; Quentin Dupriez of the European Commission brought it into the context of "Fit for 55" and other developments; and Sinéad Hickey of SISK shared their decarbonisation journey and the things to pay attention to.

A common theme throughout the webinar was that Ireland is not alone – climate action is a challenge for us all, and it can be achieved if we come together. The recording is available here.

Tax Talk

We recorded our final two podcasts for 2021 over the last couple of months. For our post-Budget 2022 episode we were joined by the Institute's President, Karen Frawley, Stephen Gahan of ODG Advisory, and Austin Hughes, Chief Economist with KBC Bank. The discussion focussed on the strategic choices facing the Government in the new global tax order and post-pandemic political context, and the action that the Government should take to foster growth in a fast-recovering economy.

When Tax Talk was established, it was always our intention to feature topics beyond tax policy that are still of interest to your but cater for a wider audience. The first of these episodes was recorded in December with our guests the current Meath All-Ireland Senior Football Champion and CTA student, Aoibhín Cleary, former Dublin footballer Cian O'Sullivan and former Kerry footballer and Australian Rules player and Council member Tommy Walsh. They joined Samantha McCaughren to discuss how they balance their lives as elite sports people with studying, training and working in the demanding area of tax.

You can listen to Tax Talk on our website or on all popular podcast apps, including Apple Podcasts, Spotify and SoundCloud.

Best Wishes

As the year draws to a close, I would like to thank you for your continued engagement and support. It has been another difficult and uncertain year for us all. Let us hope that 2022 will bring us further along the path to recovery. Thank you also to my colleagues in the Institute, committee members and volunteers, and members of Council, who have adapted and persisted throughout the year, delivering services that meet your needs. I wish you and yours the best over the winter period.

Legislation & Policy Monitor

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

News Alert

Key tax measures in Budget 2022 and Finance Bill 2021

On 12 October 2021 the Minister for Finance, Paschal Donohoe TD, and the Minister for Public Expenditure and Reform, Michael McGrath TD, delivered Budget 2022. This was followed by the publication on 21 October of Finance Bill 2021, which introduced several additional measures not announced on Budget Day. The key features of Budget 2022 and Finance Bill 2021 (as initiated) are outlined below.

Personal Tax

- Increase in the ceiling of the 2% USC rate from €20,687 to €21,295 to ensure that it remains the highest rate of USC paid by full-time minimum wage workers when the national minimum wage increases on 1 January 2022.
- The reduced USC rate of 2% that currently applies to medical card holders aged under 70 whose aggregate annual income is less than €60,000 is extended until the end of 2022.
- Increase of €1,500 in the standard rate income tax band to €36,800 for single individuals and €45,800 for married couples/civil partners (with one earner) for 2022 onwards.
- The personal tax credit, employee tax credit and earned income tax credit will increase by €50 to €1,700 for 2022.
- The weekly income threshold for the 11.05% rate of employers' PRSI will be increased from €398 to €410 from 1 January 2022. This will ensure that the 8.8% rate of employers' PRSI will apply to workers on the minimum wage once it is increased on 1 January 2022.
- The Help to Buy scheme will be extended for a further year, to 31 December 2022.
- Introduction of a remote working tax relief to provide an income tax deduction amounting to 30% of vouched heat, electricity and broadband costs incurred for days spent working from home.
- Income tax exemption for Pandemic Placement Grants by the Minister for Health to qualifying nursing and midwifery undergraduate students in 2021 to a maximum of €2,100 per student.
- Amendment to s118 of the Taxes Consolidation Act (TCA) 1997 to provide in legislation for an exemption from operating benefit-in-kind (BIK) on the provision by an employer of certain benefits related to health care and wellbeing, if they are generally made available to all employees/directors.
- Amendments to the tax arrangements that apply to international flight crew in s127B TCA 1997 to provide an exclusion from Irish payroll withholding on the satisfaction of specific criteria.
- Extension to the deduction for pre-letting expenses incurred by an individual (capped at €5,000 per vacant premises) available under s97A TCA 1997 from 31 December 2021 to 31 December 2024.

Pensions

- Various amendments to s772 TCA 1997, including enabling a death-in-service benefit from an occupational pension scheme to be transferred to an approved retirement fund (ARF) on the death of an employee or taken as a pension benefit and any such benefits transferred to an ARF fall within the ARF regime. This change will be effective from 1 January 2022. The rule that currently prohibits the transfer from an occupational pension scheme to a PRSA where an individual has more than 15 years' service will be removed effective from 1 January 2022. The AMRF requirement for individuals availing of the ARF option on retirement will be removed effective from the passing of the Finance Act.
- A technical amendment to s774 TCA 1997 to ensure that income tax relief is available for pension contributions made in certain circumstances by a company to an occupational pension scheme set up for the benefit of current and former employees of another company who is not party to the agreement, in addition to the parties to the agreement.

Covid-19 supports for business

- The Employment Wage Subsidy Scheme (EWSS) will remain in place in a graduated form until 30 April 2022. The reduced rate of employers' PRSI (of 0.5%) will cease on 28 February 2022, and the full rate will apply for March and April. The scheme will close to new employer entrants from 1 January 2022.
- The debt warehousing scheme will be expanded to allow self-assessed income taxpayers with employment income who have a material interest in their employer company to warehouse tax liabilities relating to their Schedule E income from that company.

Amendments to EII and SURE schemes

- The Bill contains a number of technical amendments to the Employment Investment Incentive (EII) and Start-Up Relief for Entrepreneurs (SURE).
- The amendments to the EII scheme include permitting institutional investors to access the scheme through a wider range of investment funds going forward and a relaxation of the rules around the "capital redemption window". The rule that a company may not issue a statement of qualification in respect of a qualifying investment until it has spent 30% of the amount raised on a qualifying purpose or more than two years after the tax year in which the investment was made has been removed for EII and SURE.
- The schemes are also extended for a further three years, to 31 December 2024.

Corporation Tax

- The Bill transposes Article 4 of the EU Anti-Tax-Avoidance Directive (ATAD) interest limitation rule (ILR) into Irish law for accounting periods starting on or after 1 January 2022. The ATAD ILR places a limit on the tax deduction for net borrowing costs of 30% of EBITDA for corporate taxpayers, with limited exemptions. These exemptions include where the relevant entity's net borrowing costs are less than the *de minimus* of €3m; where the relevant entity is a standalone entity; long-term public infrastructure projects, being a project to provide, upgrade, operate or maintain a large-scale asset in the general public interest; and interest on legacy debt.
- The Bill introduces a number of technical amendments to the anti-hybrid rules introduced in Finance Act 2019. It also introduces new anti-reverse hybrid rules in line with Ireland's commitment to implement Article 9a of ATAD into Irish law. The purpose of the rules, which apply to tax periods starting on or after 1 January 2022, is to tax income in the State that would otherwise go untaxed because an Irish entity is regarded as tax transparent in Ireland but tax opaque in a territory of a relevant participator.
- The Bill amends the transfer pricing provisions contained in Part 35 TCA 1997, which apply for chargeable periods starting on or after 1 January 2022. A new s835E

has been inserted, replacing entirely the substituted section that was introduced by Finance Act 2020, which wassubject to Commencement Order. The new s835E in Finance Bill 2021 provides for an exclusion from the application of transfer pricing rules to the computation of non-trading income in certain circumstances.

- The Bill inserts a new s25A into TCA 1997 to provide for the application of the "authorised OECD approach" (AOA) to the attribution of profits to branches of non-resident companies in Ireland.
- In respect of s481 film relief, the definition of "eligible expenditure" is amended to confirm that payments made directly by a qualifying company to an individual (not employed by the qualifying company) involved in the provision of labour-only services for the purposes of the production of a qualifying film qualify as eligible expenditure.
- The Bill introduces a new tax credit for the digital gaming sector in a new s481A TCA 1997, providing relief for qualifying costs incurred in the development of digital games. The relief takes the form of a refundable corporation tax credit, at a rate of 32% of the lowest of the eligible expenditure, 80% of the qualifying expenditure and €25m per project. As EU State Aid approval is required, the credit is subject to a Commencement Order.
- The Bill confirms the extension of s486C tax relief for start-up companies for a period of five years until 31 December 2026 and amends the definition of "relevant period" to provide relief for certain start-up companies by granting a reduction of corporation tax for the first five years (previously, three years) of trade.
- The Bill amends several sections of TCA 1997 to bring non-resident corporate landlords within the charge to corporation tax. This measure is being introduced in conjunction with the ATAD interest limitation rules from 1 January 2022 to ensure that non-resident corporate landlords will be within scope of the new rules. The Bill amends s25 TCA 1997 to increase the rate of tax for non-resident corporate landlords from 20% to 25%, equalising the position with Irish-resident companies. These amendments apply for the accounting periods starting on or after 1 January 2022.
- Section 840A of TCA 1997 is an anti-avoidance provision that denies a tax deduction for interest on certain loans between connected parties. The Bill amends s840A to specify that a loan includes a promissory note and any other agreement or arrangement having a similar effect. It also provides that a deduction is denied for interest payable on any form of refinancing of such a loan.

Capital Taxes

- A new s617A TCA 1997 has been introduced to align the CGT treatment of domestic mergers by absorption with the treatment of similar cross-border mergers within the EU.
- The Bill amends s40 of the Capital Acquisitions Tax Consolidation Act (CATCA) 2003, which applies a CAT charge where a gift or inheritance comprises of the free use of property. The amendment provides that the value of the gift or inheritance attributable to the free use of money is to be determined by reference to the best price obtainable for borrowing the equivalent amount on the open market.
- Amendments to s46 CATCA 2003 require disponers of a gift comprising agricultural property or relevant business property (where agricultural relief or business relief applies) to deliver a return of such gifts to Revenue on request, irrespective of whether the taxable value of such property, when aggregated with previous gifts or inheritances since 5 December 2001, exceeds 80% of the relevant group threshold.

VAT

- The Bill includes a requirement that Revenue is notified of certain changes to a VAT group, otherwise a penalty will apply for each taxable period for which Revenue is not notified. It also provides for an obligation on the VAT group remitter to notify Revenue within 30 days if the conditions for VAT grouping are no longer met.

- A technical amendment to s56 of the Value-Added Tax Consolidation Act (VATCA) 2010 clarifies that a person who derives 75% "or more" of their turnover from intra-Community supplies of goods, exports and certain supplies of contract work may qualify to use the zero-rating scheme.
- In his Budget speech, the Minister for Finance confirmed that the reduced 9% VAT rate for the tourism and hospitality sector will continue until 31 August 2022.
- From 1 January 2022 the farmers' flat-rate addition will decrease from 5.6% to 5.5%.
- The Bill gives effect to judgments of the Court of Justice of the European Union to provide that cancellation fees are taxable, as they constitute a payment for either a service or a right to access a service.
- The Bill provides that where VAT has been incorrectly claimed and paid under a refund order under s103 VATCA 2010, the payee will be required to repay Revenue all or part of the amount received, as appropriate.
- The temporary application of the zero rate of VAT to the supply of Covid-19 vaccines and *in vitro* diagnostic medical devices and services closely linked to them has been extended to 31 December 2022. In addition, no VAT will be payable on the importation of goods by, and goods and services supplied to, the Commission or other EU bodies in the execution of tasks conferred by Union law in responding to the Covid-19 pandemic where those goods or services are not for onward supply for consideration.

Stamp Duty

- The Bill makes a number of technical amendments to ss31E and 83E of the Stamp Duties Consolidation Act (SDCA) 1999. S31E provides for a higher stamp duty rate of 10% where more than nine individual residential units are acquired, whether directly or indirectly, in any 12-month period. The amendments to s31E include clarifying that the acquisition of a residential unit with an existing social housing lease does not qualify for the exemption from the 10% rate of stamp duty and narrowing the unintended overly wide scope where a residential unit is indirectly acquired.
- The stamp duty relief for young trained farmers has been extended until 31 December 2022.
- The Bill contains a number of measures to legislate for the modernisation and streamlining of the collection of stamp duty on financial cards, cheques and insurance policies.

Climate and Environmental Taxes

- The benefit-in-kind (BIK) exemption for electric vehicles is amended and retained until 31 December 2025. The existing BIK exemption for electric vehicles with an original market value (OMV) of under €50,000 will be tapered from 1 January 2023.
- A new tax disregard of €200 is being introduced for income received by households who sell residual electricity that they generate from renewable, sustainable or alternative energy sources back to the grid.
- Equipment directly operated by fossil fuels will no longer qualify for accelerated capital allowances under s285A TCA 1997.
- Accelerated capital allowances for expenditure on vehicles powered by natural gas/biogas and related refuelling equipment is being extended to 31 December 2024. Expenditure on hydrogen-fuelled vehicles and associated refuelling equipment incurred on or after 1 January 2022 will qualify for the scheme.

Other Measures

- The Finance Bill includes an amendment extending the timelines for the issuing of a case stated under s949AQ TCA 1997.
- The Bill states that s1077E will not apply in respect of any disclosure made, act done or omission made after the Finance Act. S1077E is replaced with a new s1077F TCA 1997, which replicates much of the

contents of s1077E and legislates for a number of administrative provisions. To reflect the revised Code of Practice, which is due to be implemented from 1 May 2022. In the Code of Practice for Revenue Audit and Other Compliance Interventions, such as the non-application of a penalty where a tax underpayment arises from a technical adjustment, innocent error and in circumstances where the tax default is below €6,000 (due to careless but not deliberate behaviour). It also removes the previous restrictions on mitigation of penalties in "offshore" cases and is effective from the passing of the Finance Act.

- The Bill makes a number of amendments to the publication of names of tax defaulters and inserts a new s1086A into TCA 1997 which will be effective from the passing of the Finance Act. It increases the threshold for publication of settlements (currently, €35,000 inclusive of tax, interest and penalties) by providing that a settlement will not be published when the underpayment of tax or refund incorrectly claimed is less than €50,000.
- The Bill amends s261 TCA 1997 to ensure that trusts in receipt of interest income that has not been subject to DIRT are subject to tax at a rate of 33% on that income. Previously this income would also have been liable to income tax at the standard rate, this potential double charge to tax is removed for the tax year 2022 and subsequent years.
- A new zoned land tax is introduced to encourage the use of land for building homes. The tax will be charged at a rate of 3% based on the market value of the land at the valuation date. The valuation date is the liability date in the first year for which the residential zoned land tax applies to a liable person, and for each successive three-year period thereafter, 1 February in the year following the final year in that three-year period. There will be a two-year lead-in time for land zoned before 1 January 2022 and a three-year lead-in time for land zoned after 1 January 2022. Therefore, the tax will become chargeable from 2024 onwards.
- The Bill inserts a new s817REA into TCA 1997 to provide Revenue with additional powers to review the procedures of intermediaries and taxpayers to ensure compliance with DAC6.
- A new s891I has been inserted into Part 38 of TCA 1997 to transpose DAC7 into Irish law. DAC7 extends the automatic exchange of information to apply to digital platform operators. The section is subject to a Ministerial Order, as it is intended that the remaining aspects will be transposed in Finance Bill 2022.
- The Bill makes a number of amendments in relation to agri-taxation. S666(4) TCA 1997 is amended to reflect that general stock relief is extended for a further three years to 31 December 2024. S667B and s667C TCA 1997 has been amended to extend stock relief for young trained farmers and for registered farm partnerships to 31 December 2022.

Ireland joins OECD Inclusive Framework agreement

On 7 October 2021 the Minister for Finance, Paschal Donohoe TD, announced that he had received Government approval to join the OECD Inclusive Framework agreement to reform international tax rules to address the challenges arising from the digitalisation of the global economy. Minister Donohoe confirmed that the proposed minimum effective tax rate of "at least 15%", which Ireland had reserved its position on in July, has been set to a precise rate of 15%. The announcement came ahead of a meeting of the Inclusive Framework on 8 October to endorse a revised Statement of Agreement on the two-pillar solution that was put forward in July.

The Institute issued a press release on 7 October welcoming the agreement on the OECD tax reform proposals announced by the Government as it will provide certainty for business. Institute President Karen Frawley said:

> "The change in language around the global minimum rate secured by the Government as well as the commitment from the EU that the Commission will hold to that rate, brings much needed certainty and stability to the international

> tax system. This is good news for business and good news for governments as the world recovers from the pandemic."

The President also welcomed the assurance from the EU that the new rate will apply only to companies with global revenues in excess of €750m. She said "[t]his means that our SMEs can continue to benefit from our 12.5% rate without any damage to their competitiveness".

Further detail on the revised Statement on the two-pillar solution is given below in Policy News and in the article in this issue of *Irish Tax Review* titled "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules". (See also article by Anne Gunnell & Clare McGuinness, "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules", in this issue.)

Policy News

Commission on Taxation and Welfare launches public consultation

On 19 October the Commission on Taxation and Welfare launched a public consultation titled "Your Vision, Our Future", which is hosted online at cotw.citizenspace.com and contains specific questions based on the Commission's terms of reference. The Commission on Taxation and Welfare was established earlier this year and is an independent body tasked by the Government with reviewing how best the taxation and welfare system can support economic activity and income redistribution, while promoting increased employment and prosperity in a resilient, inclusive and sustainable way and ensuring that there are sufficient resources available to meet the costs of public services and supports in the medium and longer term.

The consultation document notes that the Commission, as one, agreed that in-depth public consultation and stakeholder engagement exercises were necessary to elicit broad perspectives about the way in which Ireland's tax and welfare systems should be structured to better position the country to respond to developments over the next few decades and address any perceived shortcomings in the systems as they operate today. The public consultation is in the form of a questionnaire, organised into 10 chapters with a total of 34 questions.

After the public consultation the Commission proposes to engage with stakeholders through the proposed Dialogue on the Future of Tax and Welfare in Ireland. This event is expected to take place in early 2022.

The consultation period runs until Friday, 7 January 2022.

European Commission launches inception impact assessment on withholding taxes

The European Commission launched an inception impact assessment on a proposed new EU system for the avoidance of double taxation and prevention of tax abuse in the field of withholding taxes. The initiative aims to tackle the particularly burdensome withholding tax relief procedures for cross-border investors in the securities market. The general objectives of the initiative are to ensure the proper functioning of the Capital Markets Union, to facilitate cross-border investment and to prevent tax abuse. The initiative also has the specific objectives of making withholding tax relief procedures for non-resident investors more efficient and increasing the ability of tax administrations to identify and target investors that abuse rights granted under double taxation conventions.

The Commission invited feedback on the inception impact assessment by 26 October 2021 and intends to launch a public consultation in Q4 2021 that will last for 12 weeks.

European Commission consultation on proposed amendments to General Block Exemption Regulation

The European Commission is inviting Member States and all other interested parties to comment on certain proposed amendments to the General Block Exemption Regulation (GBER). The intention is that the new rules will help set the right foundations for a sustainable economy in a time of recovery from the effects of the Covid-19 pandemic. Member States and other interested parties can respond to the consultation until 8 December 2021.

The aim of the ongoing revision of the State Aid guidelines and the proposed revision of the GBER is to promote public funding that contributes to the achievement of current EU priorities, notably the Green Deal and the European Industrial and Digital Strategies, and to ensure that State Aid rules reflect the most recent market and technological developments. The adoption of the revised GBER is planned for the first half of 2022.

EU Competitiveness Council approves draft Directive on public CbCR

On 28 September the EU Competitiveness Council approved the draft 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, paving the way for its final adoption. The adoption of the Council's position follows a provisional agreement reached with the European Parliament in June.

The draft Directive is subject to the ordinary legislative procedure, which requires qualified majority voting rather than unanimous approval. In statements issued at the European Council's first reading of the draft Directive, several Member States, including Ireland, noted their ongoing concern regarding the legal basis of the proposal and expressed the view that since "both the aim and the content of the proposal relate to 'fiscal provisions'" the proposal for the Directive should be based on Article 115 of the Treaty on the Functioning of the European Union rather than Article 50(1).

The CbCR Directive will require certain multinational undertakings with revenue of more than €750m to disclose publicly in a specific report the income tax that they pay. Under the draft Directive, non-EU multinationals doing business in the EU through subsidiaries and branches will have to comply with the same reporting obligations as EU multinational undertakings.

The reporting will take place within 12 months of the date of the balance sheet for the financial year in question. The Directive sets out the conditions under which a company may defer the disclosure of certain information for a maximum of five years. It also stipulates who bears responsibility for ensuring compliance with the reporting obligation.

The next step before the Directive can enter into force is the formal approval of the provisional agreement by the European Parliament. The Directive will then enter into force on the 20th day following its publication in the Official Journal of the European Union, and Member States will have 18 months to transpose it into national law.

OECD two-pillar solution agreed by G20 leaders

As outlined above in News Alert, on 8 October at a meeting of the OECD/G20 Inclusive Framework on BEPS, 136 member countries (out of a total of 140) endorsed a revised Statement on the two-pillar solution to address the tax challenges arising from the digitalisation of the economy, which was put forward in July.

After the announcement of 8 October, the European Commissioner for Economy, Paolo Gentiloni, released a statement confirming that the European Commission will swiftly put forward a Directive to implement Pillar Two in the EU once the OECD has finalised the model rules under the pillar. Regarding Pillar One, the Commission will carefully examine whether a Directive is needed to ensure its consistent and effective implementation at EU level.

With Ireland, Estonia and Hungary joining the agreement, it is now supported by all OECD and G20 countries. Kenya, Nigeria, Pakistan and Sri Lanka have not yet joined the agreement. The two-pillar solution was endorsed by the G20 Finance Ministers and Central Bank Governors at a meeting on 13 October. A Communiqué issued after the meeting calling on the OECD/G20 Inclusive Framework:

> "to swiftly develop the model rules and multilateral instruments as indicated in and according to the timetable provided in the Detailed Implementation Plan, with a view to ensure that the new rules will come into effect at global level in 2023".

The two-pillar solution was formally endorsed by G20 leaders at the summit in Rome on 31 October.

As outlined in News Alert above, the revised agreement provides that the global minimum corporate tax rate under Pillar Two is set at 15%, with the reference to "at least" removed from the updated text. Other key changes in the updated text, compared with the July Statement, and details of the subsequent agreement reached by the UK, Austria, France, Italy, Spain and the US on 21 October on the transition from existing digital services taxes to Pillar One are outlined in the article in this issue of *Irish Tax Review* titled "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules". (See also article by Anne Gunnell & Clare McGuinness, "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules", in this issue.)

UK Autumn Budget 2021

The Chancellor of the Exchequer, Rishi Sunak MP, presented his Autumn Budget and Spending Review 2021 to the UK Parliament on 27 October. Tax measures announced in the Budget included:

- An 8% reduction in the universal credit taper rate (from 63% to 55%). The taper rate is the amount of universal credit payments that claimants lose as they work and earn more than a certain threshold.
- Proposals to legislate for the previously announced 1.25% health and social care levy and a 1.25% increase in the dividend tax rate.
- Confirmation of the delay to "Making Tax Digital" for income tax self-assessment until April 2024.
- Extension of the reporting and payment deadline for capital gains on UK residential property from 30 to 60 days.
- Introduction of a new residential property development tax from 1 April 2022 at a rate of 4% on relevant group profits over £25m where profits are derived from UK residential property development.
- Reform of R&D tax reliefs from April 2023 to improve their effectiveness by expanding qualifying expenditure to include data and cloud computing costs and to refocus support on innovation in the UK.
- Extension of the temporary £1m level of the annual investment allowance to March 2023.
- A range of changes to the business rates regime in England. These include increasing the frequency of revaluations to every three years; exemptions for plant and machinery used in onsite renewable energy production such as solar panels; freezing the multiplier for 2022/23; a new one-year relief for eligible property improvements; and a new, temporary 50% relief up to £110,000 per business for eligible retail, hospitality and leisure businesses.
- Reduction of the banking surcharge from 8% to 3% with effect from 1 April 2023, with an increase in the annual allowance for groups from £25m to £100m.
- Temporary increases to the headline rates of relief for theatres, museums, orchestras and galleries across the UK from 27 October 2021 to 31 March 2024.
- From 1 April 2023, a 50% cut in air passenger duty for flights between airports in England, Scotland, Wales and Northern Ireland. In addition, a new starting rate of air passenger duty of £91 (in respect of economy seats) on flights of 5,500 miles or more will apply across the UK except for the direct long-haul rates for Northern Ireland, which are devolved.

Determinations of the Tax Appeals Commission Published from 6 August to 31 October 2021

Case reference	Tax head/topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
97TACD2021	**Income Tax - Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption". Section 195 TCA 1997	Unknown
98TACD2021	**Income Tax - Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption". Section 195 TCA 1997	Unknown
99TACD2021	**Income Tax**	Appeal against a decision regarding tax treatment of back-pay. Section112 TCA 1997	Unknown
100TACD2021	**Income Tax**	Appeal against a decision regarding a claim for relief in respect of Permanent Health Insurance (PHI) made in error. Section 471 TCA 1997	Unknown
101TACD2021	**VAT**	Refusal of the repayment of VAT on the basis that a valid claim for repayment had not been made within the four-year limitation period. Section99 VATCA 2010	Unknown
102TACD2021	**Income Tax**	Refusal of repayment of income tax on the basis that a valid claim for repayment had not been made within the four-year limitation period. Section 865 TCA 1997	Unknown
103TACD2021	**VRT**	Appeal against the valuation of a vehicle for the purposes of ascertaining the open market selling price (OMSP) in respect of the calculation of VRT. Section 133 Finance Act 1992 (as amended) Section 146 Finance Act 2001 (as amended)	Unknown

104TACD2021	**Income Tax**	Refusal of repayment of income tax on the basis that a valid claim for repayment had not been made within the four-year limitation period. Section 865 TCA 1997	Unknown
105TACD2021	**Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption". Section 195 TCA 1997	Unknown
106TACD2021[1]	**CGT**	Appeal against a decision regarding the applicable stamp duty rate on a conveyance of agricultural land. Section 57 Finance Act 2019	Unknown
107TACD2021	**PAYE - Heath Expenses**	Appeal in respect of a PAYE balancing statement and the application of joint assessment. Sections 865, 1017 and 1018 TCA 1997.	Unknown
108TACD2021	**Income Tax - PRSI**	Appeal against a decision regarding repayment of income tax on the basis that a valid claim had not been made within the four-year limitation period. Section 865 TCA 1997	Unknown
109TACD2021	**PAYE - USC**	Appeal against a decision that a USC liability arose on payments received from the Department of Social Protection. Sections 19, 531AL, 531AM and 983 TCA 1997 and section 48B Pension Act 1990	Unknown
110TACD2021	**Income Tax - VAT**	Appeal against a decision regarding repayments of income tax and VAT on the basis that a valid claim had not been made within the four-year limitation period. Sections 865 and 865B TCA 1997	Unknown

1 See also article by Fiona Carney, "Direct Tax Cases: Tax Appeals Commission Determinations", in this issue.

111TACD2021	**Income Tax**	Appeal against a decision regarding repayment of income tax on the basis that a valid claim had not been made within the four-year limitation period. Section 865 TCA 1997	Unknown
112TACD2021	**VRT**	Appeal against a decision refusing VRT registration. (TAN authorisation) Section 136 Finance Act 1992, sections145 and 146 Finance Act 1992 (as amended) and section 14 Vehicle Registration and Taxation Regulations 1992	Unknown
113TACD2021	**Income Tax**	Appeal against estimated assessments raised in respect of payments made by the company appellant to a director for travel and subsistence expenses on the basis that such payments were not incurred “wholly and exclusively laid out or expended for the purpose of the trade or profession” Sections 112, 114, 117, 118, 929, 983, 985A and 990 TCA 1997 and Income Tax (Employments) (Consolidated) Regulations, 2001	Yes
114TACD2021[2]	**DWT**	Appeal against the application of DWT. on distributions paid to certain non-resident shareholders. Sections 20, 172, 172A, 172B , 172D and Schedule 2A TCA 1997, Double Taxation Relief (Taxes on Income and Capital Gains) (United Arab Emirates) Order 2011 (S.I. 20/2011), Articles 18 and 63-66 Treaty for the Functioning of the European Union, Council Directive 88/361/EC and Charter of Fundamental Rights of the European Union.	Yes

2 See also article by Fiona Carney, “Direct Tax Cases: Tax Appeals Commission Determinations”, in this issue.

115TACD2021[3]	**Income Tax - CGT**	Claim that a significant portion of a payment under a compromise agreement was not a payment in respect of remuneration but represents a payment coming within the provisions of sections 201(2)(a)(i)(II), 192A and 613(1)(c) TCA 1997. Sections 28,29,31,112,123, 192A, 201,532,535 and 613 TCA 1997	No
116TACD2021[4]	**VAT**	Appeal concerning whether the appellant is a accountable person for the purposes of VAT and VAT assessments raised. Schedule 1 VATCA 2010	Unknown
117TACD2021	**PAYE, PRSI, USC**	Appeal concerning the question of whether medical professionals engaged by the Appellant in a clinic are in receipt of emoluments from an employment within the meaning of s112 TCA 1997, or whether they are self-employed persons chargeable to tax under Case I Schedule D in respect of income of a trade. Sections 112, 522 and 990 TCA 1997	No
118TACD2021	**Income Tax**	Appeal against assessments to the domicile levy under s531AH TCA 1997. Part 18C TCA 1997	Yes
119TACD2021	**VRT**	Appeal regarding income tax and VAT assessment raised by the Criminal Assets Bureau. Sections 949J, 949O, 949P and 960L TCA 1997.	Unknown

3 See also article by Fiona Carney, "Direct Tax Cases: Tax Appeals Commission Determinations", in this issue.

4 See also article by Gabrielle Dillon "Value-Added Tax & VAT News", in this issue.

120TACD2021	**Income Tax – Artists' Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption". Section 195 TCA 1997	Unknown
121TACD2021	**Income Tax**	Appeal regarding entitlement to the PAYE employee tax credit. Sections 472 and s472AB TCA 1997	Unknown
122TACD2021	**VRT**	Appeal concerning the imposition of a VAT charge on the importation of a vehicle into the State. Sections 2,3 and 24 VATCA 2010	Unknown
123TACD2021	**VRT**	Appeal against the valuation of a vehicle for the purposes of ascertaining the open market selling price (OMSP) in respect of the calculation of VRT. Section 133 Finance Act 1992 (as amended) Section 146 Finance Act 2001 (as amended)	Unknown
124TACD2021	**VRT**	Appeal against the valuation of a vehicle for the purposes of ascertaining the open market selling price (OMSP) in respect of the calculation of VRT. Section 133 Finance Act 1992 (as amended) Section 146 Finance Act 2001 (as amended)	Unknown
125TACD2021	**Income Tax**	Appeal against a decision regarding repayment of income tax on the basis that a valid claim had not been made within the four-year limitation period Section 865 TCA 1997	Yes

126TACD2021	**Income Tax - Artists Exemption**	Appeal against a decision to deny the relief commonly known as "artists' exemption". Section 195 TCA 1997.	Unknown
127TACD2021	**CGT**	Appeal against a CGT assessment in respect of a disposal of land arising under a CPO Sections 535,536 and 604 TCA 1997	Unknown
128TACD2021	**Income Tax**	Appeal covering validity of assessments and whether some assessments were out of time. Sections 18, 58, 71, 791, 806, 819, 820, 908, 933, 934, 942, 949AA, 949AC, 949AH, 950, 955, Part 33 (chapter 1), Part 39, Part 40A and Part 41 TCA 1997	Yes
129TACD2021	**Income Tax**	Appeal regarding amended assessments to income tax raised following a Revenue investigation. Sections 18, 52 and 58 TCA 1997.	Yes (but was subsequently refused)
130TACD2021	**Income Tax**	Appeal regarding amended assessments to income tax raised following a Revenue investigation. Sections 18, 52 and 58 TCA 1997.	Yes (but was subsequently refused)

Direct Tax Cases: Tax Appeals Commission Determinations

Fiona Carney
Director, Tax Solutions Centre, PwC

Tax Appeals Commission Determinations

01 Income Tax – Interest Relief and Anti-Avoidance

Tax appeal **93TACD2021** related to Revenue's denial of interest relief claimed by the appellant in the tax years 2006 to 2011 under s248 TCA 1997, as extended by s250 TCA 1997, in respect of loans drawn down in Turkish lira (TRY) to subscribe for new shares in two Irish investee companies, Company L and Company P.

The loans were drawn down in December 2005 under a two-year facility. The interest rate on the TRY loans was relatively high at the time as compared to the euro rates. The appellant hedged currency risk by forward contracts and a spread bet, the gain from which was exempt from tax. Neither investee company nor their subsidiaries had any dealings in TRY, and the companies immediately swapped the TRY received for euro through spot transactions with the bank.

The appellant entered into a loan extension agreement with the bank in December 2007 to extend the term of the loan by *c.* four years to 30 November 2011 at an increased interest rate, with interest payable annually on 30 November (previously 6 December). New forward contracts and a financial spread bet extension agreement were entered into.

Revenue denied the interest relief under the anti-avoidance provisions, arguing that the appellant enjoyed a disproportionate tax saving without the burden of the economic consequences as envisaged by the Oireachtas. Revenue also asserted that several technical conditions in s248 and s250 were not met.

The loan interest had been paid out of an overdraft with the same bank. Revenue contended that the interest was not "paid" within the meaning of s248 but was simply repackaged as a different kind of debt, which remained due and owing to the bank. However, the Appeal Commissioner found that the interest was paid because the liability was discharged by increasing the liability on the euro account. Therefore, there was "an act, such as the transfer of money, which discharges the debt".

In addition, relief was available only in respect of loans made before 7 December 2005. Revenue contended that the loan extensions constituted new loans as the changes made to the contract terms were material and fundamental alterations, such that the original loan agreements were rescinded and replaced. However, the Appeal Commissioner agreed with the appellant that the loans had been extended.

Revenue also contended that Company L did not meet the conditions of s248(1)(a)(i) in 2011, as being "a company whose income consists wholly or mainly of profits or gains chargeable under Case V of Schedule D". Company L had a number of subsidiaries. In the years 2005 to 2010, its income consisted wholly or mainly of Case V income. For 2011, the greater part of its income consisted of a dividend (franked investment income) from a subsidiary.

The appellant's position is that the condition in s248(1)(a) must be met by the investee company at the time when the shares are acquired. However, Revenue contended that the condition applies on an ongoing basis in each year in which relief is claimed.

The Appeal Commissioner agreed with Revenue, noting that, although the wording in s248(1)(a)(i) could suggest that it is the status of the company at the time when the loan was made that is important, it would be contrary to the intention of the Oireachtas to facilitate an ongoing statutory relief where the main source of a company's income during the investment period changes from Case V to a non-qualifying source of income. Although s129 TCA 1997 excludes franked investment income in computing income for corporation tax purposes, the Commissioner found that it is the company's income, as opposed to its chargeable or taxable income, that must be considered for this purpose. As a result, no interest relief could be allowed for interest paid on the loan to acquire shares in Company L for the year 2011.

In dealing with the anti-avoidance provisions, the Appeal Commissioner first considered whether the provisions of s248(3) TCA 1997 apply to s250 TCA 1997. The sub-section operates to deny relief for interest paid "unless the loan is applied for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax".

The Appeal Commissioner concluded that s248(3) does not apply to s250. He went on to consider the test to be applied in the event that this conclusion is incorrect and s248(3) does apply to s250. The Commissioner concluded that, although the loans were applied for bona fide commercial purposes, the arrangement, with loans in a foreign currency with a higher interest rate, was mainly effected for tax avoidance, given that the entities had no dealings in the foreign currency and they exchanged the funds immediately for euro. Interest relief would therefore be denied were s248(3) to apply.

The Appeal Commissioner also considered whether relief was disallowed under s817A TCA 1997, which denies relief for interest paid:

> *"...if a scheme has been effected or arrangements have been made such that the sole or main benefit that might be expected to accrue to that person from*

the transaction under which the interest is paid is the obtaining of a reduction in tax liability by means of any such relief".

He first compared the value of the tax benefits with the value of the shares acquired, which constituted the immediate benefit of the loan, and found, in the case of the first loan, that the tax benefit was *c*. 12% of the value of the asset. He was also satisfied with the appellant's evidence that there was an expected benefit "to accrue...from the transaction" over and above the immediate benefit. Similar conclusions were reached in relation to the second loan. The Commissioner therefore determined that tax relief could not be considered to be the main benefit of the transaction and that s817A could have no application.

In summary, the Appeal Commissioner held that interest relief was available for all years except for interest paid in 2011 on one loan on the basis that Company L did not meet the conditions of s248(1)(a) in that year.

The Appeal Commissioners had originally been requested to state and sign a case for the opinion of the High Court, this request was later withdrawn.

02 Corporation Tax – Capital Allowances on Grid Connection Costs

Tax appeal **94TACD2021** concerned Revenue's denial of capital allowances for grid connection costs on the construction of a power station. The appellant company constructed a combined-cycle gas power station for trading purposes. Connection was required to both the electricity and gas national grids, and agreements were entered into with the Electricity Supply Board (ESB) and Bord Gáis Energy (BGE) for the installation of the connections. Due to the regulatory regime governing power generation, the appellant was obliged to transfer ownership of the connections and the lands on which they were constructed to the ESB and BGE.

The connection costs were capitalised in the company's accounts, and capital allowances were claimed under s284(1) TCA 1997, which provides that:

> *"....where a person...has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance...shall be made...on account of the wear and tear of any of the machinery or plant which belongs to such person....".*

Trading losses arose due to the large capital allowance deductions, which were used to shelter profits in later years under s396(1) TCA 1997. In a Revenue audit of later years, Revenue sought to deny relief for the losses forward on the basis that the appellant was not entitled to capital allowances on the connection costs as the connections never belonged to the appellant and the costs were too remote to qualify as ancillary expenditure on the provision of machinery and plant.

The appellant argued that the connections are machinery and plant integral to the commissioning and continuing operation of the power station. Although not legally owned by the appellant, they are used wholly and exclusively for the purposes of the appellant's trade.

The Appeal Commissioner allowed the appeal, finding that the connection fees paid constituted ancillary expenditure necessary for the provision of the machinery and plant used to generate electricity at the power station. That machinery and plant belongs to the appellant. It was not therefore necessary to consider whether the connections "belonged to" the appellant.

It is not known if the Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court.

03 DWT – Distributions Made to Individuals Resident in the UAE

Tax appeal **114TACD2021** related to the operation of Irish dividend withholding tax (DWT) by two Irish-resident companies ("the appellants") on dividends paid between 2017 and 2020 to two individual shareholders residing in the United Arab Emirates (UAE). Each of the shareholders had provided the appellants with a "Tax Domicile Certificate for Individuals" issued by the UAE Ministry of Finance for 2017 and 2018 but not for 2019 or 2020.

In the UAE, income tax is not imposed on individuals regardless of their residence. A person is regarded as tax resident in the UAE for a particular year if they are issued with a tax residency certificate by the competent authority under the terms of a tax treaty entered into by the UAE.

DWT was not operated by the appellants on the distributions on the basis that exemption under s172D(3)(a) TCA 1997 applied. However, Revenue did not agree that the following conditions were met and assessed the appellants to DWT on the entire amount of the distributions:

- the shareholder is "by virtue of the law of a relevant territory, resident for the purposes of tax in the relevant territory" and
- the shareholder declaration required under paragraph 8 of Schedule 2A TCA 1997 is accompanied by a current "certificate given by the tax authority of the relevant territory" certifying that the person is resident for the purposes of tax in that territory.

Revenue contended that "resident for the purposes of tax" must be read as resident under the Ireland–UAE double taxation treaty ("the treaty"). Based on the definition of "resident" in the treaty and its protocol, shareholders must establish not only that they are "liable to tax" in the UAE but also that they pay income tax or corporate tax on income.

However, the Appeal Commissioner concluded that the treaty deals with prospective taxation in the UAE in relation to an understood existing tax such as income tax and corporation tax. In the Commissioner's view, the status of the shareholders under UAE law is decisive for s172D(3)(a), and not necessarily how Revenue interprets their status under Irish law or interprets the treaty from an Irish tax perspective. A person is regarded as a tax resident in the UAE for a particular year if they are issued a tax residency certificate by the competent authority under the terms of a treaty entered into by the UAE. The payor of the dividend must receive this evidence before making the distribution.

Revenue also argued that the tax certificates provided by the UAE Ministry of Finance did not constitute sufficient evidence of tax residence in the UAE pending proof that the Ministry of Finance is the "tax authority" of the UAE. The Commissioner dismissed this, given that Article 4 of the treaty defines the UAE Ministry of Finance as the competent authority.

The Appeal Commissioner therefore concluded that the conditions of s172D(3)(a) were met by the shareholders but only in respect of distributions made after the Tax Domicile Certificate had been provided for the relevant years. DWT therefore applied to the distributions made in early 2018, which pre-dated the certificates for 2018, as well as the distributions made in 2019 and 2020.

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

04 CGT and Income Tax – Taxation of Settlement Payment

Tax appeal **115TACD2021** concerned the taxation of a settlement payment received by the appellant from his employer. Over the course of his employment, the appellant made a number of complaints against his employer regarding matters including defamation and damage to professional reputation. After negotiations, the appellant signed a compromise agreement, resulting in the termination of his employment and the receipt of a settlement payment of €180,000.

Revenue sought to tax the payment in full under s123 TCA 1997 as an income payment "in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment".

However, the appellant submitted that, while a certain part of the payment received under the compromise agreement fairly related to employment income and is fully subject to tax, the majority of the balance was a payment in respect of damages for victimisation and defamation. It was not 'connected with' or arising 'in consequence of' the termination' of employment and was not within s123 TCA 1997. It was a capital payment and was exempt from capital gains tax under the provisions of s613(1)(c) TCA 1997. This applies to *"any sum obtained by means of compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession"*.

Revenue argued that, under the express terms of the compromise agreement, none of the payment could be categorised as damages for defamation or injury to reputation.

The Appeal Commissioner determined that €55,000 of the payment related to the appellant's contractual and statutory entitlement to remuneration and is hence subject to income tax under s112 TCA 1997. The balance related to settling the appellant's claim that he was "defamed" and therefore did not fall within s123 TCA 1997.

In considering the application of s613(1)(c), the Appeal Commissioner found no evidence of damage to reputation, as contended by the appellant, and formed the view that no part of the payment could be considered to be compensation or damages in accordance with that section. He instead found that the balance of €125,000 related to the extinguishment of the appellant's lawful entitlement to initiate proceedings against his employer and is assessable to capital gains tax pursuant to s535(2)(a)(iii) TCA 1997 as a capital sum *"received in return for forfeiture or surrender of a right or for refraining from exercising a right"*.

The Appeal Commissioners have not been requested to state and sign a case for the opinion of the High Court.

05 CGT – "Roll-over" Relief

Tax appeal **127TACD2021** concerned Revenue's refusal of the appellant's claim for "roll-over" relief under s536(2) TCA 1997 in respect of a disposal of land arising from a compulsory purchase order ("CPO").

The appellant is a farmer. A portion of his land was acquired by a County Council in June 2007 on foot of a CPO to construct a motorway. He received compensation of €1.3m. In March 2007, the appellant purchased a separate farm and dwelling house.

The appellant submitted that, as a result of the CPO, his farmland was split into two lots now separated from the farmyard, sheds and machinery and was no longer a viable farming enterprise. Part of the proceeds received on foot of the CPO was compensation for "injury to a capital asset owned and maintained by the appellant, namely the ability to farm the land commercially". As all of these funds were reinvested in the acquisition of a new farming enterprise, the appellant claimed relief under the provisions of s536(2) TCA 1997 which applies *"[w]here an asset is lost or destroyed and a capital sum received as compensation…is, within one year of receipt or such longer period as the inspector may allow, applied in acquiring an asset in replacement of the asset lost or destroyed…".*

Revenue contended that the appellant was not entitled to relief pursuant to sections 535 and 536 as the compensation received was not a capital sum derived from an asset and the asset was not lost or destroyed. Rather the land has effectively been sold without the appellant having choice in the matter. Revenue also argued that the asset was not restored *"within one year of receipt or such longer period as the inspector may allow"* as required by s536(2) as the new dwelling house and farmland had been purchased prior to receipt of compensation.

The Appeal Commissioner found in favour of the appellant holding that the appellant's farmland and home dwelling are either lost or destroyed arising from the Council's activity and hence the appellant is compensated for that loss, the contract including compensation described as "injurious affection". The Commissioner also found that, while the new dwelling and farmland was purchased prior to receipt of the compensation, negotiations with the County Council on the quantum of compensation predated the acquisition of the new assets, which were acquired in full knowledge of the impending CPO. The Commissioner was therefore satisfied that the conditions of s536(2) were met.

The Appeal Commissioner did however agree with Revenue that the asset that was the subject of compensation was the land as opposed to the farming business which was contended by the appellant.

It is not known if the Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court.

06 CGT – Accountable Person for CGT Purposes

Tax appeal **92TACD2021** considered who is liable for capital gains tax (CGT) on a forced sale of shares that had been used as security for a loan – the debtor whose shares were sold ("the appellant") or the creditor who disposed of the shares ("the bank").

The appellant, an Irish resident, entered into two loan agreements with the bank. The appellant's shares in a French-listed company were used as security to guarantee the loans. The bank commenced enforcement of its security in 2008 and sold shares in 2008 and later years, the proceeds of which were used to repay the loans. It was disputed whether the appellant is liable for the CGT or it is a sole liability of the bank under s571 TCA 1997.

The appellant asserted that the bank is an "accountable person" as defined by s571(1) and is, by virtue of s571(5)(a), responsible for the discharge of the tax. Revenue should therefore have assessed and recovered income tax from the bank in accordance with s571(7) but had declined to do so.

Revenue contended that, pursuant to s537(2), the bank was acting as the appellant's nominee when disposing of the shares. However, the charge to CGT remained with the appellant. Revenue submitted that the provisions of s571 do not prevent Revenue from pursuing the debtor for the collection of tax.

The Appeal Commissioner found that, where a security is enforced resulting in the disposal of the asset, a CGT charge applies to the debtor (the appellant). However, s571(5) mandates that the referable CGT "shall be assessable" and recoverable solely from the bank. Revenue was obliged under s571(7) to raise assessments solely on the bank as the "accountable person" and to seek the recovery of tax solely from the bank.

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

07 Stamp Duty Rate Increase – Application of Transitional Measures

Tax appeal **106TACD2021** related to a refusal by Revenue to accept the appellant's assertion regarding the rate of stamp duty payable on the conveyance to the appellant of agricultural land. The rate of stamp duty on non-residential property increased from 6% to 7.5% as part of the Budget 2020 announcements on 8 October 2019. Transitional measures were put in place for purchasers that had already signed a contract where the transaction was completed before 1 January 2020.

The appellant purchased the property pursuant to a contract dated September 2019, but the property did not transfer until January 2020. The deed of transfer is dated in that month. The appellant maintained that the intention was to complete in December 2019 but she was unable to due to delays with the issue of the Form CG50A. The stamp duty return was filed in February 2020, and stamp duty was paid at the rate of 7.5%. An expression of doubt was indicated in the return.

The CG50 clearance application was filed on 28 November 2019 naming the appellant as the purchaser. However, a different purchaser was shown in the contract for sale, being the party who had acquired the property at auction on behalf of the appellant. In January 2020 the vendor's solicitors provided the deed of transfer showing the appellant as the purchaser, and the Form CG50A certificate was issued.

The Appeal Commissioner noted that the appellant had due notice of the rate change. It was incumbent on her and her advisers to ensure that there were no delays in completion and that all documentation was correct. The appellant was unable to account for the delay in the period from when Revenue requested clarifications regarding the purchaser to the provision of the deed of transfer. The CG50A was issued by Revenue the day after receipt of the deed of transfer, so there was no undue delay on Revenue's part. The Commissioner also noted that the CG50 relates to a separate tax head and is not directly related to the rate of stamp duty.

The Appeal Commissioner concluded that the transfer of the property took place in January 2020 and therefore the 7.5% rate of stamp duty applied.

It is not known if the Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court.

08 Income Tax – Trusts / Residence and Domicile

Tax appeal **128TACD2021** concerns the non-disclosure by the appellant in his tax returns of the existence of a number of Jersey and Isle of Man trusts (including funds settled and income derived from the trusts). Revenue raised assessments taxing the appellant on interest arising in the trusts under Schedule D Case III and Case IV.

A key question in the case was whether s71 TCA 1997 applies to tax the income from the trusts under Case III. The section applies to tax *"income arising from securities and possessions in any place outside the State"*. Revenue asserted that the fact that the bank accounts are in the name of the trusts did not preclude s71 from applying as that section does not require the securities and possessions to be in the ownership of the taxpayer. Revenue contended that, absent a definition of "possession" in the section or the Act, the term should also be given a wide meaning.

The Appeal Commissioner concluded that the trusts are 'possessions' of the appellant and that the income was correctly taxed under Schedule D Case III. The Commissioner also noted that the question as to whether Appellant was liable to tax under s806 TCA 1997 (transfer of assets abroad) was not relevant given the application of s71.

The appeal also considered the appellant's residence and domicile status. The appellant had lived and worked at various times in Ireland and in Northern Ireland. The appellant contended that he had moved his residence from Ireland to Northern Ireland for a period of years and had acquired a domicile of choice in Northern Ireland. Revenue contended that the appellant was tax resident and domiciled in Ireland in all years.

The Appeal Commissioner found that the appellant's centre of vital interest was in Ireland for the entire period and that he was tax resident in Ireland. If it were necessary to consider, he would also be regarded as Irish resident under the Ireland/UK Double Tax Agreement. Based on his apparent lack of engagement with the State in Northern Ireland, the Commissioner found on the balance of probabilities that the appellant had not acquired a domicile of choice in Northern Ireland.

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


Direct Tax Cases: Decisions from the UK Courts and Other International Cases

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	Topic	Court
01	**Corporation Tax – Payment on Disposal of Property**	UK First-tier Tribunal
02	**Duty of Care – Introduction to Tax-Planning Schemes**	England and Wales High Court
03	**Income Tax – UK Limited Liability Partnerships and Tax-Planning Schemes**	England and Wales Court of Appeal
04	**PAYE/PRSI – Contract of Service Versus Contract for Services**	England and Wales Court of Appeal
05	**Corporation Tax – Expenses of Management**	UK Upper Tribunal
06	**Dealing in Land – Appropriation to Trading Stock**	UK First-tier Tribunal
07	**DAC6 and Legal Professional Privilege**	Court of Justice of the European Union
08	**DTA Interpretation and Domestic GAAR Application**	Argentina Supreme Court

01 Corporation Tax – Payment on Disposal of Property

In ***Shinelock Ltd v HMRC*** [2021] UKFTT 320 (TC) the First-tier Tribunal (FTT) determined that an amount paid to a former shareholder of a company was neither a distribution nor an amount that qualified for relief under the loan relationship regime in the UK. The amount paid to the former shareholder equalled the gain that had arisen on a disposal of a property by the company.

The appellant company, Shinelock Ltd, made a profit on the disposal of a property. The property had been financed by way of a bank loan and a loan from the company's former shareholder. It was accepted that the parties had agreed that any profits on the disposal of the property would accrue to the former shareholder.

The facts of the case were quite complicated. The taxpayer had initially argued that the property was beneficially owned by the former shareholder, and not Shinelock Ltd, such that any chargeable gain could have been realised only by the former shareholder. However, by the time of the hearing, it was accepted that the property was beneficially owned by the appellant company. The argument then advanced by the appellant was that the payment was deductible under the loan relationship regime in the UK as a non-trading loan relationship loss, by virtue of the former shareholder's having provided finance and guarantees to Shinelock Ltd. HMRC disputed the nature of the funding provided by the former shareholder and also argued that the payment was a distribution.

Furthermore, HMRC argued that the payment amount had not been recognised in the accounts. The loan relationship rules generally provide relief in accordance with the accounting treatment of amounts arising in relation to loans. Therefore, HMRC argued that it was not deductible as a loan relationship because it had not been recognised in the accounts.

HMRC's argument that the payment was a distribution was rejected by the FTT. There was a contractual obligation to make the payment to the former shareholder, and such a payment could not be said to be made "out of assets" of the company under the UK equivalent of s130 TCA 1997. The payment was therefore still potentially deductible as a non-trading loan relationship loss.

However, the accounting policy adopted by the appellant company in respect of the payment made was fatal to its argument for securing a deduction. A "net basis" of accounting was adopted, meaning that the gain on sale and related expenses were not recorded in the company's financial statements. On the evidence provided, the FTT held that the profit and loss account did not recognise any amounts as the amounts had been excluded. There was no netting of amounts in the profit and loss, as was seen in the case of *West Burton Property Ltd v HMRC* [2021] UKFTT 160 (TC), which was discussed in "Direct Tax Cases: Decisions from the UK Courts", *Irish Tax Review*, 34/3 (2021).

Although the appeal was dismissed at this point, the FTT went on to consider a number of other points, including whether the company had made a claim to relief within the time limits. The analysis in the decision determined that there was a valid claim, even though no claim had been made within the specified two-year period. HMRC has jurisdiction to allow late claims.

02 Duty of Care – Introduction to Tax-Planning Schemes

In ***Knights and others v Townsend Harrison Ltd*** [2021] EWHC 2563 (QB) the High Court rejected a damages claim lodged by clients of an accountancy firm that had introduced them to promoters of a tax scheme that had ultimately failed. The claimants included Evergreen Ltd, a successful trading company. The defendants, Townsend Harrison Ltd (THL), carry on business as a firm of chartered accountants and business advisers.

THL introduced the claimants to several promoters of tax-avoidance schemes. Evergreen Ltd entered into a number of them. The schemes did not result in the expected tax savings. The claimants alleged that THL had acted in breach of the common law duty of care in two ways: firstly, by introducing the claimants to tax schemes; and, secondly, by advising the claimants to invest in the scheme(s). It was alleged that the claimants had suffered damages as a result of those breaches of duty of care.

In respect of both matters, the High Court held that the claimants had failed to establish any duty of care, and it followed that there could have been no breach. Although the court held that a duty of care could exist in such situations, the facts and circumstances of the case in hand meant that it did not arise in relation either to the "introductions" issue or to the "advice" issue.

The court's conclusion principally relied on the fact that the first-named claimant was "an experienced businessman who…demonstrated a significant level of sophistication and attitude to risk with regard to investments". Furthermore, the court determined that although THL may have encouraged the claimants to enter the tax scheme, no official advice was given.

03 Income Tax – UK Limited Liability Partnerships and Tax-Planning Schemes

In ***Ingenious Games LLP and others v HMRC*** [2021] EWCA Civ. 1180, the Court of Appeal reversed the decision of the Upper Tribunal (UT) in relation to the question of whether a UK LLP was trading, and if so, whether that trade was being carried on with a view to a profit. The UT had found that the LLPs were not trading and undertaken with a view to profit.

It is a long-running case that focuses on a tax-planning scheme involving a number of UK limited liability partnerships (LLPs) that were engaged in the making of films and video games. The tax scheme essentially involved making loss relief claims for expenditure incurred in acquiring films.

Although the Court of Appeal decision represents a victory for the taxpayer, the subject of the appeal was narrow, in that the court did not listen to any arguments on whether the expenditure incurred was capital or revenue in nature. The First-tier Tribunal (FTT) had decided that the vast majority of the expenditure incurred was capital in nature.

The UT, however, had also held that the UK LLP was not trading at all, so no losses were available. This meant that even the small amount of allowable revenue expenditure did not qualify for loss relief, as a UK LLP that is not trading is not regarded as transparent for tax purposes. For the UK LLP to be taxed as a partnership, the LLP must be carrying on a trade with a view to profit.

The Court of Appeal restored the decision of the FTT on both of the matters above: the partnerships were indeed trading and were doing so with a view to profit. In relation to the trading point, it was held that the transactions were fundamentally trading in nature, despite their having a fiscal motive (i.e. the loss relief). The presence of a fiscal motive will impact on trading status only where the fiscal motive renders the transaction unrecognisable in "shape and character" as a trading transaction.

The Court of Appeal confirmed that whether a trade was carried on "with a view to profit" was a wholly subjective test depending on the actual intentions of those concerned, although it said that the likelihood of profits and the timescale in which they might be achieved will often be relevant to testing whether there is a genuine subjective view to profit. In siding with the taxpayer, the court relied on the FTT's finding that there was the necessary subjective intention on the part of the controlling minds and that the expectation of a profit was realistic and not fanciful.

The outcome of the Court of Appeal decision is that out of losses of approximately £1.6bn, only £64m, or 4%, are available for offset.

04 PAYE/PRSI – Contract of Service Versus Contract for Services

In ***HMRC v Professional Game Match Officials Ltd*** [2021] EWCA Civ. 1370 the Court of Appeal delivered its judgment in a case concerning the employment status of professional football referees. The First-tier Tribunal (FTT) had held that the referees were not employees, and the Upper Tribunal (UT) upheld that conclusion.

The Court of Appeal allowed HMRC's appeal, concluding that both the FTT and the UT had erred in law when considering the question of mutuality of obligation. The Court of Appeal also upheld the UT's determination that the FTT had erred in its approach to the issue of control.

By way of background, for a contract of service to exist, there must be mutuality of obligation in the first instance, meaning an obligation on the employer to provide work and an obligation on the employee to perform that work for the employer. The UT agreed with the FTT's decision that there was no mutuality of obligation, on the basis that a referee did not undertake any refereeing work if he/she so wished.

However, the Court of Appeal disagreed and held that the FTT erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation. Relying on a number of authorities, it concluded that this was not the correct legal analysis. The court held that the fact that the terms of a contract permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.

The court also held that the FTT had erred in law when considering the question of control in the individual contracts. The FTT had misdirected itself by considering whether there was a "theoretical right to step in" while a referee was performing an engagement at a match. The FTT placed inappropriate weight on this hypothetical question when concluding that there was an insufficient degree of control.

The Court of Appeal then sent the matter back to the FTT to consider whether, based on its original findings of fact, there was sufficient mutuality of obligation and control for the contracts to be contracts of service. Given that the matter has been sent back to the FTT for further consideration, it is unlikely that there will be a conclusive result in the near future.

05 Corporation Tax – Expenses of Management

In ***Centrica Overseas Holdings Ltd v HMRC*** [2021] UKUT 200 the Upper Tribunal (UT) reversed the decision of the First-tier Tribunal (FTT), in finding that expenditure incurred by an investment company in connection with a sale of the businesses of a subsidiary was deductible as expenses of management under the UK equivalent of s83 TCA 1997.

The appellant company, Centrica Overseas Holdings Limited (COHL), is a company in the Centrica plc group. It claimed a corporation tax deduction for expenditure relating to fees paid to professional firms in connection with the disposal of certain companies owning gas and power businesses. The fees were paid by the top company in the group but recharged by book entry to COHL, the claimant for the relief.

HMRC did not argue that COHL had not incurred the expenditure. However, it successfully argued before the FTT that no deduction should be available on the basis that the management decision, to make the disposal, was taken by COHL's parent entity, Centrica plc. Although Centrica plc and COHL shared some individual directors, there were no board minutes of COHL that considered or acknowledged the transaction.

The UT concluded that the FTT had been incorrect to consider that it was necessary to have a minimum degree of formality in relation to the decision making of COHL. Although the strategic decision had been made by the parent entity, Centrica plc, several individuals involved were directors in both companies. The UT recognised that whereas it may well be desirable for decision making and any delegations of authority to be recorded in board minutes or correspondence, no such formality is necessary in terms of delegation of authority for the purposes of the UK equivalent of s83 TCA 1997. In other words, there was no need to demonstrate that the directors had "changed hats and took decisions in their capacity as directors of COHL".

Interestingly, the interpretative differences in relation to what constitutes an "expense of management" between Ireland and the UK is noted, with the Irish Supreme Court decision in *Hibernian Insurance* [2000] 2 IR 263 referenced and contrasted with the UK Court of Appeal decision in *Camas Plc v Atkinson* [2004] EWCA Civ. 541. The *Camas* case, which was applied in *Centrica*, held that expenditure on deciding whether to buy or sell an investment may be an expense of management.

06 Dealing in Land – Appropriation to Trading Stock

In ***Heather Whyte v HMRC*** [2021] UKFTT 270 (TC) the First-tier Tribunal (FTT) determined that six building plots sold from the grounds of a Grade I listed building had been appropriated to trading stock under the UK equivalent of s596(1) TCA 1997. The plots were sold to finance renovation of the estate. In a lengthy judgment totalling more than 600 paragraphs, a number of subsidiary issues were considered, but this note will focus on the main issue, namely, whether the taxpayer, Mrs Whyte, was trading in land.

HMRC contended that the disposals of the plots constituted an adventure in the nature of a trade. However, an analysis of Mrs Whyte's intentions as regards the plots when she acquired the estate weighed against there being a trading motive at the time of acquisition. This was because the number and location of the plots were not determined until after she had acquired the estate. The acquisition of the estate had to be treated in its entirety as either the acquisition of a capital asset or the acquisition of stock-in-trade – it cannot be both. It was held that, to the extent that the motivation is mixed, the predominant intention prevails. In that regard, the "predominant intention" at the time of acquisition was to hold the estate as a capital asset.

The FTT then went on to hold that if Mrs Whyte had merely obtained planning consent for the renovations and then sold bare plots, there would have been no appropriation of the area of the plots from capital to stock-in-trade. However, Mrs Whyte went beyond this, and she had commenced developing the plots herself, not just by clearing the site of trees and vegetation, draining and filling in the pond, installing utilities and constructing the access road but also by starting construction work on the houses on the plots, by digging foundations, and in the case of some of the plots, preparing the floor slab for concrete pouring and laying bricks.

The court held that the plots were appropriated from capital to trading stock when the boundaries of the plots were identified. In this regard, a deemed disposal at market value arose for capital gains tax purposes under the UK equivalent of s596(1) TCA 1997. Mrs Whyte was determined to be liable to income tax in respect of any subsequent profits generated by her adventure in the nature of a trade in respect of the plots.

07 DAC6 and Legal Professional Privilege

On 25 June 2021 a preliminary reference was made by the French Supreme Administrative Court to the Court of Justice of the European Union. The reference relates to whether Article 8ab of the consolidated DAC6 (Directive on Administrative Cooperation) is compatible with the right to a fair trial, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, and the right to respect for private life, as guaranteed by Article 7 of the Charter.

Article 8ab(5) of the consolidated DAC requires that intermediaries who are exempted from reporting on the basis of legal professional privilege must notify other intermediaries, and if there is no such intermediary, the relevant taxpayer, of their reporting obligations. The request for a preliminary ruling relates to whether the obligation to notify another intermediary, in light of legal professional privilege, is compatible with a number of Articles in the Charter of Fundamental Rights of the European Union. A similar reference was made by the Belgian Constitutional Court in December 2020.

In Ireland, s59 of the Finance Act 2020 removed the requirement for an intermediary to notify any other intermediary. Section 817RC(10) TCA 1997 now states that an intermediary subject to legal professional privilege is only obliged to notify the relevant taxpayer of the reporting obligations.

08 DTA Interpretation and Domestic GAAR Application

Argentina's Supreme Court delivered its decision in the case of ***Molinos Río de la Plata v Dirección General Impositiva*** (CAF 1351/2014 /CA1–CS1; CAF 1351/2014/1/RH1) on 2 September 2021 in relation to whether Argentina's domestic general anti-abuse rules (GAAR) could be applied to deny the benefits of an income tax treaty that does not contain anti-abuse rules itself.

The case involved a treaty-shopping dispute. An Argentine parent company established a subsidiary in Chile. The Chilean subsidiary received dividends from foreign subsidiaries located in other Latin American countries. The dividends were exempt from tax at the Chilean holding-company level due to a special exemption regime that existed in Chile at the time. The dividends were then paid up to the Argentine parent company. The dividends were also exempted from tax in the Argentine parent company, by virtue of Article 11 of the 1976 Argentina–Chile tax treaty, which provided that dividends were to be taxed only by the country in which the company distributing them was domiciled. The 1976 treaty was not based on the OECD Model. As Chile did not impose a tax, there was double non-taxation: no tax was paid in either Argentina or Chile. The Argentine tax authorities rejected the claim for relief under the treaty. The relief was denied by the lower courts on the basis that the Chilean company was a "conduit company" and that it was, therefore, appropriate to invoke the Argentine domestic GAAR provisions to override the application of the treaty. The taxpayer appealed to the Supreme Court.

The Supreme Court confirmed the decisions of the lower courts. In doing so, it relied in part on the Argentine domestic GAAR in construing the treaty with Chile, notwithstanding the fact that the treaty contained no reference to anti-avoidance or anti-abuse rules. The court held that the interposition of the Chilean holding company did not reflect economic reality and that double non-taxation was not the purpose of the treaty as interpreted in good faith.

Compliance Deadlines

Helen Byrne
Senior Manager, Tax Knowledge Services, EY

General

Jan 1	Farmers' flat-rate addition reduced from 5.6% to 5.5%. Removal of entitlement to accelerated capital allowances for equipment directly powered by fossil fuels from this date. The requirement to maintain approved minimum retirement funds (AMRFs) will be removed and funds in AMRFs will become approved retirement funds (ARFs) from this date. Land that comes within the scope of the zoned land tax provisions on 1 January 2022 will be chargeable to the tax from 1 January 2024 onwards. Land that comes within the scope of the tax after 1 January 2022 will be chargeable in the third year after coming within scope.
Jan 7	Under mandatory reporting rules, promoters of certain transactions may be required to submit quarterly "client lists" in respect of disclosed transactions made available in the relevant quarter. Any quarterly returns for the period to 31 December are due on 7 January.
Jan 15	Due date for submission of EWSS Employer Eligibility Review Form for December 2021.
Jan 30	Due date for submission of return and payment of IREF withholding tax in connection with the accounting period ended on or before 30 June 2021. Due date for IREFs to file financial statements electronically (in iXBRL format) with Revenue in respect of accounting periods ended on or before 30 June 2021.

Feb 23	Due date for SARP employer annual return. Deadline for filing professional services withholding tax F35 return for the period 1 July to 31 December 2021.
Mar 31	Deadline for submission by employers of share scheme returns in respect of 2021, including Forms ESA, RSS1, KEEP1 and ESS1. Failure by a qualifying company to make a KEEP return by 31 March will disqualify it from the relief. Taxpayers who wish to continue to rely on an opinion or confirmation issued by Revenue in the period between 1 January and 31 December 2016, in respect of a transaction, period or part of a period, on or after 1 January 2022 are required to make an application for its renewal or extension on or before 31 March 2022. Deadline for filing of third-party returns by certain financial institutions in respect of the calendar year 2021.

Relevant Dates for Companies

Jan 1	Introduction of anti-reverse hybrid mismatch rules with effect for tax periods starting on or after 1 January 2022. Interest limitation rules will apply for accounting periods starting on or after 1 January 2022. Application of new "authorised OECD approach" (AOA) for attributing income to an Irish branch of a non-resident company for accounting periods starting on or after 1 January 2022 (The provisions as they relate to small and medium sized enterprises are subject to a Ministerial commencement order). Application of amended transfer pricing domestic exclusion provisions for chargeable periods starting on or after 1 January 2022. Non-resident companies that own Irish rental property will be within the charge to corporation tax rather than income tax for profits accruing from 1 January 2022. This also brings these entities within the scope of the new interest limitation rules.[2]
Jan 14	Dividend withholding tax return filing and payment date (for distributions made in December 2021).
Jan 21	Due date for payment of preliminary tax for companies with a financial year ending on 28 February 2022. If this is paid using ROS, this date is extended to 23 January 2022. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 31 July 2022. If this is paid using ROS, this date is extended to 23 January 2022.

Jan 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 30 April 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 30 April 2021 may need to be repaid by 23 January 2022 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 January 2021 year-ends, this should extend the iXBRL deadline to 23 January 2022.
Jan 31	Last date for filing third-party payments return 46G for companies with a financial year ended on 30 April 2021. Latest date for payment of dividends for the period ended on 31 July 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 August 2021 must be made by 31 January 2022 (applies to specified accounting periods which includes some or all of the period commencing 1 March 2020 and ending 31 December 2020). CbC reporting notifications relating to the fiscal year ending on 31 January 2022 must be made to Revenue (where necessary) no later than 31 January 2022, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 31 January 2021 must be filed with Revenue (where necessary) no later than 31 January 2022.
Feb 14	Dividend withholding tax return filing and payment date (for distributions made in January 2022).
Feb 21	Due date for payment of preliminary tax for companies with a financial year ending on 31 March 2022. If this is paid using ROS, this date is extended to 23 February 2022. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 31 August 2022. If this is paid using ROS, this date is extended to 23 February 2022.

Feb 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 31 May 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 May 2021 may need to be repaid by 23 February 2022 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 28 February 2021 year-ends, this should extend the iXBRL deadline to 23 February 2022.
Feb 28	Last date for filing third-party payments return 46G for companies with a financial year ended on 31 May 2021. Latest date for payment of dividends for the period ended on 31 August 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 September 2021 must be made by 28 February 2022 (applies to specified accounting periods which includes some or all of the period commencing 1 March 2020 and ending 31 December 2020). CbC reporting notifications relating to the fiscal year ending on 28 February 2022 must be made to Revenue (where necessary) no later than 28 February 2022, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 28 February 2021 must be filed with Revenue (where necessary) no later than 28 February 2022.
Mar 14	Dividend withholding tax return filing and payment date (for distributions made in February 2022).
Mar 21	Due date for payment of preliminary tax for companies with a financial year ending on 30 April 2022. If this is paid using ROS, this date is extended to 23 March 2022. Due date for payment of initial instalments of preliminary tax for companies (not "small" companies) with a financial year ending on 30 September 2022. If this is paid using ROS, this date is extended to 23 March 2022.

Mar 23	Last date for filing corporation tax return CT1 for companies with a financial year ended on 30 June 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 30 June 2021 may need to be repaid by 23 March 2022 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 March 2021 year-ends, this should extend the iXBRL deadline to 23 March 2022.
Mar 31	Last date for filing third-party payments return 46G for companies with a financial year ended on 30 June 2021. Latest date for payment of dividends for the period ended on 30 September 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 October 2021 must be made by 31 March 2022 (applies to specified accounting periods which includes some or all of the period commencing 1 March 2020 and ending 31 December 2020). CbC reporting notifications relating to the fiscal year ending on 31 March 2022 must be made to Revenue (where necessary) no later than 31 March 2022, via ROS. CbC reports/equivalent CbC reports for the fiscal year ended on 31 March 2021 must be filed with Revenue (where necessary) no later than 31 March 2022.

Relevant Dates for Personal Taxes

Jan 31	Capital gains tax due in respect of gains arising on disposals in the period 1 December to 31 December 2021 must be paid on or before 31 January 2022.
Mar 31	Deadline for claiming separate assessment and nominating assessable spouse for 2022.

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.

[2] Where a company coming within this charge on or after 1 January 2022 has an accounting period ending on or before 30 June 2022, preliminary tax is due not later than 21 June 2022. However, if this is paid using ROS, this date is extended to 23 June 2022.

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.

At the time of writing, Finance Bill 2021, as initiated, had been published. However, further provisions/amendments may be included as the Bill progresses, which may impact the deadlines above.

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International Tax Update

01 BEPS: Recent Developments

G20/OECD Inclusive Framework on BEPS[1]

On 8 October 2021 the G20/OECD Inclusive Framework on BEPS published a statement on the components of global tax reform, agreed by 136 of its members. This is an update to the statement published in July 2021. [The Inclusive Framework countries that have not yet agreed to the proposals are Kenya, Nigeria, Pakistan and Sri Lanka.]

Readers will recall that, since 2017, the 140 member countries of the Inclusive Framework have been jointly developing a "two-pillar" approach to address the tax challenges arising from the digitalisation of the economy. Two detailed "blueprints" were published in October 2020 on potential rules for addressing nexus and profit allocation challenges (Pillar One) and for global minimum tax rules (Pillar Two). Political agreement on key aspects of the proposals was reached by the G7, G20 and many of the OECD Inclusive Framework countries in June and July 2021.

Some of the key features (discussed in further detail below) of the updated Inclusive Framework statement published on 8 October 2021 are:

1 See article by Anne Gunnell & Clare McGuinness "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules", in this issue.

- In-scope businesses under Pillar One's "Amount A" will reallocate 25% of their residual profit above a 10% profit level to market countries.
- The global minimum effective tax rate for Pillar Two is 15%.
- The subject-to-tax rule rate is 9%.
- New digital services taxes are to be curtailed, and existing ones will be repealed in due course.
- Implementation for both Pillar One and Pillar Two remains at 2023 (with the undertaxed payments rule to be implemented shortly after, in 2024).
- Pillar Two model treaty provision is to be available by the end of November 2021.[2]
- Pillar One treaty changes via a multilateral convention are to be ready in early 2022.

The updated Inclusive Framework statement shows progress in relation to some of the political questions that remained from the agreements reached in July. The most important developments are the negotiations that have allowed Ireland, Hungary and Estonia to sign up to the agreement, making an EU Directive on Pillar Two to implement the OECD proposals more likely. These include determination of the global minimum rate for the income inclusion rule and undertaxed payment rule as 15% (removing "at least" in relation to the rate). The rate for the subject-to-tax rule, the enhanced withholding tax for developing countries only, is agreed at 9% (removing the range of 7.5% to 9%).

As noted above, other areas of clarification include the amount of profits to be reallocated to market countries under Amount A of Pillar One – set at 25% of residual income above a deemed routine return of a 10% profit margin on sales.

The negotiations have also led to agreement that no new digital services taxes (DST) will be introduced (unless Pillar One's Amount A fails to be implemented by the end of 2023). This is significant, as a number of countries had announced the intention to look at unilateral measures. The Canadian Finance Ministry, for example, has confirmed that its proposed DST will be legislated for but will apply from 1 January 2024 only if the Amount A rules are not in force (but will in that case be backdated to 1 January 2022). This is designed to maintain the focus of key countries, such as the US, in getting domestic approval for the Amount A changes in 2022.

The updated statement also includes an implementation plan that reflects commitment to the ambitious and challenging objective of implementation in 2023. This includes model legislation and commentary on Pillar Two by the end of November 2021 and treaty clauses (for a new multilateral instrument) and explanatory notes for Amount A by early 2022. Implementation of the undertaxed payment rule will be deferred by one year, to 2024, to allow time for countries to enable the income inclusion rule to take effect in domestic regimes before the backstop is invoked (learning from the implementation of country-by-country reporting and the complexities of local filing).

These political and timing points aside, the statement does not answer the difficult technical questions that the Inclusive Framework has been grappling with over the summer and that businesses, understandably, see as important.

- Notably for Amount A, this includes how the "paying entity" that has to exempt or give credit for amounts allocated to market countries will be determined.
- For the income inclusion rule and undertaxed payment rule of Pillar Two, how timing differences will be dealt with (a modified deferred tax approach or excess tax credit carry-forward are options under consideration).
- There are also no further clarifications on definitions, such as how the exclusions for extractives and regulated financial services will be applied.

2 We understand this is now expected to be published on 3 December 2021.

- There are no updates on Amount B (the transfer pricing marketing and distribution return baseline reward) apart from to say that the OECD will work first on scope.

Businesses are keen to see these points resolved. For Pillar Two, these areas will have to be resolved by the end of November 2021 for the release of model legislation (which we understand is expected to be published on 3 December 2021) and explanatory notes. For Pillar One Amount A, early 2022 will be the latest possible date for resolution, and for Amount B it will be the end of 2022.

The OECD statement says that there will continue to be consultation with business "within the constraints of the timeline". There has been only limited business consultation on technical matters for 12 months while government-to-government political negotiations have been continuing, and many businesses will want an opportunity to comment on detailed technical provisions before they are legislated for. The challenging timeline suggests that consultations may have to remain limited, which will increase the risk of friction and kinks in the rules that will need to be resolved post-implementation.

The most important remaining political challenge is the US domestic approval of the rules, in particular those related to Amount A. The US Treasury Secretary, Janet Yellen, issued a statement saying that "[t]his deal paves the way for Congress to enact those proposals, and I'm hopeful they'll do so swiftly though the reconciliation process".

Further agreement on the Inclusive Framework was reached on 13 October, when the G20 Finance Ministers met and endorsed the revised OECD Inclusive Framework statement. Subsequently, the G20 Leaders met at the G20 Leaders Summit in Rome on 30 and 31 October. At the conclusion of the meeting, the G20 Leaders adopted the Rome Declaration. This Declaration outlines G20 Leaders agreement to introduce the Inclusive Framework. According to the Leaders' Declaration, this is the final political agreement as set out in the Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. In response to the Declaration, the OECD made an announcement on 31 October welcoming the Declaration and noting that the G20 leaders called on the Framework to develop model rules and multilateral instruments "swiftly, to ensure they come into effect globally in 2023."

OECD agreement from an Irish perspective[3]

On 7 October 2021 the Minister for Finance, Paschal Donohoe TD, issued a statement on the decision that Ireland would enter the OECD International Tax Agreement on Pillars One and Two.

According to the Minister, the focus in the lead-up to reaching this agreement was to secure the necessary changes to provide certainty and stability and to ensure that strategic interests are protected. Before the Minister's address the position adopted by the Irish Government was that Ireland was not in a position to sign up to the interim agreement in July 2021, as important issues remained to be addressed, in particular the minimum effective tax rate proposed of "at least 15%".

After a period of engagement with the OECD and international partners, as noted above, the revised agreement removed the words "at least" in the draft text. According to the Minister, the agreement will impact 56 Irish multinational companies that employ approximately 100,000 workers and 1,500 foreign-owned multinational companies that employ approximately 400,000 workers.

In terms of the impact on Irish taxpayers, the agreement will allow for the retention of the 12.5% rate of tax for businesses with global annual turnover of less than €750m. Accordingly, there should be no increased

3 See article by Anne Gunnell & Clare McGuinness "Ireland Joins OECD Inclusive Framework Agreement To Reform International Corporate Tax Rules", in this issue.

corporation tax rate for 160,000 businesses representing 1.8m employees.

The Minister recognised the potential cost of the agreement as being very difficult to predict and noted the estimated cost of up to €2bn annually. However, this should be balanced against the greater risks of continued business uncertainty and the associated negative impact on Ireland's attractiveness as a location for investment. The Minister also acknowledged that critical technical discussions will continue over the coming months in line with the framework of the political agreement. He further acknowledged that there remain sensitive issues for Ireland, including the method of reallocation under Pillar One and the detailed technical provisions under Pillar Two, but said that being in the agreement allows us to shape and influence those discussions.

In summary, it was agreed that Ireland is better off being within the negotiations than outside them once the key concern relating to the "at least" 15% minimum rate had been addressed. Given that Ireland intends to impose the 15% rate only on companies within the scope of the OECD changes, it signals that Ireland still wishes to be competitive and pro-business. The 12.5%/15% tax rate together with a range of non-tax factors, including talent, track record and infrastructure, means that Ireland is still an attractive location for investment. Ireland's signing up to the agreement provides a level of certainty to multinational companies with Irish operations or those considering Ireland for investment.

02 US Tax Reform[4]

On 25 August 2021 the US Senate Finance Committee Chair, Ron Wyden, along with Senate Democratic tax-writers Sherrod Brown and Mark Warner, unveiled draft legislation (Wyden draft tax proposals) for international tax reform that provided additional detail on proposed changes within the high-level "framework" that the trio released in April 2021.

Subsequently, on 13 September 2021 draft proposals for US tax reform were published by the Ways and Means Committee of the US House of Representatives.

Both the Wyden draft tax proposals and the Ways and Means Committee draft tax proposals had set out a number of different tax proposals, however, there were challenges in getting support for all the proposed measures. The Wyden draft tax proposals and the Ways and Means Committee draft tax proposals have now been surpassed by the "Build Back Better Act" Bill.

"Build Back Better Act" Bill

On 19 November 2021, the US House of Representatives supported by the Biden administration passed the "Build Back Better Act" Bill. The proposals in the "Build Back Better Act" Bill are a by-product of the compromises struck between the Biden administration and some congressional moderate Democrats who have pushed for a more limited legislative package than initially envisioned by administration. The key details of this Bill are:

- There would be no corporate tax rate increase, however, there would be a 15% minimum tax on "adjusted financial statement income" of applicable corporations. An applicable corporation is any corporation with a three-year average adjusted financial statement income that exceeds $1 billion or US companies with foreign parents with turnover of $100m in income.
- GILTI would move to a country-by-country basis with a minimum rate of 15%. There

4 See article by Louise Kelly & Anthony O'Halloran "President Biden's Proposed US Tax Reform (Build Back Better Act)", in this issue.

would be a "qualified business asset investment" deduction of 5% rather than the proposed abolition. In addition, a credit would be available for 95% of foreign taxes rather than the 80% currently available and losses would be carried forward.

- BEAT would remain but with certain modifications, including a phased BEAT rate increase from 10% to 18% (from 1 January 2024). The legislation will also make a number of changes relating to how modified taxable income is computed under the BEAT regime and will provide that outbound payments subject to US tax, as well as payments subject to an effective rate of tax in the foreign jurisdiction at least equal to the lesser of 15% or the prevailing BEAT rate, would not be subject to additional tax under the BEAT.
- There would be a reduction to the FDII deduction to 24.8% of the headline rate, resulting in a higher effective rate of 15.8%.
- There would be additional interest limitation rules designed to limit interest deductions for a domestic corporation that is a member of an international financial reporting group.

Although the House of Representatives have passed the "Build Back Better Act" Bill, it must now be passed by the Senate. We expect that the position will continue to evolve over the coming weeks before final proposals are reached.

03 EU Tax Developments

EU list of non-cooperative jurisdictions

On 5 October 2021 European Union Finance Ministers approved a decision by the Council of the European Union to remove Anguilla, Dominica and the Seychelles from the EU list of non-cooperative jurisdictions for tax purposes (Annex I, referred to as the "black list"). All three are moved to Annex II (the "state-of-play" document) and are awaiting a supplementary review by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes to assess compliance with the international standard on transparency and exchange of information on request.

The other jurisdictions in Annex II, having made commitments to reform their tax policies, are:

- Botswana, which committed to have a satisfactory rating in relation to the exchange of information on request by the end of 2019 and is awaiting a supplementary review by the Global Forum.
- Costa Rica, Hong Kong (discussed below), Malaysia, Qatar and Uruguay, which have committed to amend or abolish their harmful foreign-source income exemption regimes and have been granted until 31 December 2022 to adapt their legislation.
- Jamaica, Jordan, North Macedonia and Qatar, which have committed to amend or abolish preferential tax regimes within the scope of the OECD Forum on Harmful Tax Practices and have been granted until 31 December 2022 to amend their legislation.
- Thailand, which has been granted until 31 December 2021 to ratify the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters.
- Turkey, which committed to have a satisfactory rating in relation to the exchange of information on request by the end of 2018 and is awaiting a supplementary review by the Global Forum. The Council of the European Union has reiterated that Turkey must effectively exchange information with all EU Member States to satisfy the transparency requirement and has called on Turkey urgently to begin or continue bilateral technical work with Member States to solve outstanding technical issues in order to effectively exchange data as soon as possible, but no later than 31 December 2021.

Nine jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Hong Kong on EU watchlist on tax cooperation due to territorial source regime

As noted above, on 5 October 2021 the European Commission officially announced updates to the EU list of non-cooperative tax jurisdictions and the inclusion of Hong Kong on the EU watchlist on tax cooperation.

As a result of the foreign-source income exemption regimes review, the EU considers that Hong Kong's territorial source tax regime is harmful. The EU has granted Hong Kong until 31 December 2022 to amend its regime, and Hong Kong has confirmed that it will do so. As a result of Hong Kong's willingness to respond to the EU's concerns, defensive measures by the EU will be suspended subject to the passing of those amendments.

Based on the EU's guidance, foreign-source income exemption regimes that apply on a territorial basis are not inherently problematic. However, the EU is concerned about situations where such regimes create double-non taxation. In particular, it is concerned about the non-taxation of passive income in the form of interest or royalties where the income recipient has no substantial economic activity.

Hong Kong has announced that it will amend its tax law by 31 December 2022, with the revised rules taking effect on 1 January 2023. According to the Hong Kong Government, the proposed legislative amendments will only target corporations with no substantial economic activity in Hong Kong receiving passive income that is not chargeable to tax in Hong Kong. However, Hong Kong will continue to adopt the territorial source principle of taxation.

The EU will monitor the measures implemented by Hong Kong to comply with its commitments. If the issue is not resolved by 31 December 2022, Hong Kong will be put on the EU "black list", whereby certain defensive measures may be applied by the EU Member States, e.g. non-deductibility of costs, controlled foreign company rules and withholding tax measures.

The timeline for Hong Kong to amend its territorial source tax regime coincides with that of the BEPS 2.0 Pillar Two project, i.e. 1 January 2023. For taxpayers with consolidated revenues of more than €750m, the impact of Pillar Two is likely to be far more significant than the impact of the territorial regime revisions in response to the EU concerns, as their effective tax rate as a whole will be required to be at least 15%. Accordingly, although revisions to Hong Kong's territorial regime will be of interest, the focus of these taxpayers should remain on Pillar Two and Hong Kong's potential introduction of a domestic minimum tax.

European Parliament approves the Directive on public country-by-country reporting

Readers will recall that in a previous issue it was highlighted that representatives of the Portuguese Presidency of the Council of the EU announced on 1 June 2021 that a provisional agreement had been reached on the proposed public country-by-country reporting (CbC) Directive. On 28 September 2021 the legislative process for the adoption of the Directive took a step forward when the Council adopted its position at first reading, paving the way for final adoption of the Directive.

Cyprus and Sweden are understood to have voted against the position, and the Czech Republic, Ireland, Luxembourg and Malta to have abstained.[5] The vote follows a statement issued by some Member States in the Council on 20 September 2021 criticising the legal basis used for adoption of the proposed Directive. Croatia is of the opinion that the agreed proposal should not become a precedent for qualified majority voting on tax matters in the Council, while Cyprus, the Czech Republic, Hungary, Ireland, Luxembourg, Malta and Sweden openly questioned the legal basis, considering that adoption of the proposed Directive should require unanimity. It remains to be seen

5 Based on statements made by Cyprus, Sweden, Czech Republic, Ireland, Luxembourg and Malta in an EU Statement paper issued on 20 September 2021; Interinstitutional File: 2016/0107(COD) 11832/21.

whether these Member States take further action in the form of an appeal to the Court of Justice of the European Union against the legal basis of the Directive, knowing that qualified majority voting has been used to adopt CbC reporting obligations for the banking and extractive sectors and given that this proposal aims to improve transparency, not to harmonise taxation in the EU.

According to the Council's 28 September 2021 press release, the CbC reporting Directive is intended to enhance the corporate transparency of large multinational companies by requiring certain multinational undertakings with annual global consolidated revenue exceeding €750m to disclose publicly, in a specific report and 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. Non-EU multinationals doing business in the EU through subsidiaries and branches will have to comply with the same reporting obligations as EU multinationals. The reporting will be required within 12 months of the balance sheet date for the relevant financial year. The Directive sets out the conditions under which a company may defer the disclosure of certain commercially sensitive information for a maximum of five years and also stipulates who is responsible for ensuring compliance with the reporting obligation.

The final stage in the approval process was on 11 November 2021, when the European Parliament formally approved the Public CbC reporting Directive. As the Member States had previously approved the Directive in September, the Directive has now been formally adopted and the final text will be published in the Official Journal shortly. The Directive will enter into force 20 days after publication in the Official Journal of the EU, and therefore is expected to be in force before the end of 2021. The Member States will then have 18 months to transpose the rules into domestic law. Mandatory reporting under the Directive is expected to begin in circa 2025, but individual Member States have the option to implement the rules sooner.

05 Poland Plans to Introduce Minimum Corporate Income Tax

On 1 September 2021 the Polish Government submitted a Bill referred to as "Polski Lad" to the Parliament. The Bill represents a comprehensive tax reform, containing tax measures supporting the Budget Law for 2022. After consultations with social partners, a new measure was introduced: a minimum corporate income tax (CIT).

The minimum CIT of 10% will apply to resident and non-resident taxpayers carrying on business activities in Poland through a permanent establishment, as well as tax capital groups if, in relation to income other than capital income, they:

- incur losses or
- show a low profitability ratio from their business activities, i.e. the ratio of net income to total gross income is lower than 1%.

The taxable base is an aggregate of the following:

- 4% of gross income other than capital income,
- "excessive expenses", i.e. borrowing costs exceeding 30% of EBITDA,
- costs of certain services and intangible assets acquired from related parties and
- deferred CIT resulting in a higher gross profit/lower net loss.

When adopted by the Parliament and signed into law, the provisions regulating the minimum CIT will be effective from 1 January 2022.

06 India: New Income Tax Regulation on Sale of Shares of a Foreign Company

In 2012 India amended its income tax law to clarify that gains arising from the sale of shares of a foreign company are taxable in India if such shares, directly or indirectly, derive value substantially from the assets located in India ("indirect transfer provisions"). This clarification was made applicable retrospectively from 1 April 1962. The clarification's being retrospective in nature invited criticism in India from various foreign stakeholders. Representations were also received from various stakeholders to rationalise this retrospective amendment.

The Indian Government has presented a Bill providing certain relaxations, which is currently pending approvals and enactment. The key aspects of the Bill are:

- The indirect transfer provisions will apply prospectively from 28 May 2012.
- Tax demands raised for indirect transfer of Indian assets made before 28 May 2012 shall be nullified subject to certain conditions, such as the withdrawal of litigation and providing certain undertakings that no claim will be made for damages/litigation cost.
- Where any amount becomes refundable to such taxpayer on fulfilment of specified conditions, such amount shall be refunded to the taxpayer without any interest.

The Bill is a welcome step, especially for foreign investors that were under the purview of the indirect transfer provisions for transactions before 28 May 2012. Furthermore, there is a possibility that some of the foreign investors would have gone ahead and paid the taxes before 28 May 2012 on a voluntary basis. Although there are explicit provisions, these companies could explore, given the sums involved, whether they want to claim a refund of such voluntarily paid taxes.

07 Germany: Ministry of Finance Publishes Draft Decree on Check-the-Box Election for Partnerships

The German Ministry of Finance published a draft decree on 30 September 2021 that aims to provide additional guidance on the recently introduced option for partnerships to be taxed as corporate entities. The draft decree relates to the "check-the-box" election for partnerships introduced by the law to modernise the corporate income tax rules ("Koerperschaftsteuer-Modernisierungsgesetz") that is dated 25 June 2021 and that will apply for fiscal years beginning after 31 December 2021. Interested parties had an opportunity to comment on the draft decree until 20 October 2021.

VAT Cases & VAT News

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Director, Twomey Moran

VAT Cases

01 Activities of Public TV Broadcasters Financed by State Subsidies – Exempt Supply of Services or Outside Scope of VAT?

The decision in *Balgarska natsionalna televizia v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia pri Tsentralno upravlenie na NAP* C21/20 was published on 16 September 2021. This case concerned the interpretation of Articles 2(1)(c), 132(1)(q) and 168 of the EU VAT Directive in the context of a dispute over the scope of input VAT recovery between the Bulgarian tax authority and Bulgarian National Television (BNT).

BNT is a national provider of audio-visual media services and is responsible for the provision of media services to all Bulgarian citizens. Exemption from VAT is provided under the Bulgarian VAT legislation for certain activities of BNT. BNT is not in receipt of any remuneration or fees from its viewers. It receives payments from the State budget by way of a State subsidy for the purposes of the preparation, production and broadcasting of national and regional programmes, and this is based on a flat rate per programme hour. BNT also generates income from advertising, sponsorship and other broadcasting-related activities.

BNT changed its basis of input VAT recovery from partial input VAT recovery on all purchases to direct attribution by assessing each purchase by reference to its capability of being used for activities of a commercial nature. BNT also argued that its activity related to broadcasting TV programmes fell outside the scope of VAT rather than being an exempt activity and that only its commercial activities came within the scope of VAT. BNT claimed full input VAT recovery on costs associated with its commercial activities and partial recovery on costs associated with its dual-use inputs (i.e. for its commercial activities and non-commercial activities). The tax authority refused to recognise BNT's right to full input VAT recovery and argued that its advertising activity was taxable but its programme broadcasting activity was exempt from VAT.

The first question posed by the referring court was whether the activity of a public national television provider that comprises of the supply of audio-visual media services to viewers and that is financed by State subsidies and not by viewer fees constitutes a supply of services for consideration within the meaning of Article 2. By reference to previous case law, the court noted that a supply of services is carried out for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, with the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. In other words, there needs to be a direct link between the service supplied and the consideration received.

In this case, BNT was financed by State subsidies, and viewer fees were not paid to it. The court indicated that there is no legal relationship between BNT and the viewers (to whom the services were supplied), in the course of which there is an exchange of reciprocal performance, or direct link between those audio-visual media services and that subsidy. The viewers have free access to all of BNT's services, and those services generally benefit all potential viewers. The court indicated that the subsidy and the subsidised activity are based on legal requirements and that the grant of the subsidy is independent of the actual use by the viewers of BNT's services and of the identity or the actual number of viewers of each programme.

The court held that the activity of a public national television provider that comprises a supply of audio-visual media services to viewers and that is financed by State subsidies, and for which no fees for the broadcasting are payable by the viewers, does not constitute a service supplied for consideration.

The second question referred related to the interpretation of Article 132(1)(q) – if the activity constitutes a supply of services for consideration, is it an exempt supply under Article 132(1)(q)? As the court had decided that the activity is not a supply of services for consideration and therefore does not comprise a taxable transaction, it was not necessary to answer the second question, because exemption is applicable only if the activity is a taxable transaction in the first instance.

The remaining questions sought clarification on the scope of the right to input tax deduction of a taxable person carrying out both taxable and exempt transactions. The court stated that even though the activity engaged in by BNT is not a supply of services for consideration, it was still a requirement of the court to provide an answer that will be of assistance to the referring court. Is Article 168 to be interpreted as meaning that BNT is entitled to deduct input VAT (in full or in part) paid on goods and services used for the purposes of its activities that give rise to the right of deduction and its activities that do not fall within the scope of VAT?

The court noted that entitlement to input VAT recovery arises from the use of the goods and services for the purposes of taxable transactions and that the way in which such purchases are financed is irrelevant. In other words, the receipt of State subsidies is not relevant in determining input VAT recovery entitlement. The court further noted that calculating the amount of deductible VAT is by reference to the economic transactions that give rise to a right to deduct and those that do not, but that activities of a non-economic nature do not give rise to a right to deduct. Therefore, these latter activities are to be excluded from the calculation.

The court held that BNT is therefore not entitled to deduct input VAT for purchases of goods and services used for the purposes of its activities that do not fall within the scope of VAT. It is for the Member States to determine the methods and criteria for apportioning input VAT between taxable transactions and transactions not falling within the scope of VAT, taking into account the aims and broad logic of the EU VAT Directive in compliance with the principle of proportionality. The decision is relevant when determining if there is a supply of services for consideration and what factors are considered in assessing the existence of the direct link between the supply and the consideration.

02 VAT on Intra-Community Acquisitions of Motor Fuel – Charge to VAT and Collection of VAT

The decision in *G. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Bydgoszczy* C855/19 was published on 9 September 2021. The case concerned the requirement for G. sp. z o.o. ("G") to make an early payment of VAT on the intra-Community acquisition (ICA) of motor fuel. The court was required to interpret Article 110 of the Treaty on the Functioning of the European Union (TFEU) and Articles 69, 206 and 273 of the EU VAT Directive.

G had made a number of ICAs of diesel fuel in December 2016, and under the Polish VAT provisions the tax authority treated the ICAs as the placement of goods into a tax warehouse from another EU Member State. It argued that G was required to pay VAT on the ICAs within five days of the diesel fuel's entering Poland and that G was required to submit a monthly statement in respect of the ICAs no later than the 5th day of the month following that in which the payment obligation arose. It claimed that G had failed to comply with these obligations and required it to make an immediate payment of VAT plus interest.

For VAT purposes, the chargeable event is the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled. The VAT amount is "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred. With regard to ICAs, the chargeable event occurs when the ICA of goods is made, and this is regarded as being made when the supply of similar goods is regarded as being effected within the Member State. VAT in respect of an ICA becomes chargeable on issue of the invoice, or by the 15th day of the following month if no invoice has been issued by that time. The VAT amount is payable when submitting the VAT return by the dates set by the Member State or interim payments may have to be made.

The first question referred was whether the requirement under the Polish law to make an early payment of VAT on the ICA of motor fuel before VAT becomes chargeable is precluded by Article 110 TFEU and Articles 69, 206 and 273 of the EU VAT Directive. The court was also asked whether the requirement that the VAT payable on an ICA is calculated on a gross basis, without taking account of the right to deduct, is precluded by the Directive, and whether an interim VAT payment that is not paid within the time limit loses its legal status at the end of the VAT reporting period for which that interim payment is to be made.

The court indicated that a distinction has to be drawn between the concepts of "chargeable event" and "chargeability" of tax, on the one hand, and "payment" of the tax, on the other. It referred to the opinion of the Advocate-General, which outlined that the chargeable event, chargeability and the obligation to pay VAT represent three successive stages in the process culminating in the collection of VAT, in that for an obligation to pay VAT to arise, that VAT must have become chargeable, and for the VAT to have become chargeable, a chargeable event must first have occurred.

With reference to ICAs, as noted above, the chargeable event for VAT purposes occurs when the ICA is made, and that VAT becomes chargeable only on a subsequent date, i.e.

when the invoice is issued or, at the latest, on the 15th day of the month following that in which the chargeable event occurs, where no invoice has been issued before that time limit. In this case, it was agreed that under Polish law the chargeable event occurs before the advance payment of VAT is payable, as that payment obligation arises after the entry of the goods into the Member State, but the court noted that it appears that the payment obligation is imposed before the VAT becomes chargeable. It is apparent that, in breach of the Directive, the Polish law gives rise to the obligation to make an early payment of VAT independently of whether an invoice is issued or the time limit has expired, at the end of which VAT necessarily becomes chargeable. Although Member States may derogate from the rule that payment must be made when the return is submitted and can demand an interim payment, that option may be exercised only insofar as it relates to a tax that has become chargeable.

The court held that, in view of the fact that the possibility of collecting interim payments as provided for under Article 206 allows Member States to bring forward not the date on which VAT becomes chargeable but only the date of payment of VAT that has already become chargeable, a provision of national law is precluded from requiring payment of VAT before it has become chargeable. The decision is relevant in determining when a chargeable event arises and consequently when VAT is due and payable.

03 Building Land and Application of the Margin Scheme

The CJEU delivered its judgment in the case of *Icade Promotion SAS, formerly Icade Promotion Logement SAS v Ministère de l'Action et des Comptes publics* C299/20 on 30 September 2021. Icade Promotion SAS formerly Icade Promotion Logement SAS ("Icade") sought a reclaim of VAT that it had paid in respect of sales of building land to private individuals, and the claim was refused by the French tax authority.

Icade is a property developer that purchased land that had not been built on from private individuals or local authorities (non-taxable persons), and therefore the sales were not subject to VAT. Icade divided the land into lots and connected those lots to grids and network services, such as the road, water, electricity, gas, sewer and telecommunications networks. It then sold the lots to private individuals as building land for the construction of buildings for residential use.

Icade applied the margin scheme to those transfers and then reclaimed a refund of the VAT paid under the margin scheme. It claimed that the transfers could not be subject to VAT, on the basis that they consisted of the sale of building land to individuals with a view to the construction of residential buildings, and that they did not fall within the margin scheme, as a result of which no VAT was due. The tax authority rejected the refund claim.

Icade challenged the application of the margin scheme and argued that it can be applied to the supply of building land only where the taxable person that carries out the supply has paid VAT when purchasing the land without having any right to deduct it. It also argued that the supply of building land can be subject to the margin scheme but only where the taxable person who carries out the supply does no more than purchase and resell the land as it is. In this case, the building land had undergone some development work before the sale, and therefore, in its view, the margin scheme did not apply.

The court was required to interpret Article 392 of the EU VAT Directive, which provides that: "Member States may provide that, in respect of the supply of buildings and building land purchased for the purpose of resale by a taxable person for whom the VAT on the purchase was not deductible, the taxable amount shall be the difference between the selling price and the purchase price".

The questions referred to the court queried whether the margin scheme is limited to transactions involving the supply of buildings whose purchase was subject to VAT without the taxable person reselling them having had the right to deduct that tax at the time of that purchase. Or is the margin scheme also applicable to transactions involving the supply of buildings on whose purchase no VAT was paid, either because that purchase is not subject to VAT or because, although it is nominally subject to VAT, an exemption applies?

In considering Article 392, the court noted that there are differences between the French- and English-language versions of the provision and, in that regard, that where there is a diversion, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part. It noted that the VAT Directive draws a clear distinction between supplies of building land (subject to VAT) and supplies of land that has not been built on (exempt from VAT). Article 135(1)(k) provides exemption for supplies of land that has not been built on and is not intended to support a building, whereas building land means any unimproved or improved land defined as such by the Member States.

The court held that any supply of building land effected for consideration by a taxable person acting as such must, in principle, be subject to VAT, either in accordance with the general scheme of Article 73 (VAT is to be calculated on the sale price) or in accordance with the margin scheme (where Member States have chosen that option), under which the taxable amount is the difference between the sale price and the purchase price.

The first question was answered by interpreting Article 392 as:

> "allowing the margin scheme to be applied to transactions involving the supply of building land both where the purchase thereof was subject to VAT, without the taxable person who sold it being entitled to deduct that tax, and where the purchase of that property was not subject to VAT even though the price at which the taxable dealer purchased those goods incorporated an amount of VAT, paid as input VAT by the initial seller. However, apart from in the latter situation, that provision does not apply to transactions involving the supply of building land on whose initial purchase no VAT was paid, either because that purchase is not subject to VAT or because an exemption applies."

The second question related to whether the margin scheme is precluded from applying to transactions involving the supply of building land where the purchased land, which has not been built on, has become developed between the time of its purchase and the time at which it is resold by the taxable person.

By reference to the concept of building land, which covers both unimproved and improved land, the court indicated that the decisive criterion for the purposes of distinguishing between building land and land that has not been built on is whether, at the time of the transaction, the land in question is intended to support a building.

It noted that the margin scheme applies only to building land that is purchased with a view to resale. So the resale of purchased land that has not been built on is in principle exempt from VAT and therefore is excluded from the margin scheme.

The national definition of building land should include all land that has not been built on and that is intended to support a building and is, therefore, intended to be built on in order to comply with the principle of fiscal neutrality. It is left to the referring court to determine whether the land purchased by Icade is building land and comes with the margin scheme or is land that has not been built on and is exempt from VAT.

The court held that:

> "where undeveloped land is regarded as building land under the national legislation of the Member State concerned, the works carried out to that land for the purposes of its improvement, the land thus remaining earmarked to be built on, have no effect on its classification as 'building land' as long as those improvements cannot be classified as 'buildings'".

The margin scheme is precluded from applying to transactions involving the supply of building land where the land purchased that has not been built on has become, between the time of its purchase and the time at which it is resold by the taxable person, building land. But it is not precluded from applying to transactions involving:

> "the supply of building land where that land has been subject, between the time of its purchase and the time at which it is resold by the taxable person, to alterations such as its partitioning into lots or the carrying out of works for the connection of those lots to grids and networks, including, inter alia, the gas and electricity networks".

Whilst the decision does not have much relevance to the Irish VAT and property rules as the margin scheme for supplies of buildings/building land does not apply in Ireland.[1] However, this decision is very relevant for purchasers or developers of building land in France.

04 Accountable Person – Principal or Agent – Transport of Passengers - TAC Determination

The TAC issued its determination in case 116TACD2021 on 02 July 2021. The matter at appeal was whether the Appellant was acting as a principal in relation to the provision of passenger transport (in this case taxi and hackney services) and providing exempt services or whether the Appellant was acting as an agent and providing VATable services.

The Appellant supplied taxi and hackney services and provided a 24-hour call centre with a computer dispatch system. Calls from customers were allocated to drivers of both taxi and hackney vehicles. The Appellant received a weekly fee amount derived from radio rental from drivers who supplied their own vehicles and both radio rental and vehicle hire from drivers who it supplied with vehicles .A higher amount was payable by the latter drivers. Some drivers were employed by the Appellant and others were self-employed. The Appellants' turnover was derived from radio rental (payments by drivers who used own vehicles), vehicle hire (payments from drivers who hired vehicles from the Appellant) and corporate account holders (direct payment to the Appellant). The Appellant submitted that the contract for the supply of the exempt passenger transport was between it and the customer. The determination sets out how the business operated in practice and how payments were treated.

The Respondent submitted that what was being provided was a taxi booking facility to drivers in exchange for a weekly fee paid by the driver. It did accept that the Appellant operated as a principal in relation to its corporate account holders and in respect of the drivers it employed directly and that those supplies were exempt from VAT.

1 As Ireland did not opt to use the margin scheme for supplies of buildings/building land.

The Appeal Commissioner was satisfied that the *"...the fixed weekly payments arose as a matter of practical and administrative convenience and represented an estimate of the Appellant's gross margin on the sale price to the customer; they were not simply payments made by the drivers in exchange for services provided to them by the Appellant".* The Appeal Commissioner found that the Appellant was *"...at all material times the principal supplying transport services to its taxi and hackney customers, and the drivers who carried out those services (whether self-employed or employed) were sub-contractors operating on behalf of the Appellant".*

It is not known whether the TAC have been requested to state and sign a case for the opinion of the High Court in respect of this determination.

The decision is of relevance when considering the factors that determine whether a supplier is acting in an agency or principal capacity. In some instances a particular description can be a misnomer that does not accurately describe a payment or transaction.

VAT News

Ireland

Finance Act 2014 amended the VAT Consolidation Act (VATCA) 2010 by introducing two new provisions – s108B and s108C – both provisions are special measures for the protection of tax. Tax and Duty Manuals have recently (see below) issued outlining the circumstances where the Revenue can exercise the powers provided by these provisions and are important in terms of the compliance obligations relating to an accountable person and the "know your customer" requirements.

Documentation

Revenue eBrief No. 173/21, which issued on 15 September 2021, related to the "Guidelines for the application of Section 108B VAT Consolidation Act 2010: 'Notice of requirement to issue a document'". A Tax and Duty Manual (TDM) is available in relation to the notice of a requirement to issue a document (similar to a VAT invoice) and sets out the background to the legislative provision, when it applies and the steps to be taken where such a notice is issued. The legislation encourages a change in behaviour by forcing supplier compliance, with invoicing obligations, and in instances where no VAT invoice is issued, identification of customers making cash purchases. A penalty can apply in each instance where a supplier fails to issue a VAT invoice when obliged to do so.

Joint and several liability

Revenue eBrief No. 174/21 also issued on 15 September 2021 and relates to the "Guidelines for the application of Section 108C VAT Consolidation Act 2010: 'Joint-and-Several Liability for Tax'". A TDM is available setting out the circumstances in which this provision will be used. The power provided under s108C enables Revenue to recover unpaid VAT from persons who are involved in transactions with fraudulent traders and who may be held jointly and severally liable for the unpaid VAT. An important point to note from the TDM involves the intra-Community acquisition of goods from another Member State and where joint and several liability can arise. This can be applied to accountable persons who are not directly involved in VAT evasion but who may be a second accountable person in a chain of transactions and knowingly or recklessly participate in the fraudulent transaction.

Charities VAT Compensation Scheme

Revenue eBrief No. 198/21 issued on 26 October 2021 and relates to the Charities VAT Compensation Scheme it announced a €1 million claims cap for all claims submitted to Revenue from 1 January 2022. It follows a review undertaken by the Department of Finance, Revenue and charity representative groups. The scheme was introduced in 2018 and provides for an annual fund of €5 million in respect of which charities can reclaim a proportion of VAT paid on their operating costs. A TDM is available on Revenue's website in relation to the operation of the scheme.

Finance Bill 2021

The Finance Bill 2021 was published on 21 October 2021 and contained some legislative changes to the VAT Consolidation Act (VATCA) 2010, namely,

- to the provisions relating to VAT groups,
- the VAT56A authorisation,
- cancellation deposits,
- flat-rate farmer addition,
- VAT refund orders and Covid-19-related measures.

In respect of VAT groups the Bill includes amendments, including the requirement that certain changes to a VAT group must be notified to Revenue, and provides for the imposition of penalties for failing to do so (for each taxable period for which the failure persists).

The amendment to s56 VATCA 2010 included in the Bill provides that a person deriving 75% or more of their turnover from exports, intra-Community supplies and certain supplies of contract work may qualify as an authorised person and receive goods and services at the zero rate.

The Bill also provides that cancellation fees/ deposits will be liable to VAT with effect from 1 January 2022.

In line with the Budget Day announcement, the Bill provides for a reduction of the flat-rate addition is from 5.6% to 5.5% for unregistered farmers.

Other VAT measures included in the Finance Bill as initiated enable VAT incorrectly claimed under a refund order to be repaid to Revenue in whole or in part, as appropriate and a number of Covid-19-related changes to Schedules 1 and 2.

UK

"Entire interest"

Revenue and Customs Brief 13 (2021) deals with the meaning of "entire interest" for the purposes of the self-supply charge after the UK Supreme Court decision in *Balhousie Holdings Limited* v HMRC [2021] UKSC 11. The Brief outlines the background to the Balhousie case. The company purchased a care home in 2013 to which the zero-rate of VAT applied. It entered into a sale and leaseback arrangement with Target Healthcare REIT, the land was conveyed to Target and Target who then granted a long lease to Balhousie, with the care home being operated continuously.

In the UK, when a property has been purchased or constructed at the zero rate of VAT, with a certificate stating that it will be used for a relevant residential or relevant charitable purpose, the property may be liable to a self-supply charge if there is a change in use or the entire interest is disposed of within a 10-year period. Under this rule the self-supply charge is calculated from the date when the change of use occurs or when the entire interest is disposed of. VAT then becomes due on the remaining months within the 10-year period. The Supreme Court considered the meaning of the disposal of the 'entire interest' in the property and ruled that the sale and leaseback did not account for the disposal of its 'entire interest' in the property because the simultaneous sale and leaseback meant that Balhousie always had an interest in the property either as owner or lessee without interruption. This meant there was no break in the operation of the property as a care home throughout the transfer from the sale to the lease agreement. The earlier rulings in the case accepted HMRC's view that a sale and leaseback was two separate transactions – this point was not revisited by the Supreme Court.

The Brief sets out the conditions to be met for a disposal of an entire interest not to arise and trigger a self-supply charge. It indicates that if the conditions are not met then the sale of the property or the giving up of a long lease within the 10-year period will be subject to the self-supply charge for the remaining term, as there will be disposal of the entire interest in the property within the 10 year period.

Accounting Developments of Interest

Aidan Clifford
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IAASA sets out some key considerations for companies preparing 2021 financial statements

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published "Observations on Selected Financial Reporting Issues – Years Ending on or after 31 December 2021", highlighting some topics that preparers should consider when preparing their financial statements for 2021. It is no surprise to see Covid-19, impairments, fair values and expected credit losses discussed in detail. However, the observations also included commentary on the need to consider climate change in company reporting. The document identifies a study by the International Accounting Standards Board where there is discussion on the effects of climate change and how it would impact the accounting under IAS 1, 2, 12, 16, 38, 36 and 37 and IFRS 7, 9, 13 and 17. The IAASA said that it expects issuers to take this study into account when assessing the impacts of climate change and risks in their financial statements.

In the observations, the IAASA identified that it expects companies to provide entity-specific and comprehensive disclosures that enable the users of their financial reports to understand:

- the impact that these events have had on their financial performance, financial position, cash-flows and risks;
- the sources of estimation uncertainty and changes in the key assumptions underpinning assets, liabilities, income, expenses and cash-flows;
- the actions taken to respond to climate change (and Brexit and the pandemic); and
- the expected impact on future financial performance, financial position, cash-flows and risks.

The IAASA's financial reporting review remit extends only to companies with securities admitted to trading on a regulated market (principally the Main Market of Euronext Dublin). However, the topics identified in the paper could usefully be taken into consideration by a much wider range of companies with the aim of producing high-quality financial reports and increasing the transparency and usefulness of financial statements for users.

Operational resilience for CBI-regulated entities

One of the key tasks of the Central Bank of Ireland (CBI) is to ensure the operational resilience of entities under its supervision. Operational resilience is defined as "[t]he ability of a firm, and the financial services sector as a whole, to identify and prepare for, respond and adapt to, recover and learn from an operational disruption". In "Consultation Paper 140: Consultation on Cross Industry Guidance on Operational Resilience", the CBI sets out proposals for improving operational resilience in the sector. Final guidance is expected to be issued by the CBI shortly, and the principles and recommendations in the consultation could be applied in any business in any sector.

Trustees and the beneficial ownership of trusts

Trustees should be aware of their obligations to have registered details of the beneficial ownership of their trust with the Central Register of Beneficial Ownership of Trusts (CRBOT) on or before 23 October 2021. The obligation to register with the CRBOT was introduced under the Fourth and Fifth Anti-Money-Laundering Directives, which require each EU Member State to establish a Central Register of Beneficial Ownership of Trusts. Legislation was introduced on 23 April 2021 (SI 194 of 2021) to transpose those requirements into Irish law. The purpose of this legislation is to provide transparency in both Ireland and the EU around who ultimately owns and controls Irish trusts. This will help to identify and tackle circumstances where trusts are being used to fund criminal and terrorist organisations. The legislation also assigned the responsibility for the CRBOT to the Office of the Revenue Commissioners.

Trustees (or their agents, advisers or employees) can register for the CRBOT through the "Trust Register" portal on the Revenue Online Service (ROS). For individual trustees who do not have ROS access, the "Trust Register" portal is available in myAccount.

The Revenue website also contains a series of frequently asked questions that should assist trusts and their agents, advisers or employees to determine whether they are obliged to register and how they can meet their obligations. Further information can be accessed at https://www.revenue.ie/en/crbot/index.aspx. Queries regarding the CRBOT can be sent to Revenue via MyEnquiries in ROS or through myAccount.

As part of the customer due diligence that accountants and other designated persons must perform, the CRBOT will be checked to ensure that it is consistent with the accountant's understanding before starting work with a trust client. Banks are expected to decline to undertake any transactions on a trust's bank account while its CRBOT registration is outstanding.

"Solvency II" rules being reviewed

On 22 September the European Commission presented two proposals for Directives designed to consolidate the "Solvency II" prudential rules governing the insurance and reinsurance sector. The proposals are also expected to stimulate long-term investment in this industry. See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4783.

UK audit referrals

A number of UK auditors have ceased to hold Irish audit status and are seeking to help their clients to engage an Irish statutory auditor to undertake the audit of various Irish subsidiaries of UK groups. In many cases the UK firm wants to keep an involvement in the audit by acting as a "sub-contractor" to the Irish audit firm in the conduct of these audits. An Irish auditor taking on such appointments will need to plan and control such assignments carefully. Below would be the absolute minimum required where the UK audit firm is supplying substantially all of the audit staff and the Irish auditor is acting only as key audit partner:

- The resignation of the existing auditor and appointment of a new auditor need to be done correctly.
- The engagement letter will be from the Irish auditor.
- The incoming auditor should familiarise themselves with the audit, client and the prior-year audit files.
- The key I audit partner will need to lead the planning meeting.
- The key audit partner will meet the client and those charged with governance in the subsidiary ("the planning meeting"); this could be done virtually.
- The key audit partner will approve and sign off the audit plan.
- The audit staff (including UK staff if applicable) can undertake the audit field work, in accordance with the plan.
- The key audit partner will need to keep in contact with the audit as it progresses and plan to have a halfway-point meeting to check in on what is and is not going to plan and amend the plan as necessary.
- Any UK staff who undertake audit wok should prepare a completion memo summarising the main issues arising.
- The key audit partner will review the working papers and sign off on the key or important working papers.
- The key audit partner will sign off on the completion section of the file.
- The Irish audit firm should consider doing the statutory financial statements disclosures
- The key audit partner will meet the client for the closing meeting; again, this can be done virtually.
- The key audit partner will sign the audit report in the Irish audit firm's name.

There is a high probability that referral audits such as these will be selected for audit monitoring, so it is worth considering a hot or cold audit-quality external review. Finally, the key audit partner will need to take possession of the audit file (or an electronic copy). It will not be necessary to travel to the UK as many firms have e-audit files and most audit reviews are done electronically. However, if this is a traditional paper audit file, you may need to travel to physically inspect the file or get the file scanned or couriered.

International Standards on Quality Management ('ISQM') (Ireland)

The Irish Auditing and Accounting Supervisory Authority (IASSA) has published a "Consultation Paper Proposal to Revise the Irish Quality Management Standards". The IASSA proposes to issue three new standards:

- International Standard on Quality Management ("ISQM") (Ireland) 1, "Quality Management for Firms that Perform Audits or Reviews of Financial Statements, or Other Assurance or Related Services Engagements";
- International Standard on Quality Management (Ireland) 2, "Engagement Quality Reviews"; and
- International Standard on Auditing ("ISA") (Ireland) 220 (Revised)," Quality Management for an Audit of Financial Statements".

It is proposed that the revised standards will be effective for audits of financial statements with accounting periods beginning on or after 15 December 2022. The proposals will require a reasonably substantial rewrite and renaming of an audit firm's ISQC1 manual.

Joint Practices Group (JPG)

The JPG is an information-sharing forum between the Garda National Economic Crime Bureau, the Garda Financial Intelligence Unit and the profession. It has the objective of strengthening the procedures for the detection and prevention of money laundering and terrorist financing in accounting practices. At the last meeting of the group the discussion ranged from current trends in money laundering to the development of a "red flags" training guide for practices. The group was presented with statistics for anti-money-laundering (AML) activity in Ireland, including that 27,000 suspicious transaction reports (STRs) were made between January and September 2021, a 25% increase on the same period in 2020. The increase is attributed to a number of financial services firms' relocation to Ireland from the UK after Brexit, a number of Covid-19-related frauds and an increase in fraud generally. Accounting practices make very few STRs as criminals generally do not use legitimate accounting firms to attend to their accounting and money-laundering needs; however, 22 reports by accounting practices were made between January and September 2021.

A total of 354 accounting firms are registered on GoAML, the online STR portal. This is an increase of 182 on the previous year. Although it is not mandatory to register with GoAML until you have an STR to make, being registered shows that the firm stands ready to make a report. It was noted that when accountants made STRs, they tended to be of high intelligence value. A professional accountant is well placed and trained to spot the red flags that indicate something is not right and then to make the report.

Invoice-redirect fraud was noted as something that was particularly prevalent, and there were indications that many businesses were not reporting the fraud. Research suggests that the failure to report was due to a perception that the Garda would be unable to retrieve the funds. However, many millions of euro of invoice-redirect stolen money is intercepted every year and returned to the owners. The money will often sit for a period in a money mule's account, and there is a window of opportunity to retrieve it. Even where the funds are not intercepted, knowledge of the offence will allow the Garda to build a profile of the criminals and stop future theft from happening.

Section 19 of the Criminal Justice Act 2011 makes it an offence for any person not to report such a crime.

Reporting suspicion of money laundering or terrorist financing is just one of six different reporting obligations imposed on accountants. Many situations give rise to multiple reporting obligations for a single offence, frequently to the same State agency. Where a report was made under s19 of the Criminal Justice Act 2011 or s59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, that fact should be included in a GoAML report. The information in the GoAML report should be more than just a bald statement of "suspicion of money laundering" and should include at least the broad summary details of the specific crime that the accountant is suspicious has occurred.

A free resource for accountants who are subject to AML supervision is available at https://www.accaglobal.com/ie/en/technical-activities/technical-resources-search/2019/may/aml-guidance.html.

Registered office fraud

A recent trend for fraudsters and money launderers has been to use the registered office of an accounting practice without the firm's knowledge to form companies or to use a temporary rental property to register business addresses. Company formation agents (trust and company service providers) need to be aware of the risks and to ensure that they conduct their due diligence and risk assessment in accordance with the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Acts 2010 to 2021. Accountants and other designated persons also need to be aware of the issue. It is unacceptable simply to accept a utility bill and photo identification without taking a moment to determine the appropriateness of the information.

Market Abuse Regulation

The Central Bank of Ireland published a series of findings and expectations from its industry-wide review of compliance with the Market Abuse Regulation. See https://www.centralbank.ie/news/article/press-release-findings-of-review-into-market-abuse-risks-12-July-2021.

Registrar of Beneficial Ownership of Companies Annual Report 2020

The Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies has published its 2020 Annual Report. The report shows that 81% of companies and 64% of societies had registered by the end of December 2020; 21% of all submissions were rejected, mainly due to data validation failures, where, for example, PPSNs did not **exactly** match names. The form used to file beneficial ownership details for people with no PPSN (i.e. foreign beneficial owners) had a rejection rate of 8%. Almost one-third of all beneficial owners were noted as being "senior managing officials"; this would refer, in particular, to Companies Limited by Guarantee.

Discrepancy notices are filed where a relevant person or a designated person becomes aware that the beneficial ownership is not as per the register. Two discrepancy notices were filed, one by a competent authority (e.g. the Central Bank) and one by a designated person (e.g. an accountant or bank). An entity's not having filed with the register is referred to as "non-compliance" rather than a discrepancy. Seven non-compliance reports were made in 2020; no enforcements or prosecutions were initiated.

Designated persons are now required to check new clients' details on the register, and in 2020 13,000 so-called restricted searches were made by designated persons. A further 200 unrestricted searches were made by supervisors and authorities such as An Garda Síochána. The report can be downloaded from https://rbo.gov.ie/images/2020_RBO_Annual_Report_Final.pdf.

ODCE Annual Report 2020

The Office of the Director of Corporate Enforcement (ODCE) recently published its Annual Report for 2020. The ODCE is in the process of transitioning from being an office of the Department of Enterprise, Trade and Employment to becoming an independent Corporate Enforcement Authority. The enabling legislation is the Companies (Corporate Enforcement Authority) Bill 2018. The Bill fell on the dissolution of the last Dáil but has now recommenced its journey through the legislative process. The new authority will have enhanced powers and wider scope.

The 2020 Annual Report notes a different corporate enforcement environment than in previous years, caused by the effects of Covid-19 legislation and restrictions on the work of liquidators. The report notes that 669 liquidators' reports were received, down almost one-quarter on 2019. The ODCE expects there to be some catch-up and a return to normal levels once Covid-19 restrictions are fully lifted.

The ODCE followed up on unliquidated companies being struck off while still having debts outstanding. This resulted in 18 company directors being disqualified from a total of 24 companies. In 2020, 1,266 companies were struck off, so this equates to a prosecution rate of about 2%. There were also 75 (2019: 105) category 2 offence reports made by auditors.

IAASA publishes 2020 Annual Report

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published its 2020 Annual Report, detailing its activities for the year. The report notes a busy year, which included quality assurance reports on public-interest entity auditors; details of the fines and sanctions handed down after audit monitoring failures; a new revised ethical standard for auditors; and details of the IAASA's review of 47 sets of financial statements of public-interest entities.

Internationally relevant developments in audit markets

The International Forum of Independent Audit Regulators has published a report on the results of a member survey, identifying five relevant audit policy topics: auditor appointment and tenure; joint audits; combination of audit and non-audit services; transparency of audit-related information; and audit firms' governance and culture. The report – which highlights key facts and figures, insights about regulations and requirements, and measures that have been implemented in various jurisdictions – is available at https://www.ifiar.org/?wpdmdl=13063.

Audit inspections in the UK

The UK-based Financial Reporting Council (FRC) has published its annual inspection and supervision results for 2020/21, covering the seven largest UK audit firms: BDO, Deloitte, EY, Grant

Thornton, KPMG, Mazars and PwC. The results show that nearly one-third of audits inspected by the FRC still require improvement. More details are available at https://www.frc.org.uk/news/july-2021/frc-annual-audit-quality-inspection-results-2020-2.

Rescue process for small and micro companies

The Small Company Administrative Rescue Process (SCARP)[1] will assist some struggling small businesses to restructure their debts and become sustainably viable. It complements the existing examinership process, which – although it is a very worthwhile piece of legislation – has not always been suitable for small businesses due to the significant costs of that court-driven process. A factsheet with eligibility criteria, checklists and example documentation is available at https://www.accaglobal.com/content/dam/ACCA_Global/Technical/fact/SCARP%20 factsheet.pdf.

If the process is unsuccessful, the company will most likely end up in liquidation. Unsecured creditors rarely receive a dividend in a liquidation, so they are likely to prefer the SCARP, where they will at least receive something. The legislation is expected to be commenced by the Minister shortly.

SME Covid-19 recovery resource

The European Bank for Reconstruction and Development (EBRD) has launched a business guide (https://businessguide.ebrd.com) with legal and business guidance to support micro, small and medium-sized enterprises to enhance their response to new challenges following the Covid-19 pandemic. The new website offers expert guidance to help owners and managers deal with suppliers, customers and employees; steer through operational and financial challenges; and navigate a restructuring process. The platform also provides guidance on corporate, employment and insolvency law, areas in which small business have a strong demand for know-how and information.

The website is structured around six modules, or entry points:

- developing your business strategy,
- managing your people successfully,
- running your business successfully,
- taking your business online,
- keeping your business's finances healthy and
- restructuring your business finances.

Templates and cases studies support the guidance and help users to apply concepts in their day-to-day operations.

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1 See article by Emer Dowling "Tax Implications of Insolvency Procedures including the Small Companies Administrative Rescue Process", Irish Tax Review, 34/3 (2021).

Pensions Authority

The Pensions Authority published its Annual Report and Accounts for 2020. The report notes that the Authority took six prosecutions and opened 35 new investigations in the year. In respect of the six prosecutions, four resulted conviction – two for not replying to requests for information, one for not remitting pension deductions and one for late remittance of pension deductions.

In respect of defined-benefit (DB) pensions, the Authority notes that 13% of such schemes were not in compliance with the funding standard. Of the 566 (2019: 597; 2018: 614) DB schemes in the country, 12 (2019: 7; 2018: 6) do not have a funding proposal in place. It should be noted that being funding-standard compliant does not mean that the scheme is fully funded on a fair-value or IFRS 19/FRS 102 basis. DB pension funding is particularly problematic in an environment where government and corporate bond rates are at historical lows.

Accounting for micas

Micas are a group of minerals whose outstanding physical characteristic is that when used in construction they can expand and cause cracks and structural damage, frequently requiring a complete rebuild or demolition of the building. Although there are some Government redress schemes offering 90% compensation, this is available only for principal private residences. For non-principal private residences and commercial buildings, the presence of micas presents some considerable accounting issues.

Accounting standards will not allow an entity simply to accrue for the estimated repair costs, as this can be done only when the repair contracts are signed.

However, there is a clear impairment in the value of these buildings. The standard impairment process would be to start by looking at market value. Unfortunately, there is simply no market for these buildings, other than site value. The impairment review will therefore be based on a review of the "value in use" of the building. The value in use is the cash-flow that the building will generate over its life. The value-in-use calculation does, however, allow the preparer to include cash-flows that are "necessarily incurred to generate the cash inflows from continuing use of the asset (including cash outflows to prepare the asset for use)". The preparer may schedule out the cash inflows and outflows and include the repair costs in those projections. Effectively, the cost of the repair will be reflected in the carrying value of the asset through an impairment but not as a provision for repair.

Revenue Commissioner's Update

Therese Bourke
Personal Taxes Policy and Legislation Division, Revenue

Dolores Cañas-Bejarano
Personal Taxes Policy and Legislation Division, Revenue

Revenue Update on Share-Based Remuneration

Overview

Given the competitive labour market in Ireland, where talent is highly mobile and employee expectations are changing, share-based remuneration (SBR) can be a tax-efficient mechanism for employers to attract and retain employees. It has become a key element of remuneration packages provided by employers from many Small and Medium Enterprises (SMEs) and large multinationals. In 2020, the total value received by employees in the State across all share schemes exceeded €1.4 billion.[1]

SBR has many advantages for both employers and employees. From the employer perspective, performance can be incentivised by linking awards to the attainment of certain business goals or objectives, as well as providing cashflow benefits. At the same time, SBR can allow employees to share in the growth in the value of the company. However, careful management of the various SBR compliance obligations are really important for both employers and employees, as outlined further below.

Types of Share Schemes

Broadly, share schemes fall into either approved or unapproved categories, as set out in Table 1 below. Employers only require advance approval from Revenue to operate approved share schemes. Of the approved schemes, Approved Profit-Sharing Schemes (APSS) are the most common, followed by approved savings-related share option schemes (SAYE). The value of shares received by employees in 2020 under these schemes exceeded €217 million and €37 million respectively[2].

Unlike approved schemes, which generally are required to be open to all employees and on similar terms, unapproved schemes can provide greater flexibility and employer discretion. Based on a preliminary review of filings to date of the new Employer's Share Awards return (Form ESA), the total value reported in the returns for 2020 exceeded €925 million, with Restricted Stock Units (RSUs) accounting for 91%.

1 Data extracted from 2020 employer returns - Forms RSS1, ESS1, SRSO1, ESOT1, KEEP1 and preliminary analysis of Form ESA.

2 Data extracted from 2020 employer returns - Forms ESS1 and SRSO1 respectively.

Table 1: Revenue Approved Schemes and Unapproved Schemes

Revenue Approved Schemes	Unapproved Schemes
Employee Share Ownership Trusts (ESOTs)	Restricted Stock Units (RSUs)*
Approved Profit Share Schemes (APSS)	Unapproved Share Options
Approved Savings Related Share Option Schemes (SAYE)	Key Employee Engagement Programme (KEEP) Employee Share Participation Plan (ESPP)* Restricted Share Schemes* Forfeitable Share Schemes* Convertible Share Schemes* Phantom Share Schemes* Growth/Hurdle/Flowering Share Schemes* Discounted/Free/Matching Share Schemes*

Note: Schemes marked with * are reported to Revenue in the new Employer's Share Awards return (Form ESA).

Employer's Share Awards Return (Form ESA)

Revenue introduced a new Employer's Share Awards return (Form ESA) in June 2021, on foot of s8 of the Finance Act 2020. Employers and agents should use the ESA to fulfil mandatory reporting obligations for certain unapproved SBR schemes for 2020 onwards, as noted with an asterisk in Table 1 above. The format of the new ESA return is very similar to existing electronic returns for other share schemes, including KEEP1, RSS1 and ESS1. Detailed information about the ESA requirements is available in several eBriefs issued by Revenue during 2021, as well as in the relevant Tax and Duty Manuals. The filing date for the ESA return and all other share scheme returns for the year 2021 is 31 March 2022.

Compliance Considerations for Employers and Employees

Employer Compliance Considerations

Some common SBR tax compliance issues that Revenue is aware may arise for employers are as follows:

- Incorrectly operating payroll taxes on SBR (including a failure to operate tax). When taxing SBR, it should not be assumed that an exemption from employer's PRSI applies in every case. This exemption is only applicable where the shares awarded are in the employing company or in a company controlling the employing company. In addition, this exemption does not apply to cash-settled awards, such as phantom share awards or cash settled RSUs. A payroll coding which applies the PRSI exemption incorrectly could give rise to material liabilities for an employer.
- Misclassification of share schemes. For example, incorrectly classifying a restricted share award as an RSU, or, convertible securities treated as growth shares.
- Incorrect implementation of rules in cross-border scenarios. For example, incorrect apportionment of a taxable RSU for periods of non-residence during the vesting period.
- Failure to file the relevant share scheme reporting return by the due date.

Employee Compliance Considerations

Where an individual is responsible for self-accounting for the tax resulting from SBR, some common compliance issues that Revenue is aware can arise are as follows:

- Failure to correctly account for tax on the exercise of an unapproved share option within 30 days of the exercise, and also file an Income Tax Return for each year in which an exercise takes place.
- Failure to correctly account for dividend income and/or capital gains tax on a subsequent disposal of the shares.

Comprehensive guidance material on share schemes is available on Revenue's website, www.revenue.ie, including a dedicated Tax and Duty Manual for each share scheme.

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President Biden's Proposed US Tax Reform (Build Back Better Act)

Introduction

President Biden based the economic planks of his 2020 election campaign on the premise that the benefits of President Trump's 2017 Tax Cuts and Jobs Act (TCJA)[1] are skewed towards large corporations and wealthy individuals. The Democratic election proposals were very much focused on a retooling of the federal income tax system that would target large corporations and high-income individuals to pay for lower- and middle-class tax relief and bankroll trillions of dollars in new spending initiatives proposed by the administration.

Although the Biden team did not publish detailed tax plans as part of its election campaign, voters got an insight into the broad pillars of his tax proposals from campaign speeches, debates and briefings to reporters. The President's appetite for both international and domestic tax reform is evident from early in his term, with the new

1 See Tax Cuts and Jobs Act of 2017.

Democratic Secretary of the Treasury, Janet Yellen, re-engaging with the talks led by the Organisation for Economic Co-operation and Development (OECD) on the Base Erosion and Profit Shifting (BEPS) Pillar One and Pillar Two project; her predecessor, Steven Mnuchin, had suspended US involvement in the OECD-led talks in June 2020. With tax reforms high on the agenda in May, the President published his "Green Book" to accompany the proposed Budget for FY 2022, and in early September the Ways and Means Committee of the US House of Representatives published its draft proposals for US tax reform as part of the President's $3.5 trillion "Build Back Better Act".[2]

This article considers the various draft US tax proposals including the "Build Back Better Act" Bill that has been recently passed by the House of Representatives , discusses the mechanics of implementing US tax policy, and considers the impact for both US multinational companies (MNCs) doing business in Ireland and Irish MNCs doing business in the US. Although the House of Representatives have passed the "Build Back Better Act" Bill and it is now on the Senate floor the position will continue to evolve over the coming weeks before final proposals are reached, and we will discuss the final changes in a later article.

Setting the Political Scene

The balance of power

On 20 January 2021 Joe Biden became the 46th President of the United States of America and assumed responsibility for US tax and spending policy. Although the widely predicted "blue wave" did not materialise, the levers of power in the White House, Senate and House of Representatives are narrowly held by the Democrats. In the Senate, the Democrats have 50 of the 100 seats, with Vice President Harris casting the tie-breaking vote when needed. In the House of Representatives, the Democrats have a majority of eight seats.

The fact that tax policy originates in Congress, not the White House, and the Democrats control such a narrow margin in both Chambers of Congress potentially limits the Biden administration's ability to introduce wide-ranging tax reforms. Such a narrow margin of power also impacts decisions regarding how legislation is introduced into both Chambers, as we will explore below.

The art of US law making

Given the narrow majority in the Senate, in the absence of bipartisan support, it would be extremely difficult for the Democrats to introduce any wide-ranging tax reform. The difficulty in manoeuvring the bipartisan Infrastructure Bill through the various Chambers provides an insight into the art of US law making. In recognition of these difficulties, to get approval for the ambitious spending and tax-raising measures, Democrats have turned to the Budget Reconciliation process to advance their tax reform agenda.[3] Budget Reconciliation is generally available only when one party controls Congress, and it enables legislation to clear the Chamber with a simple majority. Although there are benefits associated with the Budget Reconciliation process, i.e. the Senate requiring only a simple majority rather than the 60 votes needed to approve legislation, it also imposes some limitations. One such limitation is that Budget Reconciliation cannot be used where it increases the Budget deficit beyond 10 years.

The Senate approved the Budget Reconciliation process in early August, and the House followed suit on 27 August 2021, paving the way for a $3.5 trillion fiscal-year 2022 resolution. As spending Bills must start in the House, the House of Representatives and the Senate work closely on the drafting of the legislation because identical proposals must be passed in both Chambers.

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2 See Build Back Better Act.

3 See The 2022 Budget Resolution and Reconciliation - Final (house.gov).

Current State of Play: Key Legislative Proposals

At the time of writing, the US House of Representatives supported by the Biden administration have passed the "Build Back Better Act" and the Bill now heads to the Senate where it appears likely that to be modified in some form. If the Senate makes changes, the modified measures would need to return to the House of Representatives for final approval. For the purposes of this article, we will consider the current tax rules, the Green Book,[4] the Wyden Proposals[5], the Ways and Means Committee[6] proposal and the "Build Back Better Act"[7] Bill to try to piece together the direction of travel. The proposals in the "Build Back Better Act" are a by-product of the compromises struck between the Biden administration and some congressional moderate Democrats who have pushed for a more limited legislative package than initially envisioned by administration.

Table 1: Key legislative proposals for US tax reform.

	Current law (TCJA)	FY22 Biden Green Book		Draft Tax Proposals Ways and Means Committee	"Build Back Better Act" Bill
US corporate tax rate	• 21%	• 28% – for fiscal-year-end taxpayers, the tax rate is prorated	Not specified	• 26.5% for companies with income of more than $5m	• No corporate tax rate increase.
Corporate Alternative Minimum tax (AMT)	• N/A	• Minimum tax of 15% on worldwide pre – tax book income (reduced by book NOLs) for companies with greater than $2 billion worldwide book income.	N/A	• N/A	• 15% minimum tax on "adjusted financial statement income" of applicable corporations. • An applicable corporation is any corporation with a three year average adjusted financial statement income that exceeds $1 billion. • US companies with foreign parents would need to have turnover of $100m in income.

4 See https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf.

5 See https://www.finance.senate.gov/imo/media/doc/040121%20Overhauling%20International%20Taxation.pdf.

6 See https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/SubtitleISxS.pdf.

7 See https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5376RH-RCP117-18.pdf

	Current law (TCJA)	FY22 Biden Green Book		Draft Tax Proposals Ways and Means Committee	"Build Back Better Act" Bill
Global Intangible Low-Taxed Income (GILTI)	• Minimum rate 10.5% • 10% return on physical assets only (known as QBAI) • Losses cannot be carried forward • GILTI not on a country-by-country basis • 80% of foreign tax credits can be claimed; • no carry-forward	• Minimum rate 21% • No QBAI exemption • GILTI on a country-by-country basis	• Minimum rate to be increased (amount not specified). • No QBAI exemption. • Mandatory high- tax exclusion determined based on effective tax rate (ETR);. hHigh- tax exclusion less generous in some cases than CbBC. • 80--100% of foreign tax credits can be claimed;, no carry-forward	• Minimum rate 16.56% • 5% return on QBAI; 10% in US territories • Losses can be carried forward • GILTI on a country-by-country basis • 95% of taxes can be claimed as a carry-forward	• Minimum rate 15%. • GILTI on a country-by-country basis • 5% return on QBAI; no change from current position on income earned in a US territory. • Losses can be carried forward. • Effective for taxable years beginning after 31 December 2022.
Interest expense limitation	• Interest deductions may be disallowed to the extent that the interest paid exceeds 30% of the taxpayer's adjusted taxable income for the year, with certain exceptions	• Additional limitation for the deduction of interest expense based on a member's proportionate share of the group's EBITDA reflected in the group's financial statements	• nN/aA	• New interest deduction limitation applicable to domestic corporations that are part of groups with "disproportionate" leverage ratios in the US • Appears to apply equally to US- and foreign-parented multinationals	• An additional limitation designed to limit interest deductions for a domestic corporation that is a member of an international financial reporting group. • Interest deduction is limited to an allowable percentage of 110% of the net interest expense reported on the group's applicable financial statement.

	Current law (TCJA)	FY22 Biden Green Book		Draft Tax Proposals Ways and Means Committee	"Build Back Better Act" Bill
					• Applies for taxable years beginning after December 31, 2022 • Unlimited carry forward of disallowed deductions. • Certain exclusions to apply.
Base Erosion and Anti-Abuse Tax (BEAT)	• BEAT rate is 10 or 11% (depending on industry)	• Repeal and replace BEAT with Stopping Harmful Inversions and Ending Low-tax Developments (SHIELD), which denies 100% of the deductions with respect to payments to related parties in low-tax countries (by reference to an agreed minimum tax rate at OECD level or, if such agreement is not in place, a new GILTI rate), effective for tax years beginning on or after 1 January 2023	• Retain BEAT with changes	• BEAT would be amended to make it more like the SHIELD proposals (where the tax does not apply unless the taxpayer is subject to a foreign ETRthat is less than the BEAT rate) • Increased BEAT rate of 12.5% for tax years beginning after 2023, and 15% for tax years beginning after 2025 • For the first time would encompass cost of goods sold	• Retain BEAT with certain modifications. • Phased BEAT rate increase from 10% - 18% from 1 January 2024. • Outbound payments subject to US tax, as well as payments subject to an effective rate of tax in the destination jurisdiction at least equal to the lesser of 15% or the prevailing BEAT rate, would not be subject to additional tax • Amounts paid to a foreign related party that are required to be capitalised into inventory subject to BEAT. • BEAT amendments will apply to taxable years beginning after 31 December 2021.

	Current law (TCJA)	FY22 Biden Green Book		Draft Tax Proposals Ways and Means Committee	"Build Back Better Act" Bill
Foreign-Derived Intangible Income (FDII)	• FDII is taxable at a rate of 13.125% • Rate due to increase from 2025	• Repeal and replace with R&D incentives		• FDII taxed at a rate of 20.70% • To apply for taxable years beginning after 31 December 2025	• FDII to be taxed at a rate of 15.8%. • Applies for taxable years beginning after 31 December 2022.

Corporation tax rate increase

Initial consensus based on the Green Book and Ways and Means Committee tax proposals pointed to a US corporation income tax rate increase. The view of the moderate Democrats is clearly evidenced in the "Build Back Better Act" Bill who pushed for a more limited legislative package. This included no increase to the current corporate income tax rates and a number of concessions from the published Ways and Means Committee tax proposals.

Corporate Alternative Minimum Tax Rate

Corporate tax increases had been a key pillar of the Biden administrations revenue raising measures however, the "Build Back Better Act" Bill does not provide for a corporation tax increase and instead provides for a 15% minimum tax on "adjusted financial statement income" of applicable corporations. Generally, an applicable corporation is any corporation with a three-year average adjusted financial statement income that exceeds $1 billion or US companies with foreign parents with turnover of $100m in income.

Once a corporation is determined to be an applicable corporation, it remains so unless, there is an ownership change or a consistent reduction in the adjusted financial statements income below a yet to be determined applicable threshold. The "Build Back Better Act" Bill details that the proposals would be effective for taxable years beginning after 31 December 2022.

GILTI

TCJA introduced the US GILTI regime in 2017. Broadly, this regime effectively requires a US shareholder of a controlled foreign company (CFC) to subject the income of the foreign subsidiary over a 10% rate of routine return on tangible business assets to GILTI tax. For US MNCs with subsidiaries in Ireland, the profits of the Irish subsidiary company would generally be included in the GILTI calculation, and depending on the profile of the US taxpayer, the profits of the Irish company may or may not have been subject to a top-up tax.

Each of the proposals seeks to a varying degree to tighten the GILTI regime. Most notably, all of the proposals look to move GILTI to a country-by-country basis in line with OECD Pillar Two proposals. There are, however, some differences between the President's proposal, the Green Book, House Way and Means Committee proposals and the "Build Back Better Act" Bill. Most notably, the "Build Back Better Act" Bill would take steps to tighten the GILTI regime, albeit not to the extent proposed by some other Democratic law makers:

- GILTI rate to increase to 15%;
- a credit available for 95% of foreign taxes rather than the 80% currently available – other proposals had not referenced a change to the "haircut" for foreign taxes suffered;
- a QBAI deduction of 5% rather than an abolition, as set out under other proposals; and
- the carry-forward of losses, which was not included in other proposals.

Each of the various GILTI proposals points to CFCs of US MNCs paying more tax on their foreign profits. Where these rules land and how they interact with the recently agreed Pillar Two proposals remain to be seen, and we will explore the final landing position in a future article.

BEAT

Again, the BEAT was a new tax introduced by TCJA in 2017. BEAT is essentially a "minimum tax" concept whereby if a US taxpayer's tax liability is reduced by related-party base-erosion payments (such as interest), BEAT may impose an additional tax. BEAT applies to deductible amounts paid or accrued to related parties. Currently, the BEAT rate is 10% or 11% (depending on the industry). BEAT is a particularly important consideration for inbound US investments, and Irish companies with US operations are closely monitoring the proposed changes for the impact on their current operating structure. These are important considerations for both Irish MNCs with US operations and US MNCs with operations in Ireland.

Various proposals all target BEAT to varying degrees, with Biden's Green Book proposals detailing a full repeal of BEAT and the introduction of a new system called Stopping Harmful Inversions and Ending Low-tax Developments (SHIELD). In essence, SHIELD would seek to deny 100% of the deductions with respect to payments to related parties in low-tax countries (by reference to an agreed minimum tax rate at OECD level or, if such an agreement is not in place, a new GILTI rate), effective for tax years beginning on or after 1 January 2023. The Ways and Means Committee proposals would amend BEAT to make it more like SHIELD, but the BEAT reforms are not as wide-ranging. The Green Book and the Ways and Means Committee proposal both extend the scope of the rules to include cost of goods sold, which is currently not the position.

The "Build Back Better Act" Bill in its current form would retain BEAT, with certain modifications as set out above. The proposed legislation would also make a number of changes related to how modified taxable income is computed under the BEAT regime. Including outbound payments subject to US tax, as well as payments subject to an effective rate of tax in the foreign jurisdiction when at least equal to the lesser of 15% or the prevailing BEAT rate, would not be subject to additional tax under the BEAT. The BEAT rules would be modified to treat as a base erosion payment amounts paid to a foreign related party that are required to be capitalised into inventory as well as amounts paid to a foreign related party for inventory that exceed the costs of the property to the foreign related party. The BEAT amendments would apply to tax years commencing after 31 December 2021 and therefore is not deferred by one year which is the case for a number of the other provisions.

FDII

It has been much discussed that US tax law and high corporate tax rates before enactment of TCJA encouraged US taxpayers to offshore profitable intangibles to related foreign entities to try to achieve lower tax rates on the income generated from those intangibles. In enacting TCJA, the US Congress wanted to address this and to encourage US corporates to hold and exploit intangibles in the US. To fulfil this objective, Congress introduced FDII, which is effectively income earned by a US domestic corporation in excess of a fixed return on US tangible assets derived from sales to foreign persons. The regime provides a special deduction for income that falls into the FDII category. Currently, FDII is taxed at an effective rate of 13.125%, with the rate due to increase after 2025.

The Green Book proposes a repeal of FDII and its replacement with, at this point unspecified, R&D incentives. Currently, a deduction of 37.5% is applied to the federal corporation tax rate to arrive at the 13.125% tax rate that applies to FDII. The Build Back Better Act proposes to reduce the deduction to 24.8% of the headline rate, resulting a higher effective rate of 15.8%%. It remains to be seen where these proposals will land, but with the White House's renewed focus on critical supply chains, it will be interesting to see where the US Congress ultimately lands to encourage US MNCs to hold and exploit, in particular, their ex- US intangible property rights in the US

Interest limitations

Interest-stripping rules were also updated in the US under TCJA. Interest deductions may be disallowed to the extent that the interest paid exceeds 30% of the taxpayer's adjusted taxable income for the year, with certain exceptions. These rules apply to taxable periods commencing after 31 December 2017.

The "Build Back Better Act" Bill seeks to impose additional interest limitation rules designed to limit interest deductions for a domestic corporation that is a member of an international financial reporting group. Under this provision, the interest deduction is limited to an allowable percentage of 110% of the net interest expense reported on the group's applicable financial statement. Only domestic corporations whose three-year average net interest expense exceeds $12 million would be subject to the new interest limitation. The interest limitation should apply for taxable years commencing after 31 December 2022, and would allow an unlimited carry forward of disallowed deductions.

Tax on Stock buybacks:

The "Build Back Better Act" Bill provides that when a domestic corporation the stock of which is traded on an established securities market (a covered corporation) is subject to a tax equal to 1% of the fair market value of its stock which is repurchased during a taxable year by such corporation or certain affiliates.

What Happens Next?

As the "Build Back Better Act" Bill has now been passed by the House of Representatives, it must also be passed by the Senate, and the Senate is then free to approve the House Bill or make its own changes. The House and the Senate would then begin a process of reconciling the differences between their two Bills before one can be passed into law by the President. At the time of writing we understand that it is the intention to have the Bill signed before year end.

Implications for Irish Businesses and Ireland Inc.

It remains to be seen what final tax reform proposals the House and Senate will land on, and there will be some interesting weeks ahead as more progressive Democrats will need to ensure that they have moderate Democratic support the "Build Back Better Act" Bill through the Senate.. At this point, it is remains difficult to determine the impact that the proposals will have on businesses headquartered on both sides of the Atlantic. For Irish business operating in the US, the changes to BEAT and interest limitations may increase the cost of doing business in the US,

For US-headquartered companies, the outcome of the GILTI changes (rate and mechanics) coupled with the OECD Pillar One and Pillar Two proposals[8] will ultimately dictate Ireland's ability to use tax as a tool to attract new foreign direct investment. Generally, the cost of doing business in overseas locations will increase; this is not a problem unique to Ireland. Ireland Inc. will continue to play a key role for US companies exploiting both European and wider-market territories, and it is imperative that Ireland's offering in terms of talent, infrastructure, committed EU membership, common law legal system, business supports and ease of doing business continues to be enhanced in order to remain competitive.

8 See article by Anne Gunnell & Lorraine Sheegar "Institute Responds to OECD Consultation on Pillar One and Pillar Two Blueprints", *Irish Tax Review*, 34/1(2021).


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Ireland Joins OECD Agreement to Reform International Corporate Tax

Introduction

Addressing the tax challenges of the digitalisation of the economy has been a longstanding area of focus of the OECD/G20 Base Erosion Profit Shifting (BEPS) project. It was one of the 15 Actions that formed part of BEPS package adopted in 2015. At the time, the OECD said that it would come back to address the tax challenges of the digital economy in 2020 after reviewing the implementation of the other BEPS measures.

However, after substantial public debate, the OECD Task Force on the Digital Economy was given a renewed mandate for its work on tax and digitalisation in January 2017. Discussions among member countries of the G20/OECD Inclusive Framework on BEPS ("the Inclusive Framework") on how to address the tax challenges of the digitalisation of the economy culminated in the publication of two detailed "Blueprints" in October 2020 on potential rules for addressing nexus and profit allocation challenges (known as "Pillar One") and for global minimum tax rules (known as "Pillar Two").

Political agreement on key aspects of this two-pillar solution was finally reached by the G7 and G20 in June of this year, and on 1 July 130 of the 139 Inclusive Framework member countries joined in a *Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* ("the July Statement"). Ireland did not sign the July Statement and reserved its position on a global minimum effective tax rate of "at least 15%".

On 8 October 2021 the Inclusive Framework published a revised *Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* ("the updated October Statement"). The updated October Statement contained clarifications on some of the key outstanding issues from the July Statement, including – most importantly, from an Irish perspective – setting the effective tax rate for the purposes of the income inclusion rule and the undertaxed payment rule at a precise rate of 15%. A total of 136 out of 140 Inclusive Framework member countries, including Ireland, joined in the updated October Statement.

This article examines the position adopted by Ireland towards the July Statement, the subsequent Department of Finance public consultation on the OECD proposals and the rationale for the change in Ireland's position in October. It also summarises the key components of the two-pillar solution as outlined in the updated October Statement, including the proposed implementation process.

Ireland Reserves Its Position

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

The Minister also expressed broad support for the agreement on Pillar Two, but he 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 did not sign the July Statement. However, Minister Donohoe confirmed that Ireland would constructively engage in further discussions and technical work in the lead-up to achieving a comprehensive agreement in October.

Department of Finance Consultation on OECD International Tax Proposals

On 20 July the Department of Finance launched a public consultation[1] on the proposed changes to the international tax architecture under discussion by the countries of the Inclusive Framework. The purpose of the consultation was to help identify the challenges and opportunities of the proposals for Ireland's corporation tax code and broader industrial policy.

1 Department of Finance Public Consultation on OECD International Tax Proposals, 20 July 2021, https://www.gov.ie/en/consultation/d03f6-minister-donohoe-launches-public-consultation-on-the-oecd-international-tax-proposals/

In early September the Institute responded[2] to the public consultation based on feedback received from members. In our response, we noted the lack of technical detail in the proposals under negotiation, particularly in relation to the global minimum effective tax rate, making it difficult to provide technical recommendations on the proposed changes to the international tax framework. The Institute confirmed its support for the Government's decision not to sign up to the draft agreement in July until there was more clarity on the proposals and how they would be implemented. We also noted the importance of the 12.5% corporation tax rate in providing tax certainty and stability to the many global and indigenous businesses that have set up in Ireland over the last 25 years.

Considering that the impact of the OECD international tax proposals and the US tax reform measures could be very significant for Irish companies operating overseas, depending on the final design of such proposals, we highlighted that the timing and sequencing of the OECD/G20 deliberations and the US legislative process would be critical. We emphasised the importance of not progressing an EU Directive to implement any further corporate tax reform measures in the EU until both processes are concluded and fully understood.

We also provided broad observations on some of the aspects of the OECD two-pillar approach as outlined in the July Statement, regarding the threshold, data segmentation, elimination of double taxation and removal of digital services taxes under Pillar One; and the effective tax rate test and timing differences, treatment of the R&D tax credit, substance-based carve-out and mechanism for implementation regarding Pillar Two.

Finally, we noted that, whatever emerges from the global tax reform process, the Irish policy response needs to bring tax certainty and clarity to business. We emphasised that quick and decisive action will be required over the next 12 months to make whatever changes are required to the Irish corporation tax code in order to maintain the competitiveness of the economy and protect businesses trading in and out of Ireland.

Ireland Joins OECD International Tax Agreement on Pillar One and Pillar Two

On 8 October the Minister Donohoe announced that he had obtained Government approval to join the Inclusive Framework agreement to reform international tax rules to address the challenges arising from the digitalisation of the global economy. The announcement was made before a meeting of the members of the Inclusive Framework the following day to endorse a revised Statement of agreement on the two-pillar solution that was put forward in July.

Minister Donohoe confirmed that the proposed minimum effective tax rate of "at least 15%", which Ireland had reserved its position on in July, had been set to a precise rate of 15%.[3] Noting the importance of this revision for Ireland, he said:

> "The agreement provides that the minimum effective rate for multinationals with an annual revenue in excess of €750m is 15%. We have secured the removal of 'at least' in the text. This will provide the critical certainty for Government and industry and will provide the long-term stability and certainty to business in the context of investment decisions."

The Minister stated that the 15% rate will apply to 56 Irish multinationals, employing approximately 100,000 people, and 1,500 foreign-owned multinational enterprises

2 Response to Department of Finance Public Consultation on OECD International Tax Proposals, Irish Tax Institute, 10 September 2021, https://taxinstitute.ie/wp-content/uploads/2021/09/2021-09-10-ITI-Response-to-Consultation-on-OECD-International-Tax-Proposals-FINAL.pdf.

3 Statement by Minister Donohoe on decision for Ireland to enter OECD International Tax Agreement, 7 October 2021, https://www.gov.ie/en/speech/615f7-statement-by-minister-donohoe-on-decision-for-ireland-join-oecd-international-tax-agreement/.

based in Ireland, which employ approximately 400,000 people. Minister Donohoe said that the agreement will continue to allow Ireland's tax system to support innovation and growth, including through the use of R&D tax credits. He also confirmed that he had received assurances from the European Commission that the proposed EU Directive to transpose the OECD agreement will be faithful to the agreement and not go beyond the international consensus.

The Minister further confirmed that he had received assurances from the European Commission that maintaining the 12.5% corporation tax rate for businesses out of scope of the OECD agreement does not present any difficulties. This means that there will be no increase in the corporation tax rate for 160,000 businesses in Ireland, which employ approximately 1.8m people.

The Minister remarked on the reputational and economic risks for Ireland if it stayed outside the agreement. He referred to the importance for Ireland – as a small, open economy – of staying in line with international accords; how Ireland would lose its influence on the critical discussions on the implementation rules if it remained outside of the process; and how failure to sign up would lead to continued uncertainty for businesses operating in Ireland and the potential for other jurisdictions to collect top-up taxes on subsidiaries based in this country if Ireland did not apply the global minimum effective tax rate.

The Department of Finance and Revenue have estimated that the cost of the agreement will be up to €2bn annually when both pillars come into effect. Commenting on Ireland's future competitiveness, Minister Donohoe said:

> "I am confident that Ireland will remain competitive into the future, and we will remain an attractive location and 'best in class' when multinationals look to investment locations. These multinational enterprises support our economy with high value jobs and at the same time, Ireland provides a stable platform and a long proven track record of success for MNEs choosing to invest here."

After the Minister's announcement, the Institute welcomed[4] the Government's decision to join the OECD agreement as it will provide certainty for business. Institute President Karen Frawley said:

> "The change in language around the global minimum rate secured by the Government as well as the commitment from the EU that the Commission will hold to that rate, brings much needed certainty and stability to the international tax system. This is good news for business and good news for governments as the world recovers from the pandemic."

The President also welcomed the assurance from the EU that the new rate will apply only to companies with global revenues in excess of €750m. She said "[t]his means that our SMEs can continue to benefit from our 12.5% rate without any damage to their competitiveness".

The Updated October Statement

On 9 October the OECD confirmed that after the meeting of the Inclusive Framework, 136 member countries (out of a total of 140) had endorsed a revised *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, which was proposed in July. Mauritania subsequently joined the Inclusive Framework on 4 November as its 141st member and also joined the updated October Statement bringing the total number of jurisdictions participating in the agreement to 137.

The updated October Statement confirmed that the global minimum corporate tax rate under Pillar Two is set at 15%, with the reference to "at least" removed from the revised text.

With Ireland, Estonia and Hungary joining the agreement, it is now supported by all OECD countries and all EU Member States that are

4 Irish Tax institute press release, 7 October 2021, https://taxinstitute.ie/institute-news/agreement-achieved-by-government-will-provide-certainty-for-business/.

part of the Inclusive Framework. At the time of writing, Kenya, Nigeria, Pakistan and Sri Lanka have not joined the agreement. Pakistan had signed the July Statement but did not endorse the updated October Statement. Cyprus, which is not a member of the Inclusive Framework, is the only EU Member State that has not joined the international tax agreement.

The updated October Statement was subsequently endorsed by the G20 Finance Ministers and Central Bank Governors at their meeting in Washington on 13 October[5] and by the G20 leaders at their summit in Rome at the end of October.[6]

Key Components of the Two-Pillar Solution

The key components of the two-pillar solution as described in the updated October Statement are set out below. Pillar One deals with the reallocation of certain profits from large multinational enterprises (MNEs) to market jurisdictions (i.e. where sales arise), whereas Pillar Two refers to a global minimum tax.

Pillar One

The key components of Pillar One are:

- In-scope companies for the purposes of the new taxing right (Amount A) are MNEs with global turnover over €20bn and profitability above 10%, calculated using an averaging mechanism. This threshold will be reduced to €10bn following a review that will be carried out after seven years and is contingent on successful implementation.
- Extractives and regulated financial services are excluded from the scope of Amount A.
- Amount A may be allocated to a market jurisdiction where an in-scope MNE derives at least €1m in revenue in that jurisdiction; however, this threshold will be set at €250,000 for smaller jurisdictions.
- The amount to be allocated to market jurisdictions is 25% of residual profit (which is defined as profit in excess of 10% of revenue) using a revenue-based allocation key.
- The rules for determining the surrendering entities from which Amount A will be reallocated to market jurisdictions have not yet been clarified.
- The profit or loss of an MNE will be determined by reference to the financial accounts with a small number of adjustments; for example, losses will be carried forward.
- Segmentation will occur only in exceptional circumstances where, based on the segments disclosed in the financial accounts, a segment meets the scope rules.
- A marketing and distribution profits safe harbour will cap the Amount A allocation to market jurisdictions where residual profits are already taxed. Details regarding the scope of the safe harbour have yet to be clarified.
- Mandatory and binding dispute prevention and resolution mechanisms will be available to avoid double taxation in relation to Amount A. However, an elective binding dispute resolution mechanism for issues related to Amount A will be available for certain developing economies.
- No further detail has been provided on the design or scope of Amount B. Amount B is intended to standardise the remuneration of related-party distributors that perform "baseline marketing and distribution activities" in the market jurisdiction. The Statement notes that work on Amount B will be completed by the end of 2022 and 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.
- Tax compliance will be streamlined (including filing obligations) and will allow in-scope MNEs to manage the process through a single entity.

5 Fourth G20 Finance Ministers and Central Bank Governors meeting, Communiqué, 13 October 2021, https://www.g20.org/wp-content/uploads/2021/10/G20-FMCBG-Communique%CC%81-Fourth-G20-FMCBG-meeting-13-October-2021.pdf.

6 G20 Rome Leaders' Declaration https://www.g20.org/wp-content/uploads/2021/10/G20-ROME-LEADERS-DECLARATION.pdf.

- A Multilateral Convention (MLC) will be implemented that will require all parties to remove all digital services taxes and other relevant similar measures with respect to all companies and to commit not to introduce such measures in the future.
- No newly enacted digital services taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC.

Pillar Two

Pillar Two comprises:

- two interlocking domestic rules, known as the Global Anti-Base Erosion (GloBE) rules, that encompass an income inclusion rule (IIR), which imposes top-up tax on a parent entity in respect of the low-taxed income of a constituent entity, and an undertaxed payment rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent that the low-tax income of a constituent entity is not subject to tax under an IIR; and
- a treaty-based rule, referred to as the subject-to-tax rule (STTR).

The GloBE rules

Unlike Pillar One, which will be implemented through a newly developed Multilateral Convention, the GloBE rules will have the status of a common approach. This means that Inclusive Framework members are not required to adopt the rules. How the US minimum tax on global intangible low-taxed income, known as GILTI, will co-exist with the GloBE rules has yet to be clarified.

Key elements of the GloBE rules are:

- The rules will apply to MNEs that meet the €750m country-by-country reporting threshold.
- Government entities, international organisations, non-profit organisations, pension funds and 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. International shipping income is also excluded.
- The GloBE rules will provide for an exclusion from the UTPR for MNEs in the initial phase of their international activity (which is defined as MNEs that have no more than €50m in tangible assets abroad and that operate in a maximum of five other jurisdictions). This exclusion is limited to a period of five years after the MNE comes into the scope of the GloBE rules for the first time.
- The rules will impose a top-up tax using an effective tax rate test calculated on a jurisdictional basis.
- There will be a common definition of covered taxes and tax base determined by reference to financial accounting income with agreed adjustments.
- The minimum tax rate for the purposes of the IIR and the UTPR will be 15%.
- The GloBE rules will also provide for a formulaic substance-based carve-out that will exclude an amount of income equal to 5% of the carrying value of tangible assets and payroll. However, for a transitional period of ten years, the amount of income excluded will be:
    - 8% of the carrying value of tangible assets, declining annually by 0.2% for the first five years and by 0.4% for the last five years; and
    - 10% of payroll, declining annually by 0.2% for the first five years and by 0.8% for the last five years.
- The meaning of tangible assets or payroll for the purpose of the carve-out has not yet been defined.
- The GloBE rules will provide for a *de minimus* exclusion for those jurisdictions where the MNE has revenues of less than €10m and profits of less than €1m.

The subject-to-tax rule

The updated October Statement confirms that the STTR will apply to interest, royalties and a defined set of other payments made from a developing country to an Inclusive Framework member that applies nominal corporate income tax rates below the STTR. The additional tax that may be payable will be limited to the difference between the minimum rate of 9% and the tax rate on the payment. The STTR will be incorporated into bilateral treaties between countries at the request of the developing country member of the Inclusive Framework.

Unilateral Measures Compromise

On 21 October, the UK, Austria, France, Italy, Spain and the US issued a joint statement announcing the terms of an agreement, referred to as the "Unilateral Measures Compromise" on the transition from existing Digital Services Taxes (DSTs) to the new multilateral solution on Pillar One as described in the updated October Statement.[7] The UK, Austria, France, Italy, Spain and countries which have enacted DSTs and other relevant similar measures (together referred to as 'Unilateral Measures') before 8 October 2021, are not required to withdraw their DSTs until Pillar One takes effect.

Under the Unilateral Measures Compromise, where taxes accruing to UK, Austria, France, Italy, Spain under existing Unilateral Measures during a defined period after political agreement is reached, and before Pillar One takes effect (the Interim Period), exceed the tax due under Pillar One in the first full year of Pillar One implementation (pro-rated to achieve proportionality with the length of the Interim Period), such excess will be creditable against the portion of the corporate income tax liability associated with Amount A, as computed under Pillar One in these countries, respectively.

In return, the US has agreed to terminate proposed trade actions and will not impose further trade actions against the UK, Austria, France, Italy, Spain with respect to their existing DSTs until the end of the Interim Period.

Next Steps

An implementation plan for both pillars is set out in the Annex to the updated October Statement, the key details of which are summarised below.

Pillar One	Pillar Two
Early 2022 – Text of the Multilateral Convention and Explanatory Statement to implement Amount A and require parties to remove all digital services taxes and other relevant similar measures with respect to all companies and to commit not to introduce such measures in the future.	**End November 2021** – Model rules, supplemented by commentary, to define scope and mechanics of the GloBE rules.
Early 2022 – Model rules for domestic legislation necessary for the implementation of Pillar One.	**End November 2021** – Model treaty provision to give effect to the STTR.
Mid 2022 – Signing ceremony for the Multilateral Convention.	**Mid 2022** – Multilateral Instrument for implementation of the STTR in relevant bilateral treaties.
End 2022 – Finalisation of work on Amount B.	**End 2022** – Implementation framework to facilitate coordinated implementation of the GloBE rules.
2023 – Effective implementation of Pillar One.	**2023** – Effective implementation of Pillar Two, except for the UTPR, which will come into effect in 2024.

7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027640/Joint_statement.pdf

The European Commission has indicated that once the OECD has finalised the model rules for Pillar Two, it will swiftly bring forward a Directive to implement the rules within the EU. The Commission has also stated that it will carefully examine whether a Directive is needed to ensure the consistent and effective implementation of Pillar One at EU level.[8] The position regarding the proposed EU digital levy as an own resource, which the Commission has put on hold pending the outcome of the discussions at the G20/OECD,[9] is not yet apparent.

The pathway for implementation of the two-pillar solution in the US is less certain. Welcoming the outcome of the October Inclusive Framework meeting, the US Secretary of the Treasury, Janet L. Yellen, stated "[t]his deal paves the way for Congress to enact those proposals, and I'm hopeful they'll do so swiftly though the reconciliation process".[10] However, uncertainty remains over political endorsement of the rules in the US, particularly those relating to Pillar One, which would require Congress approval. In addition, as already mentioned, how the US GILTI regime will co-exist with the GloBE rules is not yet defined.

Conclusion

Although the precise number for the minimum effective tax rate under Pillar Two may have been settled, the implementation plan outlined in the updated October Statement is very ambitious, given that many of the key design features of both pillars have yet to be determined. The OECD has indicated that, within the constraints of the timeline set out in the implementation plan, it will continue to consult with stakeholders as work progresses. Undoubtedly, stakeholder input into the next stage of the process will be critical to ensure that the final technical rules that emerge provide tax certainty and can be practically applied without undue burden for business.

8 Statement of European Commissioner for Economy, Paolo Gentiloni, 19 October 2021. https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5247.

9 Response to Parliamentary Question by Paolo Gentiloni on behalf of the Commission, 28 July 2021, Question Reference E-002417/2021.

10 Statement by US Secretary of the Treasury, Janet L. Yellen, on the OECD Inclusive Framework Announcement on 8 October 2021, https://home.treasury.gov/news/press-releases/jy0394.

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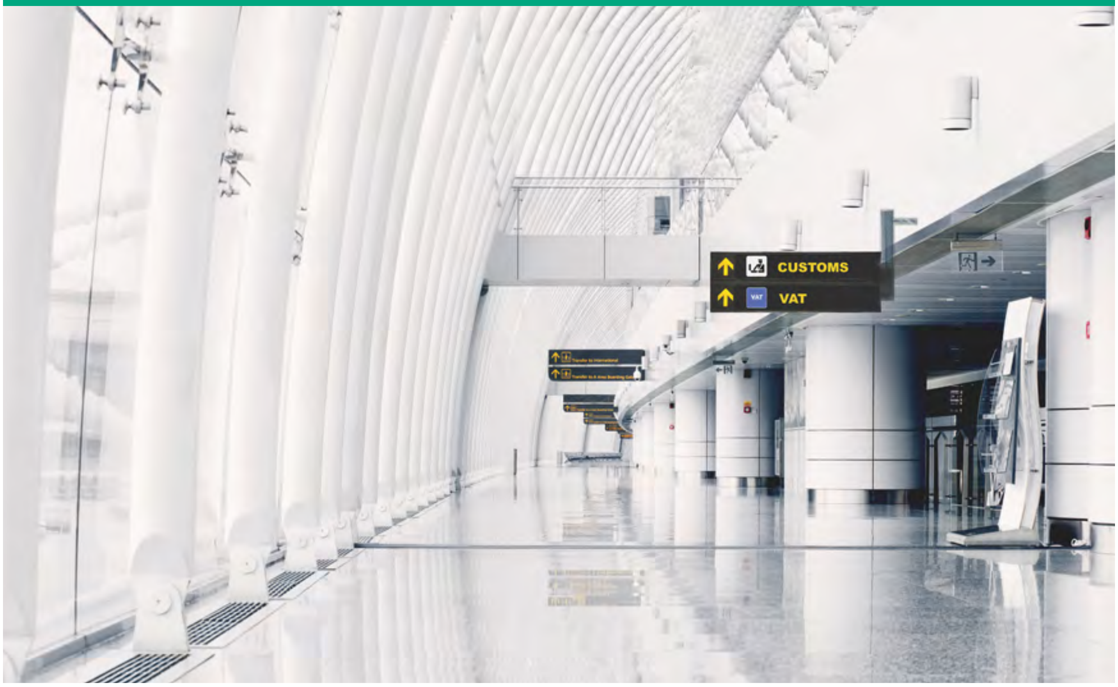
The e-Commerce Boom: Navigating the Customs and VAT Challenges



Introduction

In the ten years leading up to 2020, the retail industry as a whole was in the midst of perhaps the greatest sustained shift in consumer behaviour patterns it had ever seen. With the ongoing advancement of digital technologies and the introduction of new, online-only selling platforms, consumers began to move further away from in-person "bricks-and-mortar" retail towards an online experience. Increasingly complex and efficient global supply chains allow consumers to purchase goods from retailers throughout the world, safe in the knowledge that the goods will arrive at their doorstep without the need to visit a physical store. As a demonstration of this growth, between 2010 and 2019, internet sales in the UK more than doubled as a percentage of total retail sales, increasing from 7.3% to 19.2%.[1]

From an Irish perspective, perhaps the biggest shift that impacted e-commerce businesses and the overall indirect tax landscape came on 1 January 2021 with the end of the Brexit transition period. This saw the UK reverting to third-country rules for import and export trade with the EU. Given the close trading relationship between Ireland and the UK, this shift has had a particular effect on consumers in Ireland, with UK purchases becoming imports and subject to customs and VAT formalities.

Ireland is in a unique position when compared with the other 26 EU Member States regarding the impact of Brexit. Due to the historical position of unrestricted movement of goods between EU Member States that the EU Customs Union afforded, many Irish online businesses operated a UK-centric fulfilment model. Stock for the Irish market is not generally held in great quantities on the island of Ireland but rather held in warehouses in the UK for fulfilment on a "just in time" basis to Irish customers. Additionally, many of the major online retailers that supply the Irish market are based in the UK.

For businesses that have never had to deal with import formalities, the prospect of arranging an import transaction with customs formalities can be daunting, not least due to the documentary formalities associated with such a movement but also, more importantly, due to the increased cost of doing business. The vast majority of products traded in the e-commerce and retail sector attract a positive rate of customs duty and import VAT, with many clothing items dutiable at 12% and certain footwear attracting a duty as high as 16.9%. Although any applicable import VAT should be a recoverable cost for most businesses, this can still have cash-flow implications, subject to the application of an import VAT deferment/relief.

In response to these challenges and additional costs, businesses in the e-commerce sector are required to identify and consider the availability and applicability of certain duty mitigation strategies and reliefs to reduce or eliminate these additional costs. The primary simplification available in Ireland with respect to import VAT is now the postponed accounting procedure (effective from 1 January 2021), which allows the importer to account for import VAT in the VAT return and simultaneously reclaim this VAT in line with the importer's input VAT recovery entitlement. This provides importers with a significant cash-flow simplification.

The primary customs relief available for e-commerce imports is the "consignments of negligible value" relief.[2] This relief allows for the import of goods free of customs duty, excluding alcoholic products, perfumes and toilet water, and tobacco or tobacco products, that have an intrinsic value of €150 or less. Although this is not a new relief, the exponential growth of online sales due to the Covid-19 pandemic coupled with the imposition of new rules on UK–EU trade has brought to the forefront the importance of accurately and effectively implementing this relief. Furthermore, and to add yet more complexity to an already challenging environment, the July 2021 VAT e-commerce changes have placed more focus on the areas of customs and VAT with respect to e-commerce imports.

Import Models in the e-Commerce Sector

Although there are a number of e-commerce business models, the most commonly used is a business-to-consumer (B2C) model, whereby an online business (UK based) sells and ships directly to an end private customer (located in Ireland). However, more and more we are seeing the emergence of platform models and consumer-to-consumer (C2C) supplies. Each

1 UK Office of National Statistics, "Internet Sales as a Percentage of Total Retail Sales (Ratio) (%)", Retail Sales Index Time Series (DRSI) (September 2021).

2 Article 23, Council Regulation (EC) No. 1186/2009.

of these models approaches the connection and sale to consumers in a different way, but fundamentally each still gives rise to the requirement to ship the goods into a country and, as a result, to comply with associated customs formalities. From a distribution standpoint, the way that goods are shipped into the country may be impacted by the sales model but will generally fall into a postal, distribution or direct supply model.

Each of these models comes with its own specific challenges and concerns. For VAT, these business models give rise to several different questions, such as who is accountable for the VAT liability arising, where is the VAT payable, when is the time of the supply, what is the taxable amount for the purposes of calculating import VAT, what is the best way of settling this VAT liability (through customs agents, IOSS, direct registration) and are C2C transactions within the scope of VAT to begin with. For logistics, these business models have different pros and cons – postal imports may offer the easiest route to market but give the seller the least amount of control and oversight of the import. Distribution allows for greater control but may lead to imports being indirectly affected by other goods in the same container/truck. Direct supply, while offering the greatest level of control and management of the import, will likely incur the greatest direct cost. Businesses therefore have to weigh the potential benefits of one model in terms of ensuring that goods clear customs on time, with the increased costs that this may incur.

Impact of indirect Tax on the Customer Experience

The customer experience is key for e-commerce businesses to retain customers and entice new ones to their platform. When one initially thinks about the primary drivers of the customer experience in an e-commerce sale, indirect tax may not be front of mind. Such things as price, delivery speed, quality of goods and ease of return are generally seen as the key metrics to determine if a customer is satisfied with their shopping experience or not. However, each of these four elements can be impacted either directly or indirectly by the indirect tax treatment. In the worst-case scenario, customs duty and import VAT are not highlighted at the time of purchase and the customer receives a notice requesting payment before the goods are released. With import VAT of 23% and customs duty of 12% for certain items, the true cost that the customer pays could end up 35% greater than what was originally displayed at the point of purchase. In respect of delivery delays, the requirement and obligation to declare goods for customs purposes can impact the time of delivery if not managed properly, with goods held up at borders or not able to ship due to incorrect or incomplete paperwork.

In respect of the above challenges and potential pitfalls, businesses can take proactive steps to ensure that they do not materialise. Knowing the correct customs classification and VAT rate applicable to the goods allows online retailers to display the fully landed cost to consumers at the point of purchase. This gives customers oversight over the full cost of goods and should not result in a situation where the customer receives a request for additional payment to receive the goods. Similarly, having the necessary knowledge of the importation requirements allows businesses to implement processes and procedures that will enable accurate and timely declarations to be filed.

VAT Challenges for Businesses

The amendments to the VAT rules in July 2021 removed the VAT exemption for goods up to the value of €22, meaning that import VAT is now payable on all B2C e-commerce transactions. Given the prevalence of B2C supply chains between UK suppliers/retailers and Irish customers, and in light of Brexit, this has led to a renewed focus on the overlay between VAT and customs rules in the context of imports.

Incoterms and legal title

Incoterms are a set of rules developed by the International Chamber of Commerce to facilitate the conduct of global trade. Reference to incoterms in a contract for the sale of goods clearly defines the parties' respective obligations regarding areas such as risk, costs, arrangement of transport and customs clearance, thereby reducing the potential for legal complications.[3]

Within the structure of an e-commerce import, the incoterms agreed on with the customer will help to determine who is responsible for the customs clearance of goods. Generally, the Incoterms used in such a transaction would be delivered at place (DAP) or delivered duty paid (DDP). The primary difference between the two is the party who has responsibility for the fulfilment of customs obligations and payment of customs duties. The primary similarity between the two is that the price paid by the customer at the checkout should be inclusive of any applicable import VAT and duty.

Although it is the expectation that the business that is selling the goods will arrange for customs clearance, the incoterm will define who is noted as the importer, and this should be clearly communicated to the customer either directly on the website or platform or through the terms and conditions.

As has been mentioned, a commercial priority for most retailers is ensuring a seamless shopping experience for the customer. For VAT purposes, the application of VAT-inclusive pricing in conjunction with incoterms DDP should ensure that the customer is not "caught on the hook" for any unexpected additional charges to cover payment of import VAT and duty separate from the original purchase price. However, retailers need to balance this commercial objective against triggering any unwanted VAT obligations in the country of importation. For example, DDP incoterms can suggest to some that legal title remains with the supplier until the point of delivery, and ordinarily a local supply of goods would trigger a VAT registration obligation for a non-established supplier in the country in which the supply is made. Therefore the interplay between legal title, incoterms and pricing arrangements is fundamental in achieving that seamless customer experience, but the VAT implications need to be identified early so that they can be managed as efficiently as possible.

Import One Stop Shop

The introduction of an Import One Stop Shop (IOSS) from 1 July 2021 has meant that EU VAT arising on "distance sales of goods imported from third countries" can be settled by way of a single registration portal. In alignment with customs duty relief (more on this below), the goods cannot be in consignments of more than €150 and cannot be subject to excise duties – otherwise, the IOSS is not available. In addition to the obvious system configuration issues that these parameters bring into play is the more fundamental question – what constitutes a distance sale of imported goods? Based on general VAT principles, the location of the goods at the time that title transfers from supplier to customer is generally considered to be the place of supply, and the applicable VAT treatment follows accordingly. In circumstances, where legal title transfers from supplier to customer in the EU Member State of arrival (as opposed to the third country of dispatch), this would appear to be excluded from the scope of the IOSS on the basis that such supplies reflect an import of goods made by the supplier followed by an intra-EU supply (as opposed to a distance sale of imported goods). Revenue guidance supports this view where it is outlined that the IOSS can be used to declare and pay the import VAT due "where the goods in question are located outside the EU at the time they are sold". Therefore suppliers who wish to use the IOSS to report VAT on their supplies of imported goods should ensure that the terms and conditions that they have entered into with the end customer reflect the above.

Online marketplaces and imports

Since 1 July 2021, online marketplaces have been responsible for VAT in cases where they "facilitate" B2C online sales of imported goods from outside the EU in consignments with a value of €150 or less or B2C sales made

3 International Chamber of Commerce, *Incoterms 2020* (2019).

within the EU by a non-EU-established seller. This change has had the impact of bringing an additional party within the scope of EU VAT, which may otherwise have remained outside of the VAT net in the absence of getting involved in the legal transfer of title from supplier to customer. There are numerous practical obstacles for such online marketplaces in complying with their obligations – namely, how to differentiate, at the point of sale, whether that particular sale is one where they are liable for the VAT arising or the legal supplier instead retains that accountability (e.g. whether the value of the consignment is over or under €150). Once the correct determination has been made, there is the added burden of ensuring that that decision is supported by and reflected in the documentation that follows. Another example of a practical challenge facing online marketplaces is how to control the VAT rate that is applied to the supply when there may be numerous different products made available for sale on their site. Given that the online marketplace may not be in possession of sufficient information relating to the goods at the time of supply in order to verify the VAT rate applied to the transaction, it may be disproportionate to hold the online marketplace accountable for underpaid VAT in such instances. In this regard, the updated legislation includes a limited liability provision, which may be relied on by the online marketplace where certain conditions are satisfied. The burden on them to prove that all relevant conditions have been met in doing so.

The value of imported goods

In general terms – i.e. for supplies that do not qualify for the IOSS/low-value customs duty relief – the customs value assigned to imported goods and the different expenses that must be included in the taxable amount calculation will impact the amount of import VAT arising. The legislation (s53(1) VATCA 2010) is worded quite broadly:

> *"The value of imported goods...shall be...the valuation of goods for customs purposes...together with any taxes, duties, expenses resulting from the transport of the goods to another place of destination within the Community (if that destination is known at the time of the importation) and other charges levied either outside or, by reason of importation, within the State (other than value-added tax) on the goods and not included in the determination."*

Therefore the person liable for the payment of import VAT will need to be able to identify the costs that are associated with the imported goods and to consider whether these costs are required to be included in the taxable amount calculation.

Customs Challenges for Businesses

Regardless of the import model chosen, e-commerce businesses will always have to consider the customs obligations associated with the importation of such goods. Ultimately, it is their responsibility to ensure that the goods clear customs and that delivery is made to the customer on time. This can present significant challenges to certain businesses, especially those based in the UK, which may never have been required to consider or interact with the importation customs process before. Such businesses may have a lack of customs knowledge and resources and thus be forced to rely on third-party providers to assist and ensure that customs formalities are completed correctly.

The importation of goods under the e-commerce model presents specific challenges that many traditional B2B importers do not face. Companies in this space should understand and be actively aware of these challenges to ensure the most customer-friendly, efficient and cost-effective import model. Awareness of the issues that may present themselves should help all impacted businesses from both a planning and a customer experience standpoint and so should not be ignored by retailers in the e-commerce space.

The customs declaration

To allow import VAT to be levied, all imports into the EU have to be declared at the border using an electronic customs declaration.[4] This

4 European Commission, "New Form of Customs Declaration for Low Value Consignments" (11 July 2019).

removed the previous procedure allowable for certain imports, such as those through postal consignments, to be declared for free circulation without a formal customs declaration. This was a shift with regards to the procedures available for importing goods and has ensured that customs authorities now have full visibility over all imports regardless of the method of import or operator.

In response to the requirement for all imports to be supported by an electronic customs declaration and the increased pressure that this would put on national customs IT systems, the European Commission implemented the "super reduced dataset" to facilitate the implementation of the customs aspects of the VAT e-commerce package.[5] This reduced dataset, known as the H7, requires around one-third of the data that a standard declaration does and can be used by anyone claiming the "consignment of negligible value" relief.

Although the H7 declaration was brought in to facilitate e-commerce imports and those where the customs relief is claimed, it is not prescriptive for importers to use this. A standard customs declaration can still be used for such imports if so desired. Although, on the face of it, such a choice may appear counterintuitive, as there would be the requirement for more data, the use of the H7 is limited to goods with a value of €150 or less where the customs relief can be claimed. For certain businesses, this could result in operating a dual declaration system, where new data feeds need to be created to populate the H7 information. Therefore there is a consideration for businesses of whether it would be preferable to complete only standard customs declarations and not make use of this new H7, to ensure a harmonised IT interaction.

Importing party and customs representation

Although the incoterm used will determine which party has responsibility for customs clearance, it is still necessary to define who can be stated as the importer on the customs declaration where "consignment of negligible value" relief is claimed. Under the traditional e-commerce model, the end customer could, and would most likely, be stated as the importer. In such a scenario, customs representation should be taken into consideration and dealt with effectively.

Such representation may be either direct, in which case the customs representative shall act in the name of and on behalf of another person, or indirect, in which case the customs representative shall act in his or her own name but on behalf of another person.[6] It is essential for declarants or those facilitating a customs declaration to state the type of representation but also to ensure that the correct empowerment has been provided. Persons who fail to state that they are acting as a customs representative or who state that they are acting as a customs representative without being empowered to do so shall be deemed to be acting in their own name and on their own behalf.[7] If empowerment is not properly obtained from the end customer, this could lead to potential issues related to joint and several liability for both the customs agent and the e-commerce business.

However, where an alternative e-commerce business model is used, such as bulk imports of individual shipments, there is a question of who can act in the capacity of importer while claiming the customs relief. The *judgment of the Court* of Justice of the European Union *(First Chamber) of 2 July 2009* in *Har Vaessen Douane Service BV v Staatssecretaris van Financiën* C-7/08 concerned the import of consignments of negligible value where the import was completed by an EU-based entity on behalf of individual customers. The determination in the case provided that where grouped consignments, shipped from a third country, arrived at a distribution centre and were then distributed to customers, they were to be characterised as a group of individual

5 European Commission, *Importation and Exportation of Low Value Consignments – VAT e-Commerce Package: "Guidance for MSs and Trade"*, Taxud/A2/2020 (2020).

6 Article 18, Regulation (EU) No. 952/2013 of the European Parliament and of the Council.

7 Article 19, Regulation (EU) No. 952/2013 of the European Parliament and of the Council.

low-value parcels. The EU distribution entity in the case (PTT) was named in box 8 of the SAD as consignee, but this was found not to prejudice the eligibility for the relief of the EU entity with which the orders were placed.

The facts and ruling in this case open the question of who can act as the importer when claiming the customs relief and may allow for the possibility to import goods as a bulk consignment, with the EU business entity stated as the importer, while continuing to claim the "consignment of negligible value" relief.

Customs valuation in the context of low-value consignment relief

For the purpose of claiming the "consignment of negligible value" relief, the goods must have an "intrinsic value" of €150 or less. The "intrinsic value" of commercial goods is defined in the Union Customs Code Delegated Act (UCC DA) under Article 1(48) as:

> *"….the price of the goods themselves when* ***sold for export to the customs territory of the Union****,* ***excluding transport and insurance costs****, unless they are included in the price and not separately indicated on the invoice, and any other taxes and charges as ascertainable by the customs authorities from any relevant document(s) [emphasis added]".*

With the removal of the VAT relief threshold on imports, there is now considerable focus on the intrinsic value of the goods as this will determine the ability to claim the customs relief. An essential element of this is for businesses to understand and identify where additional costs, such as transport and insurance, are included in the overall price and thus artificially bring the value of the goods over the threshold, resulting in a loss of the ability to claim the customs relief.

Where there may be a "chain of sale" associated with the import transaction, closer scrutiny is required to assess the appropriate value to be declared at import.

Return of goods

The return of goods in large quantities and frequencies is a stark reality of the e-commerce sector, with most retailers offering free returns on their products and an easy way for consumers to complete this through local drop-off points or by post. It is known from experience that return rates for e-commerce retailers are significantly higher than for traditional retailers, with fashion having high return rates and electronics less so. From a commercial standpoint, businesses must be able to offer their customers easy and free returns, and in turn must ensure that any customs duty or import VAT paid can be reclaimed. However, the commercial and business expectations do not always align with the reality of claiming a refund of customs duty and/or import VAT from the customs authorities.

Given that all imports require an electronic customs declaration and the subsequent payment of import VAT and/or customs duty, it is necessary to conclude that where goods are returned and the trader wishes to reclaim the import taxes paid, this will require a formal invalidation of the customs declaration. In the context of an e-commerce import, the invalidation of a customs declaration is completed in accordance with Article 148(3) UCC DA:

> *"Where goods which have been sold under a distance contract as defined in Article 2(7) of Directive 2011/83/EU of the European Parliament and of the Council… have been released for free circulation and are returned, the customs declaration shall be invalidated after the goods have been released, upon reasoned application by the declarant, if the following conditions are fulfilled:*
>
> *(a) the application is made within 90 days of the date of acceptance of the customs declaration;*
>
> *(b) the goods have been exported with a view to their return to the original supplier's address or to another address indicated by that supplier."*

In consideration of the above, retailers must now ensure that their refund policies align with these criteria and that their supply chain model is robust enough to support the invalidation by providing proof of the export of the goods. Perhaps of greater concern to retailers and customs agents is the additional steps required to facilitate such invalidations. In the Irish customs system (AIS), this invalidation is a two-step process that requires Revenue approval and the provision of supporting documents for the claim for an invalidation.

As demonstrated above, e-commerce has grown at a considerable rate over the past two years alone, and therefore it is necessary to consider the ability of customs authorities to deal with an influx of invalidation requests. Although the European Commission has specifically noted the need to mitigate the impact of this – stating that "the invalidation requires a reasonably simple process that does not pose unmanageable workload on customs administrations and does not significantly disrupt the daily operations of businesses"[8] – there has yet to be an effective method proposed, and it is left to the national customs administrations to effect this change.

Further clarity is also required on how split returns are to be treated, that is, where two or more items are purchased but only one is returned. For these returns the invalidation of the entire declaration is not appropriate, yet the rules regarding the amendment of a customs declaration do not necessarily align with the reality of a return due to a change of mind or an incorrect size. Such returns are not catered for or explored in the European Commission guidance on the topic, and it is therefore left to national customs authorities to determine the most appropriate course of action within the legislative confines of the UCC.

The uncertainty regarding of how these returns are to be handled should be of concern to retailers. Where such returns cannot be completed, the risk of a negative effect to margin is a real possibility. Businesses may be required to refund the cost of customs duty and import VAT to consumers as part of their refund policy. Where these costs cannot be recovered from the customs authorities, businesses will be left at a financial loss.

Conclusion

Brexit, Covid-19 and the introduction of the July 2021 VAT e-commerce package have all contributed to a considerable change in customer spending habits and in the interplay between VAT and customs requirements in the context of the UK–Ireland supply chain. As this article explains, impacted suppliers need to be mindful of the potential pitfalls that can be triggered by the legal terms and pricing arrangements, and of the practical implications of falling within the scope of VAT as an online marketplace "facilitating" a supply of goods. From a customs perspective, suppliers should be aware of the type of customs declaration that is required and of the focus on customs valuation as the primary driver for potential reliefs.

The new trading rules and obligations place increased focus on the need for e-commerce retailers to identify and implement duty-saving reliefs when importing goods into Ireland. Implementing such a relief scheme comes with its own challenges, but with the appropriate planning and effective management, those issues can be mitigated.

The return of goods still presents a complex challenge from both a practical and a legislative perspective and will no doubt become a pressing issue for retailers and customs authorities, as the share of e-commerce purchases continues to get closer to that of traditional "bricks-and-mortar" retail. As the e-commerce landscape continues to evolve, so too must the customs systems and rules that underpin the movement of these goods cross-border. This has begun with the introduction of reduced dataset customs declarations and must continue, to ensure that the e-commerce sector continues to progress unhindered.

8 European Commission, *Importation and Exportation of Low Value Consignments – VAT e-Commerce Package: "Guidance for MSs and Trade",* Taxud/A2/2020 (2020).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Tax Compliance and the Capital Taxes

Introduction

Any mention of tax returns and tax compliance naturally brings to mind the familiar rules and requirements relating to income tax and corporation tax compliance. Understandably, the compliance requirements around these tax heads are well known, and practitioners are extremely well versed in these matters, with most able to reel off filing dates as easily as their multiplication tables when they were in primary school.

This article reviews some of the lesser known but equally important requirements when it comes to personal tax compliance and inclusions in tax returns for the capital tax heads. For the purposes of the article, the discussion is limited to capital acquisitions tax (CAT) and capital gains tax (CGT), and also included is a review of one of the most important returns in the context of CAT – the Statement of Affairs (Probate) (SA2). A review of the SA2 is timely as it "celebrated" its first birthday on 14 September, having replaced the Inland Revenue Affidavit (CA24) on 14 September 2020.

The article is divided into three sections. In the first part the filing requirements are examined in respect of each of the tax heads, including additional information under each tax head that is relevant to a tax return. The second part reviews the implications for the taxpayer of not filing a tax return or not disclosing the requisite information in the relevant tax return. The final part of the article reviews the SA2 since its inception in September last year.

Capital Gains Tax

Filing requirements and filing dates

Where a person sells, disposes or gifts an asset during the year, CGT applies at the current rate of 33% on any gain that arises. With respect to disposals made on or between 1 January in a calendar year and 31 December in a calendar year, a return should be filed as follows:

- Where a person files an income tax return (Form 11), they should include the relevant details of the CGT disposal on this return, which must be filed by 31 October after the year in which the disposal was made. For example, any disposals made between 1 January 2020 and 31 December 2020 must be filed by 31 October 2021, or if filing on ROS, the due date is extended to 17 November 2021.[1]
- Where a person is not obliged to file an income tax return, they must instead file a Form CG1, which must be filed by 31 October in the year after the year the disposal was made. For disposals between 1 January 2020 and 31 December 2020, the CG1 must be filed by 31 October 2021.

There are a number of sections and panels in the Form 11 that are relevant to disposals and acquisitions of capital assets and CGT during the relevant tax year. Section L relates to CGT, and there are a number of disclosures required in this Section, that are discussed below.

Form 11: Section L Panels	
802-804	Panels 802 to 804 require disclosures on connected-party acquisitions and disposals, and details on connected-party transactions should be included. Connected-party transactions have particular rules that apply in relation to the calculation of CGT, and it may materially affect a CGT computation where those rules are misapplied. This disclosure also performs the function of notifying Revenue of a connected-party transaction that otherwise may not have been known nor have been, on the face of it, an obvious connected-party transaction (e.g. a disposal to an in-law).
805	Panel 805 relates to the principal reliefs[2] from CGT. It is worth noting that it is the consideration on the disposal of the qualifying assets that is the required figure in this section. Retirement relief is divided into disposals "outside the family" and disposals "within the family".[3] Retirement relief has lifetime thresholds, and it is useful to be aware of those thresholds[4] when completing this section to ensure that they are not breached.

1 Revenue eBrief No. 088/21. To qualify for this extension, one must both pay and file through ROS.

2 E.g., Retirement relief, s604A TCA 1997, principal private residence relief and disposal of a site to a child.

3 Please see commentary below on the recent Tax Appeals Commission determination 140TACD2020.

4 For disposals outside the family, €750,000 if the disponer is under 66 and €500,000 if 66 or older. For disposals within the family, €3m if the disponer is 66 or older (there is no threshold if the disponer is aged between 55 and 65).

	It is important that the correct figure is inserted as, again, it may have a material influence on the calculation of a tax liability. For instance, a miscalculation of the proportion of chargeable business assets to sales proceeds in respect of a share disposal may mean that the disposal does not qualify for retirement relief as the lifetime threshold is breached. This disclosure also performs the function of notifying Revenue that a relief has been claimed on a disposal in the relevant tax year. Where no liability arises, this disclosure may be the only notification that a transaction has occurred on which relief is claimed.
809	Panel 809 requires a disclosure of connected-party losses, including the name and tax reference number of the relevant connected party and the amount of the loss. As connected-party losses are restricted (s549 TCA 1997), it is important that this information is accurate as it may be relevant to a future disposal.
810	Panel 810 relates to the four/seven-year exemption from CGT under s604A TCA 1997. The information sought in this disclosure is the amount of the gain relieved by the application of the section. This may not correlate to the sales proceeds or chargeable gain where there has been a proportionate reduction of relief as the asset was held for longer than four/seven years from acquisition.
815	Panel 815 provides for the annual exemption, and it is important that the rules relating to the annual exemption are correctly applied. For example, there is no entitlement to the annual exemption where retirement relief is claimed, and there is no ability to transfer unused annual exemption between spouses.
818	To minimise the scope for queries, panel 818 sets out the amount of the net unused losses carried forward to 2021, and this figure should be accurately calculated.

Form 11: Section M Panels	
	Section M of the Form 11 relates to the acquisition of chargeable assets in the relevant tax year and provides for different asset classifications. Care should be taken to classify an asset correctly as this may be relevant for the purposes of qualifying for relief in the future.

Form CG1, although a slightly different format, requires the exact same content in the disclosures as the Form 11, as discussed above.

Spouse/civil partner losses

Where a spouse has a surplus capital loss in a year of assessment, this can be deducted from the capital gains of another spouse where the spouses are living together (s1028(3) TCA 1997). The same treatment also applies in the case of civil partners. This provision is automatic, so if a spouse/civil partner does not wish to use this provision for disposals in any year, an application can be made to Revenue before 1 April of the following year to disapply this treatment. Where a spouse has made a disposal at a lower tax rate (e.g. a disposal that qualifies for entrepreneur relief), an application to be separately assessed should be considered as it may be more efficient to carry forward the capital losses of the other spouse to be used against a higher-taxed gain in the future (i.e. in the example, the value of the loss is only 10% instead of 33%).

Capital Acquisitions Tax

Filing requirements, filing dates and payment dates

Where a person receives a gift or inheritance, CAT applies to the beneficiary at the current rate of 33% on the taxable value of the gift/inheritance. The IT38 is the relevant CAT return and must be filed online in the following circumstances:

- when the total taxable value of all gifts/ inheritances received by the beneficiary exceeds 80% of the relevant group threshold and
- where a beneficiary is claiming agricultural or business relief, irrespective of whether the 80% group threshold is breached.

The latter condition is important as it was introduced by s55 Finance Act 2020 and may be missed by anyone who is not dealing with CAT filings on a regular or more recent basis.

Instead of filing an IT38, there is also the option to file a simplified version known as an IT38S, which can be filed online or by post. This may be filed only where the following conditions are satisfied:

- there is no claim for reliefs, exemptions or credits, apart from the small gift exemption, and
- the benefit received has no conditions or restrictions and is received from one person only, as opposed to forming part of a larger benefit.

Section K of the Form 11 relates to CAT, and a disclosure is required by a taxpayer regarding whether they have received a gift or inheritance in the relevant tax year. This disclosure will allow Revenue to cross-check whether an IT38 has been filed.

All gifts or inheritances with a valuation date in the 12-month period ending on the previous 31 August must file a CAT return and pay the tax by 31 October of that year. For example, in respect of a valuation date of 3 November 2020, a return must be filed and the tax paid by 31 October 2021.[5]

Discretionary Trusts

Discretionary trust tax (DTT) applies to discretionary trusts on the latest date of:

- the date the property becomes subject to the trust,
- the date of death of the disponer,
- the date when the youngest of the principal objects of the trust reaches 21 years – principal objects include the disponer's:
  - spouse/civil partner,
  - children and
  - predeceased child's children.

The following DTT charges will apply to the trust property:

- an initial once-off 6% charge (on the occurrence of the latest date listed above) and
- an annual 1% charge on 31 December in each year that the trust is in place (but not levied until the 31 December in the year after the initial 6% charge).

The initial 6% charge is payable within four months of the relevant valuation date of the inheritance that was deemed to be taken by the trustees. Where a residuary estate passes into a discretionary trust under a person's will, the date of the ascertainment of the residue of the estate will be the valuation date, and the 6% initial charge will be payable within four months of that date.

The following returns must be made by the accountable person (the trustee):

- Form IT4 for the 6% once-off charge and
- Form IT32 for the 1% annual DTT.

CGT and CAT: Late Filings and Payments

Where a return is filed late, the taxpayer is subject to certain surcharge provisions. The surcharge provisions for the late filing of a tax return have been streamlined across most of the tax heads over recent years.

5 Revenue eBrief No. 088/21 extended the ROS return filing and tax payment date to 17 November 2021 for beneficiaries who received gifts or inheritances with valuation dates in the year ended 31 August 2021. To qualify for this extension, one must both pay and file through ROS.

A surcharge applies on the final CGT, CAT or DTT liability of 5% (to a maximum of €12,695) where the return is filed within two months of the filing deadline. Where the return is more than two months late, the surcharge is 10% (to a maximum of €63,485).

Implications of Non-disclosure or Non-filing of Tax Return

Denial of relief

Retirement relief

A recent Tax Appeals Commission (TAC) determination, 140TACD2020, examined the interaction between s598 and s599 TCA 1997 and the implications of identifying a transaction as "within the family" or "outside the family" on the Form 11/CG1. It is difficult to see why this description is used in the tax return, as although it correlates to the heading of the relevant sections, it does not reflect the operation of the relief itself. Relief under s599 applies only to disposals to a child. The definition of "family" has far broader reach and includes spouse, brother, sister, ancestor and lineal descendant.

The case considered whether relief under s599 is automatic or must be claimed and whether selecting "Retirement Relief – Within the Family" on the Form 11 amounts to a claim for relief under this section. The Appeal Commissioner found that the selection of "Retirement Relief – Within the Family" on the Form 11 does not represent a claim for relief under s599 on the basis of the statutory definition of "family" in s598 and s599 and in the absence of a specific reference to the legislative provisions on the prescribed form (i.e. Form 11). The Appeal Commissioner went on to find that the taxpayer had filed a fully and correctly completed tax return.

The case also found that relief under s598 TCA 1997 automatically applies due to the language and terminology used in the section.[6] Relief under s599, however, must be claimed.[7] In summary, where relief is claimed under s599, it is given if the conditions therein are met. Relief is given under s598 if the conditions therein are met.[8]

Four/Seven-year exemption and principal private residence relief

The four/seven-year exemption is provided for in s604A TCA 1997, and principal private residence relief in s604 TCA 1997. The language for these reliefs appears to follow the same line of reasoning as in the foregoing analysis of retirement relief, whereby they appear to apply automatically when the conditions for the relief are met. Therefore in the authors' opinion, the non-disclosure of the relief in a tax return should not result in a scenario where the relief is denied.

There is a specific panel in the tax return for s604A and the amount of relief claimed. As the section is specifically referenced, there is an argument that the decision by the Appeal Commissioner in 140TACD2020 may not necessarily be followed.

Time Limits

Seemingly small misdemeanours, such as not disclosing a transaction or not filing a CAT return where there is no associated tax liability, can have potentially serious implications for a taxpayer.

Broadly, there is a four-year time limit in relation to Revenue's ability to make enquiries or raise or amend assessments in relation to a taxpayer's historical tax affairs. Under the self-assessment regime (s959AA TCA 1997), Revenue does not have the right to raise an assessment or amend an assessment to tax for any chargeable period more than four years after the end of the chargeable period for which the chargeable person has filed a tax return and has made in that return a "full and true disclosure of all material facts necessary

6 Section 598(2)(b)(i) TCA 1997 provides that "relief shall be given...".

7 Section 599(6) TCA 1997 provides that "[*r*]elief under this section may be claimed...".

8 Paragraph 20 of TAC determination 140TACD2020.

for the making of an assessment for the chargeable period" (s959AA(1)). A Revenue officer can carry out enquiries into a return at any point up to the end of the fourth year after the return was filed (s959Z(3)). In the case of an amended assessment, the four-year period runs from the end of the year in which the amended return is filed.

This protection guarding a taxpayer's right to prevent historical tax matters being revisited by Revenue can be severely compromised where incorrect or incomplete tax returns are filed or, worse still, where no tax return is filed at all.

Where a taxpayer has failed to submit a Form 11, CG1 or CT1, as appropriate, in addition to the penalties (ss1052 and 1054 TCA 1997) and surcharges (s1084 TCA 1997) that may be levied (s959O), the four-year time limit for making enquiries (s959Z(4)) or raising an assessment (s959AC(2)) does not apply.

This is extremely relevant where, for example, a taxpayer does not usually file a Form 11 and makes a disposal of a capital asset in a tax year. There is a requirement to file a CG1, and if it is not filed, there is no four-year time limit protection. Another example relates to the changes to the requirement to file CAT returns where either business or agricultural relief has been claimed. This may not be commonly known, and the failure to file a return in this instance means that that there is no four-year time limit protection.

The *Irish Tax Review* article "Is There a Time Limit for Historical Revenue Queries?",[9] which provides an extremely informative review of the various aspects of time limits and detailed consideration of each of the relevant sections, is recommended reading in this area. The present article repeats the definitions contained in that article of the wording employed in s959AA TCA 1997:

> "For a return to be 'full and true', it must disclose all items of income in respect of which the person is chargeable to tax in the year and, to the extent that any deductions are claimed, it must contain full and correct details of the facts in relation to those deductions...
> Disclosure means to reveal or make apparent that which (so far as the 'discloser' knows) was previously unknown to the person to whom the statement was made. Where the word 'disclose' is used with reference to information to be provided, it is understood as requiring a statement of the relevant information that is in the possession of the person who is required to make the disclosure for a particular purpose...
> It is necessary to determine whether the item in question is a 'material fact' for the making of an assessment."

Where a taxpayer has made a disposal or used a relief to reduce a CAT or CGT liability, regardless of the existence of a corresponding tax liability, there is usually a requirement to disclose the event on the relevant tax return (i.e. Form IT38, 11 or CG1), as detailed above.

As the taxpayer making the disposal, receiving the proceeds, or receiving the gift or inheritance is clearly in possession of the relevant information – and, arguably, would find it extremely difficult to claim that they were not – they are required to disclose those details to Revenue. The question is whether the non-disclosure of such an event in the relevant tax return is sufficient to render the return incomplete and the taxpayer incapable of relying on the protections afforded under s959AA.

The legislation goes some steps further to provide for no time limit on Revenue making enquiries or raising or amending assessments

9 Stephen Ruane and Paul Wallace, "Is There a Time Limit for Historical Revenue Queries?", *Irish Tax Review*, 30/1 (2017).

where a Revenue officer has "reasonable grounds" for believing that a return delivered by a taxpayer does not contain a full and true disclosure of all material facts necessary for the making of an assessment (ss959AC and 959Z TCA 1997). This is a far lower threshold than the predecessor provisions (ss955 and 956), which required the Revenue officer to have "reasonable grounds"[10] for believing that the return was insufficient as it had been completed in a "fraudulent or negligent manner". Fraud and negligence are notoriously difficult to prove.

On an initial read, this would appear to suggest that Revenue can bypass the four-year time limit where there is non-disclosure of an event as a matter of fact or where the Revenue official has "reasonable grounds" for believing that the return is not a full and true disclosure (e.g. some part of the event has not been disclosed, a disclosure of the application of a relevant relief is not included, the chargeable gain to be relieved is not included or the chargeable gain is inserted instead of the consideration).

However, it is arguable – and certainly there is historical case law[11] that could be relied on to support the approach – that the following three elements must exist:

- a tax consequence arose
- out of the non-disclosure, omission or inclusion of the material fact
- that caused the return not to be full or true.

There must be a tax liability to raise an assessment. It would seem reasonable to consider that where the deficiency in the tax return does not result in a tax liability or an increase in a tax liability, it is immaterial to the making of an assessment. Where this is the case, it should not amount to a situation where there has been a failure to make a "full and true disclosure of all material facts necessary for the making of the assessment" and result in the removal of the four-year time limit.

It is in situations where, for example, a relief has not been correctly applied or has been claimed in error and a tax liability arises or increases therefrom, the foregoing provisions may have grave implications. Where said relief should have been disclosed on a tax return or a tax return should have been filed in the first instance, a taxpayer may find themselves in a scenario where the four-year time limit for raising enquiries and raising or amending assessments is not available as a protection and Revenue is entitled to raise an assessment in respect of a historical transaction.

Taxpayers and their professional advisers need to pay attention to the requirements for the filing of capital tax returns. There is a very strong suggestion that all disclosures should be included, and care should be taken to check what information is required. It is also recommended to check whether there have been any changes to the legislation in recent Finance Acts that alter the previous rules on filing tax returns, dates of filings and information to be included in tax returns.

10 See Ronan Furlong, "The New Self-Assessment Regime: Plus Ça Change...?", *Irish Tax Review*, 26/3 (2013), for discussion of the meaning of the term "reasonable belief". In summary, case law would suggest that, for "reasonable grounds" to exist, the grounds must not be absurd, irrational or ridiculous and there must be some firm basis for the belief.

11 *O'Rourke v The Appeal Commissioners & another* [2016] IESC 28.

2020120 **ANY PANEL(S) OR SECTION(S) THAT DO NOT REQUIRE AN ENTRY SHOULD BE LEFT BLANK**

PPSN

L - CAPITAL GAINS - Capital Gains for the year 1 January 2020 - 31 December 2020 [801 - 821]

801. **Description of Assets**	No. of Disposals	Aggregate Area in Hectares	Aggregate Consideration
(a) Shares / Securities - Quoted			, , .00
(b) Shares / Securities - Unquoted			, , .00
(c) Agricultural Land / Buildings		, .	, , .00
(d) Development Land		, .	, , .00
(e) Foreign Life Policies (S. 594) chargeable at 40%			, , .00
(f) Offshore Funds (S. 747A) chargeable at 40%			, , .00
(g) Commercial Premises			, , .00
(h) Residential Premises			, , .00
(i) Shares or Securities exchanged (S. 913(5))			, , .00
(j) Venture Fund Gains (S. 541C(2)(a))			, , .00
(k) Other Assets			, , .00
(l) **Total Consideration**			, , .00

Insert ☒ in the box(es) to indicate	**Self**	**Spouse or Civil Partner**
802. If any disposal was between connected parties or otherwise not at arm's length	☐	☐
803. If any of the original acquisitions were between connected parties or otherwise not at arm's length	☐	☐
804. If the market value has been substituted for the cost of acquisition of any assets disposed of	☐	☐

805. **Claim to Reliefs - Self**

(a) Disposal of Principal Private Residence: enter amount of consideration , , .00

(b) Retirement Relief - Within the Family: enter consideration on disposal of qualifying assets , , .00

(c) Retirement Relief - Outside the Family: enter consideration on disposal of qualifying assets , , .00

(d) Disposal of a site to a child: enter amount of consideration , , .00

(e) If you wish to claim relief for farm restructuring under S. 604B, insert ☒ in the box and complete the Farm Restructuring Relief claim form which is available on **www.revenue.ie** ☐

(f) Other (specify) enter amount of consideration , , .00

806. **Claim to Reliefs - Spouse or Civil Partner**

(a) Disposal of Principal Private Residence: enter amount of consideration , , .00

(b) Retirement Relief - Within the Family: enter consideration on disposal of qualifying assets , , .00

(c) Retirement Relief - Outside the Family: enter consideration on disposal of qualifying assets , , .00

(d) Disposal of a site to a child: enter amount of consideration , , .00

(e) If you wish to claim relief for farm restructuring under S. 604B, insert ☒ in the box and complete the Farm Restructuring Relief claim form which is available on **www.revenue.ie** ☐

(f) Other (specify) enter amount of consideration , , .00

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2020120 **ANY PANEL(S) OR SECTION(S) THAT DO NOT REQUIRE AN ENTRY SHOULD BE LEFT BLANK**

PPSN

	Self	**Spouse or Civil Partner**
Gains / Losses / Net chargeable gains		
807. Chargeable gains in the year before S. 604A relief	, , .00	, , .00
808. Losses in the year before S. 604A relief	, , .00	, , .00
809. If any of the losses at Line 808 refer to a loss to a connected person, give the following details		
(a) Name of connected person		
(b) Tax Reference Number of connected person		
(c) Amount of loss	, , .00	, , .00
810. Amount of gain relieved under S. 604A	, , .00	, , .00
811. Chargeable Gain(s) net of allowable current year losses and S. 604A relief (excluding Foreign Life Policies)	, , .00	, , .00
812. Previous Gain(s) Rolled-over (now chargeable)	, , .00	, , .00
813. Current year losses arising in 2020 available for offset against previous gains rolled over	, , .00	, , .00
814. Amount of unused Loss(es) from prior year(s) available for, and offset against chargeable gains above	, , .00	, , .00
815. Personal Exemption (max €1,270 per spouse or civil partner & not transferable) (**Note**: losses, including losses forward, must be used first)	, .00	, .00
816. Net Chargeable Gain (excluding Foreign Life Policies)	, , .00	, , .00
817. Chargeable Gain on Foreign Life Policies	, , .00	, , .00
818. Unused Loss(es) for carry forward to 2021	, , .00	, , .00

If you have an overall CGT loss in 2020 there is no need to complete Lines 819 or 820

819. **In respect of net chargeable gains that arose in the period 1 January 2020 - 30 November 2020**

	Self	**Spouse or Civil Partner**
(a) Enter amount of net gain to be charged at 33%	, , .00	, , .00
(b) Enter amount of net gain to be charged at 40% (excluding Foreign Life Policies)	, , .00	, , .00
(c) Enter amount of net gain on Foreign Life Policies to be charged at 40%	, , .00	, , .00
(d) Enter amount of net gain on disposal of chargeable business asset(s) by a relevant individual to be charged at 10% under S. 597AA	, , .00	, , .00
(e) Enter amount of net gain in respect of Venture Fund Capital to be charged at 15%	, , .00	, , .00
(f) (i) Enter amount of net gain in respect of a disposal of land under Compulsory Purchase Order (CPO) which has accrued in 2020 by virtue of S. 542(1)(d)	, , .00	, , .00
(ii) Date of disposal	DD/MM/YYYY	DD/MM/YYYY

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2020120 **ANY PANEL(S) OR SECTION(S) THAT DO NOT REQUIRE AN ENTRY SHOULD BE LEFT BLANK**

PPSN

	Self	**Spouse or Civil Partner**
820. In respect of net chargeable gains that arose in the period 1 December 2020 - 31 December 2020		
(a) Enter amount of net gain to be charged at 33%	, , .00	, , .00
(b) Enter amount of net gain to be charged at 40% (excluding Foreign Life Policies)	, , .00	, , .00
(c) Enter amount of net gain on Foreign Life Policies to be charged at 40%	, , .00	, , .00
(d) Enter amount of net gain on disposal of chargeable business asset(s) by a relevant individual to be charged at 10% under S. 597AA	, , .00	, , .00
(e) Enter amount of net gain in respect of Venture Fund Capital to be charged at 15%	, , .00	, , .00
(f) (i) Enter amount of net gain in respect of a disposal of land under Compulsory Purchase Order (CPO) which has accrued in 2020 by virtue of S. 542(1)(d)	, , .00	, , .00
(ii) Date of disposal	DD/MM/YYYY	DD/MM/YYYY

Double Taxation Relief

821. If you wish to claim relief for foreign tax in respect of a disposal that gives rise to a liability to capital gains tax shown above, provide the following information in respect of each such foreign disposal

Country	Amount of gain	Amount of foreign tax for which relief is now claimed
	, , .00	, , .
	, , .00	, , .

M - CHARGEABLE ASSETS ACQUIRED IN 2020

822. Enter the number of assets acquired and the consideration given

Description of Assets	Number of Assets: Self	Number of Assets: Spouse or Civil Partner	Self Consideration	Spouse or Civil Partner Consideration
(a) Shares (quoted and unquoted)			, , .00	, , .00
(b) Residential Premises			, , .00	, , .00
(c) Commercial Premises			, , .00	, , .00
(d) Agricultural Land			, , .00	, , .00
(e) Development Land			, , .00	, , .00
(f) Business Assets			, , .00	, , .00
(g) Antiques / Works of Art			, , .00	, , .00
(h) Other			, , .00	, , .00

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Online Inland Revenue Affidavit (CA.24): One Year On[1]

2020 – New Form SA2 Introduced

September 2020 saw a change to probate practice, with the move to e-filing for part of the application process. From 14 September 2020 new probate applications are no longer made using the paper Inland Revenue Affidavit (Form CA24), which has been replaced by the online Statement of Affairs (Probate) (SA2) for deaths occurring on or after 5 December 2001. The SA2 is submitted directly to the Revenue through myAccount if an application is made by a personal applicant or through Revenue Online Service (ROS) if the application is made by a solicitor. Probate applications for deaths before 5 December 2001 will still require the submission of the CA24 with the probate application. When the SA2 is completed and submitted electronically, a Notice of Acknowledgement is generated and submitted with the application to the Probate Office.

The main aim of the SA2 is to reduce error rates and thereby speed up the probate application process. In the online format, Revenue can

1 See article by Mark Bradshaw "Development of an Online Inland Revenue Affidavit (CA.24)", *Irish Tax Review*, 3/2(2020).

ensure that questions are answered in the first place, before moving on to the next section of the SA2, and that information is filled out correctly. Before this, the CA24 allowed for questions to be skipped or not answered correctly, and this in itself led to a large number of errors, slowing down the process in general and leading to a possible rejection of the CA24 by the Probate Office.

Additional Requirements Introduced

The SA2 includes some additional questions that were not on the CA24, e.g. information on charitable bequests and additional questions on property to establish all of the assets and how they are owned. However, the questions are mainly very similar to the CA24. In relation to beneficiaries, the SA2 asks for details where the current benefit exceeds €12,000. The CA24 sought details where the benefit was over €16,750. Now beneficiaries must also provide their domicile and date of birth. Initially, the SA2 required beneficiaries to list all gifts and inheritance taken on or after 5 December 1991 regardless of whom that gift or inheritance came from. Following lobbying from the Law Society of Ireland, Revenue agreed from 20 November 2021 disclosure of non-aggregable benefits (i.e. outside of the relevant group threshold in that case) is no longer compulsory in the online form.

Personal representative(s) no longer swear the contents of the SA2 to be true; however, you can generate a statement and ask the personal representative(s) to sign this to confirm their agreement that the information is correct before you submit on their behalf. The oath and original will (if applicable) still need to be sworn and exhibited in the usual way.

Interaction with Department of Social Protection

The SA2 is linked directly to the Department of Social Protection database, which allows for verification of data that is updated daily, including dates of death and PPSNs. When inputting beneficiary details on the SA2, a tick box is available to say “PPSN not available” for one beneficiary only. This prevents delays where a beneficiary does not have a PPSN. Where an estate has multiple beneficiaries without PPSNs, it is possible to write to Revenue to explain the circumstances and provide an undertaking not to distribute estate assets to these beneficiaries until they provide their PPSNs.

Impact of Introduction of Form SA2

The SA2 is now one year into its existence, and overall the changes are welcome, although some teething problems remain.

A year down the line, whether the SA2 is having the desired effect of speeding up probate applications remains to be seen. Although filling out and submitting the SA2 online may be quicker, it requires more information to be provided by the personal representative(s) of an estate and beneficiaries than previously. One example is the requirement to confirm a beneficiary’s domicile status, which can be difficult to determine for beneficiaries residing abroad and it is not within the power of the personal representative(s) to determine this. However, Revenue have already demonstrated their willingness to take onboard feedback from practitioners as evidenced above regarding disclosure of prior benefits. The SA2 was launched against the backdrop of the pandemic, which in itself created an additional workload and, with personnel working from home, caused the wait time for grants of representation to increase. However, it is hoped that this coming year, without Covid-19 restrictions causing additional logistical delays, the efficiency benefits promised with the introduction of the SA2 may come to fruition.

Kieran Binchy
Barrister-at-Law

Perrigo and the €1.6 Billion Assessment

Introduction

The High Court delivered its judgment[1] on 4 November 2020 in the challenge by Perrigo Pharma International DAC ("Perrigo") against an amended assessment to corporation tax for 2013 in the sum of €1,636,047,645, reported to be the largest ever assessment issued by Revenue. The Court in its judgment upheld the legality of the amended assessment. It has subsequently been widely reported that a separate appeal before the Tax Appeals Commission (TAC) of the assessed liability has been settled.[2]

Background

In 2013 Perrigo sold to another company, Biogen, its remaining 50% interest in the intellectual property (IP) relating to a pharmaceutical product sold under the brand name Tysabri, used to treat multiple sclerosis and Crohn's disease. The nature and treatment of this "IP disposal" was at issue in both proceedings.

In its relevant corporation tax returns, Perrigo treated the IP disposal as a part of its trade, attracting tax at the 12.5% rate applicable to

1 *Perrigo Pharma International DAC v McNamara* [2020] IEHC 552.

2 See e.g. https://www.irishtimes.com/business/health-pharma/perrigo-agrees-300m-settlement-of-1-64bn-tax-assessment-1.4687034.

trading transactions under s21(1) of the Taxes Consolidation Act 1997 (TCA 1997). In issuing the amended assessment, Revenue treated it as a capital transaction, attracting tax at the effective rate of 33% under s78 of TCA 1997, giving rise to an assessed liability of more than €1.6bn.

Perrigo challenged the amended assessment on two fronts.[3] It appealed to the TAC on the basis that the amended assessment incorrectly characterised the transaction, being the disposal of the Tysabri IP, as being a capital transaction rather than a disposal made in the course of its trade.[4] It separately challenged by way of judicial review in the High Court the legality of the raising of the amended assessment, on grounds, among others, that the assessment was raised in breach of Perrigo's legitimate expectation that Revenue would treat the transaction as a disposal made in the course of its trade. On the basis of the value of the amended assessment, the application for judicial review was heard in the Commercial Court, by McDonald J.

Grounds of Challenge

The grounds on which the assessment was challenged were that the amended assessment raised by Revenue was:

- in breach of Perrigo's legitimate expectations and/or
- so unfair as to amount to an abuse of process and/or
- an unjust attack on its constitutionally protected property rights.

The bulk of what is a lengthy and detailed judgment addresses the legitimate expectation claim, itself based on four separate categories of representation purported to have been made by Revenue to Perrigo. The essence of Perrigo's claim was that it had a legally enforceable legitimate expectation that Revenue would treat the IP disposal as arising by way of trade, rather than as a capital transaction.

Legitimate Expectation: The Legal Principles

The Court began by summarising the existing law on legitimate expectation. Relying on the judgment of Fennelly J in the Supreme Court in *Glencar Exploration plc v Mayo County Council (No. 2)*,[5] the Court noted that there are three criteria essential to legitimate expectation, being (1) the public authority must make a statement or representation as to how it will act in respect of an identifiable area of its activity; (2) that representation must be addressed or conveyed to an identifiable person or group, to give rise to a transaction or relationship or an action in reliance on the representation; and (3) the representation must be such as to create a reasonable expectation that the public authority would abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.

The Court then noted that, even if the above three criteria are met, there are further factors that could weigh against a legitimate expectation arising, as per *Wiley v The Revenue Commissioners*.[6] The High Court had held in *Wiley* that where an applicant was aware that he or she did not come within the ambit of a relevant statutory provision, there could be no legitimate expectation; the Supreme Court had agreed, and had added that an applicant could not use legitimate expectation to obtain a remedy that would

3 This is in line with the distinction, set out in *Kenny Lee v Revenue Commissioners* [2021] IECA 18, between challenging the legality of an assessment and appealing the quantum of the statutory charge to tax, as analysed by Tomás Bailey and Rachel O'Sullivan, "*Lee v Revenue Commissioners*: Mapping the TAC's Jurisdiction", *Irish Tax Review*, 34/1 (2021).

4 Although appeals to the TAC are generally held in private, the tax appeal is referenced at paragraph 3 of the High Court judgment, and as per note 2 above, Perrigo has subsequently informed the markets that the tax appeal has settled.

5 *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 IR 84.

6 *Wiley v The Revenue Commissioners* [1994] 2 IR 160.

involve a statutory authority's carrying out an activity that the authority was not empowered to carry out.

The Court further noted that it remains unresolved whether legitimate expectation could give rise to a substantive remedy or it is confined to procedural remedies. Counsel for Perrigo, the Court noted, argued that it would make no difference: Perrigo's claim was that, at the very least, it had a legitimate expectation (a) that Revenue would not retrospectively treat an IP disposal as anything but a trade and (b) that if it were considering making such a decision prospectively, Revenue would give Perrigo adequate notice to allow it to organise its corporate affairs accordingly.

The Alleged Representations

An expectation of one party necessarily arises from a representation of the other party. Perrigo sought to rely on four categories of representation for the purposes of the legitimate expectation claim:

- a certificate issued by the Minister for Finance;
- a tax briefing document, *Tax Briefing*, Issue 57;
- the conduct of the parties, including the returns made by Perrigo, the accounts and tax computations supplied to Revenue by Perrigo, and the assessments issued by Revenue on the basis of those returns, accounts and computations; and
- the combined effect of each of the three above factors.

The Court indicated that it would first consider whether the three preconditions identified by Fennelly J in *Glencar* were present by reference to each of those four categories of representation. It was only if they were present in one of the four categories that the Court would then have to consider the other possible limitations (such as lack of statutory authority or unavailability of a substantive remedy).

The Shannon Certificate

On 20 February 2002 the Minister for Finance had issued a certificate ("the Shannon Certificate") to Perrigo, which was at the time called Elan Pharma International Ltd. ("EPIL"). Perrigo contended that, under the certificate, IP disposals by it were treated as part of its trade, and that therefore the certificate was a representation by the Minister and by Revenue (which was involved in its issue) that such activities would be regarded by Revenue as being in the nature of a trade. Revenue contended that the certificate merely stated that as long as trading activity was carried out, the trading activity would attract the relevant tax rate, without addressing whether the activity itself was actually a trading activity.

The Shannon Certificate arose as follows. In 1980 a 10% tax rate was introduced for manufacturing. At a time when the corporation tax rate ranged from 45% to 36%, the 10% rate was extended to cover service activities carried on by companies in the IFSC and Shannon Airport. For the latter, if the Minister formed the opinion that the trading activity contributed to the use or development of the airport, the Minister was empowered to certify that those activities were "relevant trading operations" for the purposes of s39A of the Finance Act 1980, later re-enacted as s445 TCA 1997. Those trading operations would then be deemed by s445(9) TCA 1997 to constitute the manufacture of goods in the State and would be subject to the 10% rate of corporation tax applicable to manufacturing operations.

The High Court judge considered in detail the terms of the certificate itself, the relevant provisions of s445 TCA 1997 and the nature of the application for the grant of the certificate.

The certificate stated:

> "2. The trading operations of the Company to which the certificate refers are:
> **(A) Intellectual Property Rights Management:**
> Acquiring, holding, exploiting, dealing in and disposing of any franchise,

> licence and intellectual property right including without limitation any patent, trademark, copyright (including design copyrights, performing right, marketing right, production right, lending right, industrial design right and plant breeders right) whether by means of licensing, sub-licensing, distribution research and development or similar arrangement or agreement".

Perrigo contended that it always understood the certificate to include IP disposal as one of the relevant trading operations. The judge found, however, that the document must be construed objectively. His conclusion was that, looked at objectively, the wording of the certificate did not extend to outright disposals and was limited to partial disposals by way of licensing, sub-licensing or similar arrangements.

The judge also looked in depth at the legal and factual context in which the certificate was issued. He examined the final proviso in the certificate itself, which stated:

> "Any income arising from the operations referred to above is chargeable to tax under Case 1 of Schedule D as part of the Company's trading income. [The question of whether the Company is trading and if so whether any of its particular operations are trading operations and therefore chargeable to tax under Case 1 of Schedule D is primarily one of fact to be determined after the events in question have taken place]."

The Court analysed in detail the statutory background of s445 and the case law on whether an activity was a trade or a capital transaction. It decided that s445 did not seek to amend the law in relation to what constitutes trading for tax purposes.

The Court also considered the application made by Perrigo for the certificate and noted that the formal application document itself referred to the exploitation of IP by way of **licensing or sub-licensing**, not by way of outright **disposal**, as did the further communications between EPIL and the Minister and Revenue.

The Court concluded that (1) the Shannon Certificate covered licensing and similar arrangements, but not outright disposals; and (2) even if had covered disposals, neither the correspondence nor the certificate itself stated that the activities in question constitute "trading" activities for tax purposes, but rather stated that as long as a **trade** of the type specified in the certificate was carried out, that trade would be subject to the 10% tax rate. It guaranteed treatment of a specific type of trade, but without prejudice to the question of whether any particular transaction or series of transactions constituted a trade.

The Court concluded that Perrigo had failed, in regard to the Shannon Certificate, to establish the necessary representation that Revenue or the Minister would treat an outright disposal as a trade, and that therefore the claim on the basis of the certificate must fail.

Tax Briefing, Issue 57

As the Shannon scheme, along with the IFSC scheme, was approaching expiry on 31 December 2005, with the consequent expiry of the 10% tax rate, affected companies (and tax practitioners) had sought clarity and assurances from Revenue in relation to how their profits from their trading activities would be taxed. After meetings between senior representatives of Revenue, including the then Chairperson, and the Heads of Tax or senior tax partners of the four largest accountancy firms in Ireland (including EPIL's tax advisers), *Tax Briefing*, Issue 57[7] ("TB 57"), was issued by Revenue, stating that the recently introduced corporation tax rate of 12.5% would apply to the relevant trading activities (in both Shannon and the IFSC – in the interests of brevity, only Shannon is referred to below).

7 *Tax Briefing*, Issue 57, October 2004.

Perrigo claimed that, in filing its tax returns, it relied on TB 57, and in particular on the statement in TB 57 that relevant Shannon trading activities "will qualify for the 12.5% tax rate".

The judge noted that TB 57 itself states that, for the purposes of s3(1) TCA 1997, "trade" is not defined but takes its "generally accepted meaning". TB 57 sets out how advance opinions can be sought and expressions of doubt can be made. He found that TB 57 clearly stated that the Shannon certificate "applies only to income arising from trading activities", rather than stating that all activities of a company in the Shannon regime constitute trading activities. TB 57 then clearly states that only those trading activities meeting the requirements of the Shannon scheme would qualify for the 12.5% rate, with a further proviso that in any situation the question of whether a trade is being carried on is to be determined by an examination of the facts and the application of the badges of trade and of the case law. The judge further noted that even if there had been a representation that the same activities covered by the Shannon Certificate would be considered to be a trade, the certificate covered only licensing and sub-licensing but not outright disposals. He therefore concluded that in this second category there was no representation made that could give rise to a legitimate expectation and that the claim based on the *Tax Briefing* must fail.

The course of dealings

The third category of alleged representation comprised the interactions between Revenue and Perrigo (when known as EPIL) over a long period of years during which, Perrigo now alleges, it made returns accompanied by financial statements that clearly showed that IP disposals were being treated by EPIL as part of its trade, without this ever being questioned by Revenue. The case made by Perrigo was that at all times EPIL accounted for tax at the 10% or 12.5% rate on its trading activity including IP disposals, and that Revenue never raised an issue or concern in relation to this, even when EPIL came within the ambit of Revenue's Large Cases Division (LCD).

To address this aspect of the claim, the Court analysed in detail Part 41 (for taxable periods to 1 January 2013) and Part 41A (for subsequent periods) of TCA 1997, setting out how, under both regimes, returns are filed by the chargeable person, assessments or self-assessments are then made, and amended assessments can be made by Revenue within certain time limits. Perrigo put considerable emphasis on an article[8] in *Irish Tax Review*, published on behalf of Revenue, and on meetings between EPIL's tax representatives and members of the LCD.

Perrigo relied in particular on the financial statements and tax computations submitted with its tax returns, in which, it claimed, it had treated its IP as trading stock or circulating capital. The fact that all disposals of IP were included for Schedule D, Case I, trading profit/loss was obvious, it claimed, from the fact that no adjustment was made to the operating profit in the tax computations for acquisitions, amortisation, impairments or disposals of IP. Revenue submitted in reply that, as part of the self-assessment regime that applied, the corporation tax returns of EPIL were processed by Revenue in a "non-judgmental manner". Revenue stated on a factual basis it never closely examined the returns and assessments as the company was, for most of the relevant period, loss making. Revenue further contended that Perrigo's argument, if allowed to succeed, would undermine the operation of the self-assessment tax regime as provided for by the Oireachtas, which is predicated on returns being filed by the taxpayer, and assessments issuing on the basis of those returns, with Revenue retaining a statutory right to subsequently amend the assessments. If the issuing of an assessment following the making of a return could give rise to a legitimate expectation, it argued, no

8 Sean Moriarty, "Revenue's Large Case Division", *Irish Tax Review*, 17/1 (2004).

amended assessments could ever issue, which clearly contradicts the statutory scheme.

The Court reviewed the statutory scheme for the assessment of tax under Parts 41 and 41A, emphasising the self-assessment element, and reviewed the returns and financial statements filed by EPIL. The Court concluded that, on the evidence presented, it could not positively find that Revenue must have known that IP was treated as stock in trade. The Court also reviewed the contents of the *Irish Tax Review* article and concluded that it did not assist Perrigo's case, as no indication was given in the article that Revenue would not make an amended assessment even where it had a good, cooperative relationship with a taxpayer – on the contrary, it clearly indicated that audits were likely to arise.

In relation to the statutory scheme, the Court concluded that the reality is that every compliant taxpayer faces the prospect of their return being re-opened and re-examined by an Inspector of Taxes within the four-year period – for example, by the opening of an audit.

Against that backdrop, the judge stated that he failed to see how Perrigo could plausibly suggest that the non-objection by Revenue in the past can give rise to an implied representation that thereafter the ongoing transactions of the company would not be subject to scrutiny or the possibility of adverse assessment by Revenue using its statutory powers. A failure to object to tax returns did not amount to a representation.

The Court therefore concluded, in relation to the history of dealings, that Perrigo had failed to establish anything that would give rise to a representation that Revenue would not revisit the tax treatment of any individual IP disposal, and in particular the Tysabri IP disposal. Again, the legitimate expectation claim must fail, without even considering the other two *Glencar* preconditions.

All three categories combined

The Court found that in light of its view that no representation had been made in each of the three categories, it could not be suggested that a combination of them gave rise to a legitimate expectation.

Other Grounds

Perrigo sought to rely as an alternative on *R v Inland Revenue Commissioners, ex parte Unilever plc*[9] and *Keogh v Criminal Assets Bureau*[10] to argue that the conduct of Revenue amounted to an abuse of power. In the absence of a course of dealings, the Court distinguished the present case from *Unilever*, and in the absence of a procedural unfairness, it distinguished it from *Keogh v CAB*. Given that the constitutional claim briefly put forward by Perrigo was dependent on the same material considered for the legitimate expectation claim, that constitutional claim was also dismissed by the Court.

Conclusion

The Court concluded that Perrigo had failed to establish any legal basis for the Court to interfere with the assessment raised. It stressed that the question of whether the disposal of the Tysabri IP constituted a trading or a capital transaction is a matter to be resolved before the TAC. Such a resolution will not be forthcoming, as Perrigo and Revenue have settled that appeal for a sum of slightly less than €300m.

Analysis

In order to succeed, a legitimate expectation claimant must establish a representation made by a public authority, reliance on that representation and the creation of a legitimate expectation such that it would be unjust to allow the public authority to resile from its representation. Even then, there are further limiting factors to be considered, such as the extent to which a public authority

9 *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681.

10 *Keogh v Criminal Assets Bureau* [2004] 2 IR 159.

can bind itself to do something outside its statutory power. In *Perrigo* it is noteworthy that the legitimate expectation claim failed to clear even the first hurdle of establishing a relevant representation: the Court never considered reliance, the creation of an expectation or limiting factors because it failed to be satisfied that the Shannon Certificate, the *Tax Briefing* or the course of historical dealings between the parties, individually or together, amounted to a representation.

Of particular note is the Court's analysis of the self-assessing character of the tax regime. A taxpayer who has treated their affairs on the basis of a certain understanding, filed returns on that basis, paid tax on that basis and organised their financial affairs on that basis, will always feel aggrieved by Revenue's raising an amended assessment on a revised and contrary basis. While such a grievance is understandable, it is not one for which a Court remedy is readily available. What this recent decision of the High Court makes clear, in the authors' view, is that while a taxpayer may have an expectation that the basis on which they have always been assessed by the Revenue Commissioners will be the basis on which they will be assessed in the future, it is not necessarily a legitimate expectation in the legal sense.


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After *Uber*, Are We Any Clearer About What It All Means?

Introduction

On the face of it, whether you are an employee or self-employed may seem straightforward, but in reality, the question (and the implications of that) are often not that simple!

The *Uber* case (*Uber BV and others v Aslam and others* [2021] UKSC 5) saw the UK Supreme Court uphold the Uber drivers' claims that they were entitled to workers' statutory rights, including the right to the national minimum wage, paid annual leave and other workers' rights.

With news of this decision, perhaps alarm bells have started to sound on this side of the water too, and although it is timely to review the employment status of personnel, we should be mindful that, unlike current Irish employment law, UK law recognises three categories of individuals for statutory employment law purposes: employees, workers and self-employed individuals.

Will Ireland go down a similar road and adopt a "worker" status? If so, what would that mean and what might be the impact?

What About Cases Before the Irish Courts?

The issue has, of course, been topical in Ireland for a number of years, and in late December 2019 the Irish High Court for the first time delivered its own verdict on employment status in the "gig economy" – *Karshan (Midlands) Limited (t/a Dominos Pizza) v Revenue Commissioners* [2019] IEHC 894[1]. The Tax Appeals Commission (TAC) had previously determined that Domino's delivery drivers were employees and not self-employed contractors. This decision was upheld by the High Court. The concepts taken into account in the judgment have been well documented – (1) mutuality of obligations, (2) substitution, (3) integration and (4) contractual terms – but the key take-away (excuse the pun!) from the judgment is that the determination of employment status is not a "one-size-fits-all" answer, and it will need to be determined by application of the concepts to the particular set of circumstances under consideration in each case.

To quote from the High Court decision:

> "In truth, there is no comprehensive statutory or common law definition of a 'contract for services' or 'contract of service' even though those terms are regularly used. Those adjudicating at first instance, whether a commissioner or court, may be tempted to adopt a box-ticking exercise when considering if an appellant or claimant is an employee or not. In fact, classification needs a careful and flexible understanding of relationships."

Is Legislation Needed? And What Might That Look Like?

Although some efforts have been made to bring in legislation to address "disguised employment", or "bogus self-employment", and to protect and improve working conditions, to date these have not come to fruition.

In May 2021 the Protection of Employment (Platform Workers and Bogus Self-Employment) Bill 2021 was initiated as a Private Member's Bill. At the time of writing, the Bill has not progressed beyond the Seanad Second Stage, where the general principles of the bill are debated.

The Explanatory Memorandum to the Bill refers to the fact that it is not always obvious whether an individual is an employee or an independent contractor and that the "gig economy" is leading to increased casualisation of work, with both social security and employment law ramifications. Also noted is a "common misconception" that parties freely choose whether to provide services as employees or self-employed. It further states that the basic underlying consideration, in both Irish and EU law on the issue, is whether the person performing the work does so "as a person in business on their own account".

The express purpose of the Bill is to provide legislation to eliminate misconceptions and provide clarity – not to bring genuinely self-employed individuals into the employee framework. The stated intention of the Bill is to have application in the areas of tax, social welfare and social insurance, and in its current form it provides for a presumption of employment status (i.e. where the employment status is to be determined, it is to be presumed that an individual is an employee until the contrary is shown).

1 See article by Pat O'Brien "Delivered to Your Door: The Dominos Pizza Case and Employment Status" *Irish Tax Review* 33/2 (2020).

The Bill provides that:

- where the form and substance of any agreement between parties are inconsistent, regard must be had to the substance;
- any agreement, action or arrangement purporting to define the status is not conclusive; and
- any perceived advantage or disadvantage to a party or parties arising from the determination, in relation to liability to tax or to social insurance contributions, or the applicability of employment protection laws must be disregarded save to the extent that it may provide a motive for misrepresenting the nature of the agreement.

Although legislating on the issue might be envisaged as a solution that would provide the desired clarity, the question remains of whether, if enacted, this legislation (or, indeed, any) would really provide certainty from an employment law, tax and social protection standpoint, and in all types of scenarios.

What Is the Social Protection View?

Having undertaken an examination of the issue, the Joint Committee on Social Protection, Community and Rural Development, and the Islands published its report in June 2021 on the issue of "bogus Self-Employment" (33/SPCRDI/02/2021). The Committee acknowledged that both the extent and the cost of bogus self-employment in Ireland are largely unknown, but it focussed on three key aspects:

- Scope Section determinations and the remit of the section,
- the current legal position of employees in Irish employment law and
- anti-victimisation and current deterrents.

The Committee made 13 recommendations, including that:

- the Code of Practice on determining employment or self-employment status of individuals and the use of intermediary arrangements, which includes personal service companies and managed service companies, is updated and placed on a statutory footing by the end of 2021;
- the updated Code of Practice would acknowledge and could be applied to workers engaged in platform working and the gig economy;
- a dedicated and appropriately resourced employment status unit is established in the Workplace Relations Commission to examine and provide determinations on employment status cases regardless of whether they relate to social insurance, employment rights or tax obligations;
- relevant departments, including Revenue, develop targets for and carry out inspections to ensure compliance;
- the period for employers to pay backdated PRSI is increased from six months to six years; and
- where a legislative change is required (e.g. employment, anti-victimisation and blacklisting, Workplace Relations Act), this would be enacted in a timely manner.

The final recommendation was that the Department of Social Protection respond to the recommendations in the report in the first instance and keep the Committee apprised of progress on an annual basis thereafter.

Code of Practice on Determining Employment Status

After the Joint Committee's report, the latest Code of Practice on Determining Employment Status was released in July 2021. This Code has been updated by an interdepartmental working group comprising the Department of Social Protection, the Office of the Revenue Commissioners and the Workplace Relations Commission (WRC). It is noted that the Code is intended to be a "living document" that will continue to be updated to reflect relevant changes in the labour market, legislation and case law. In line with the Joint Committee's recommendation, it is proposed to place the

Code on a statutory footing, with legislation to be brought forward this year.

The Code notes that its purpose is to provide a clear understanding of employment status, taking into account current labour market practices and developments in legislation and case law. It aims to be of benefit to employers, employees, independent contractors, and legal, financial and HR professionals. It is also aimed at investigators, decision-makers and adjudicators in the Department of Social Protection, the Office of the Revenue Commissioners, the WRC, their respective appeals bodies and the courts.

The Code acknowledges that there is no single, clear legal definition of the terms "employed" or "self-employed" in Irish or EU law. It states that both the written or oral contract and the reality behind the contract must be taken into consideration.

Typical characteristics of both employment and self-employment are described in the Code (with some minor changes from the previous version), and additional detail is provided on the five key factors or "legal tests" to be considered: mutuality of obligation, substitution, the enterprise test, integration and control.

The Code highlights the binary distinction between employee status and self-employed status, suggesting that it is not anticipated that Ireland, unlike some other jurisdictions, will start to recognise a "worker" category of employment status. It also states that the Department has established a dedicated team of Social Welfare Inspectors to investigate employment arrangements across all sectors. Where misclassification occurs, going further than the Joint Committee recommendation, the Code states that PRSI and tax must be paid for the full period concerned. Without a time limit on the amount of retrospective PRSI or tax that may be due, any amounts owed due to misclassification could really add up!

On the fundamental issue of determination of employment status, however, the Code has, understandably, not provided us with the holy grail but, rather, confirms that the concept of "case-by-case" analysis must continue. The Code highlights that none of the factors is determinative on its own and that, when making a determination on the correct employment status, it is necessary to take all of them into account and to weigh them up in a rounded way. Getting a specific mention are workers in the digital/gig/platform economies, where "each case must be considered in the round and entirely on its own merits".

Is There an Answer at EU Level?

If we were in any doubt, the *Uber* case tells us that we are not alone in trying to grapple with these new working relationships. At EU level, in September this year the European Parliament Committee on Employment and Social Affairs adopted a resolution on Fair working conditions, rights and social protection for platform workers – new forms of employment linked to digital development (2019/2186(INI)).

The resolution notes that people working in the platform economy are generally classified as formally self-employed, and as such, they do not benefit from the equivalent social protection, labour rights, and health and safety protection that are connected to an employment contract in most countries. The blurred distinction between workers and the self-employed that is often seen in platform work causes uncertainty as regards their rights and entitlements and the applicable rules. Digital labour platforms globally generated revenue of at least $52bn in 2019,[2] and it is acknowledged that more and more sectors are likely to be impacted by this in the future.

As Member States have developed different approaches, leading to fragmented rules and initiatives and negative effects for workers, companies and consumers, it is acknowledged that there is a need for a legislative initiative at

2 International Labour Organization, *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (Geneva: ILO, 2021), p. 20.

European level to overcome the resulting legal uncertainty and improve platform workers' rights. It is recognised, too, that there needs to be a level playing field with traditional economic parties, with consideration of the fact that many platforms are not based in the country where the activities are performed.

The concept of a third category of worker is also considered in the resolution, with the European Parliament favouring a binary approach so as not to further blur "already confused concepts" or further distort competition between digital platforms and traditional companies, but also in order to be compatible with national classifications.

The resolution sets out that the European Parliament's view is that there should be a European framework (based on a comprehensive impact assessment and consultation with the relevant actors) that safeguards platform work that offers decent working conditions while tackling precarious forms of platform work, and which could be complemented by national legislation or collective bargaining agreements. It stresses that any EU legislative initiative should promote innovation, the creation of new business models, cooperatives, start-ups and SMEs, as well as decent jobs, and emphasises that the opportunities and flexible working arrangements provided by digital labour platforms should remain possible, provided they are not detrimental to social protection and workers' rights.

It is claimed that the issue of legal uncertainty must be urgently addressed and must recognise what it terms the "heterogeneity of platforms and platform workers". The resolution includes a proposal to introduce a rebuttable presumption of an employment relationship for platform workers, in accordance with national definitions as set out in Member States' respective legislation or collective agreements, such that whenever platform workers dispute the classification of their employment status in legal proceedings, it is for the party who is claimed to be the employer to prove that there is no employment relationship.

The resolution stresses the need to better combat bogus self-employment by means of a Directive, to cover platform workers who fulfil the conditions characteristic of an employment relationship based on the actual performance of work, and not on the parties' description of the relationship. In addition, the view is taken that workers on digital labour platforms should have the same rights and the same access to social protection, on an equal basis, as non-platform workers of the same category and stresses that any Regulation must respect the principles of solidarity and the different approaches of Member States.

In addition to concerns around employment rights and social protection, the resolution comments in relation to potentially increased health and safety risks for platform workers, training and skills, and data management.

The resolution refers to the Commission's intention to present a proposal for a legislative initiative to improve the working conditions of platform workers by the end of 2021 and calls on both the Commission and Member States to carry out various tasks to promote the appropriate protection of platform workers' rights and well-being.

Although the UK is no longer part of the EU, we should also be mindful of what has been happening there in this space. As noted above, the concept of a "worker" category has been established for statutory employment law purposes. In addition, on the tax side, from 6 April 2021 new rules have been introduced whereby the responsibility for deciding the employment status of workers has been placed on the shoulders of "clients" (being the organisation receiving a worker's service). Although currently applying to all public sector clients and "large" private sector clients, the rules, often referred to as IR35, dictate that, if applicable, income tax and employee National Insurance Contributions must be deducted by the client from fees and paid to HMRC. In addition, employer National Insurance Contributions and Apprenticeship Levy, if applicable, must be paid by the person/organisation who pays the worker's intermediary. In essence, the rules can mean that the end-user of the worker's services, which are often provided through "one-person" service companies, would be responsible for withholding tax and social security from the fees it pays to the intermediary or services/ limited company.

Where Does This Leave Us Now?

It is widely recognised that the employment landscape has been changing and that it will continue to evolve.

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The Principal Non-Tax Legal Issues Pertaining to Share Schemes

Introduction

Employer companies increasingly encounter an expectation on the part of target hires of a share incentive to form part of the compensation offer. Long established as an essential element of executive compensation, the offer of a potential ownership stake to employees at different levels across a business has become a key employer tool in the battle to secure and retain top talent. Effective use of this tool means that the share scheme solution will vary from company to company, and although tax treatment will be a significant factor in shaping that solution, there are a multitude of non-tax legal factors to consider. This article provides an overview of some of the principal non-tax legal issues that arise when advising on the establishment and operation of share schemes in Ireland by either a private company limited by shares ("private company") or a public limited company ("public company").

Can the Company Establish a Share Scheme or Grant/Settle an Award?

"Employees' share scheme"

Company law is the primary framework within which any share scheme will be established. As outlined below, certain exemptions to some of the company law restrictions on the ability of a company to establish and operate a share scheme depend on that scheme being an "employees' share scheme". The Companies Act 2014 (s64(1)) defines an employees' share scheme as:

> *"....any scheme, for the time being in force, in accordance with which a company encourages or facilitates the holding of shares in, or debentures of, the company or its holding company by or for the benefit of employees or former employees of the company or of any subsidiary of the company including any person who is or was a director holding a salaried employment or office in the company or any subsidiary of the company."*

It is important to note, therefore, that if a scheme permits non-employees (such as a consultant or non-executive director) to participate, there is risk that the scheme might not be an employees' share scheme.

Company capital

Whenever a company whose constitution states an authorised share capital proposes to allot new shares (pursuant to a share scheme or otherwise), it is necessary to check that there are sufficient unissued shares remaining in the authorised but unissued share capital of the company to meet such allotments. If not, it will be necessary for the company to pass an ordinary resolution (provided its constitution has not limited its power to do so) to increase the authorised share capital. If its constitution has limited its power to do so, the constitution will need to be amended by way of a special resolution before passing the necessary ordinary resolution.

Allotment of shares

For a company to make an allotment of new shares, it is necessary to check that the company's directors have the authority to do so. The Companies Act 2014 (s69(1)) provides that no shares may be allotted by a company unless the allotment is authorised, either specifically or pursuant to a general authority, by ordinary resolution or by the constitution of the company. Where an existing authority stipulates a period during which allotment may occur (optional in the case of a private company; required in the case of a public company), the allotment of new shares will require a fresh authority if it is to take place after the end of that period (unless in respect of a pre-existing public company right). In the case of a public company however, shares allotted in pursuance of an employees' share scheme fall outside this restriction on allotment, and no related authorisation is required. Accordingly, the directors of a public company are not restricted by this provision of the Companies Act 2014 from allotting new shares to employees under an employees' share scheme, whether or not the public company is generally authorised to allot shares at that time.

Pre-emption

It is necessary to check whether pre-emption rights apply. The default position under the Companies Act 2014 is the application of pre-emption rights, meaning that new shares cannot be offered to a third party without the shares first having been offered to existing company shareholders. However, pre-emption rights do not apply to allotments of new shares to the extent that the constitution, a special resolution or the terms of issue of already allotted shares so provide. In addition, pre-emption rights do not apply to shares allotted in pursuance of an employees' share scheme.

Financial assistance for the acquisition of shares

The Companies Act 2014 (s82) provides that it shall not be lawful for a company to give any financial assistance (directly or indirectly or by means of a loan or guarantee, the provision of security or otherwise) for the purpose of an acquisition made or to be made by any person of any shares in the company or, where the company is a subsidiary, in its holding company. The consequences of providing unlawful financial assistance can be severe, and if committed by a company, each of the company's officers in default is liable to imprisonment or a fine, or both.

There are a number of exceptions to the prohibition, however, including (s82(6)(f)) the provision by a company, in accordance with any scheme, of money for the purchase of, or subscription for, fully paid shares in the company (or its holding company) to be held by or for the benefit of employees or former employees (including executive directors) of the company (or its subsidiary). To avoid any issues regarding whether a share scheme comes within this exemption, it is preferable that the share scheme be a scheme in the sense of an arrangement that is clearly defined and that has been approved by a resolution of the board of directors. In the case of a public company, its net assets must also not be reduced as a result of providing the financial assistance under this exemption.

Exemptions also exist (s82(6)(o)) in connection with providing financial assistance for the acquisition of shares in a holding company on behalf of present or former employees or an employees' share scheme; and in respect of the provision of loans to employees (other than directors) for the purpose of acquiring fully paid shares. In the case of a private company, it would also be possible for it to establish and provide financial assistance (other than to acquire shares in its parent public company) in connection with a share scheme where this has been approved by its shareholders. Particular care should be taken to ensure that no financial assistance issues arise where it is proposed to make awards to non-employees.

What Are the Directors' Responsibilities?

Directors' duties

When exercising any of the powers of a company entrusted to them under the constitution, the directors of the company are required to act in good faith in what they consider to be the interests of the company. This applies just as strongly to the adoption of a share scheme as it does to anything else they might do in the name of the company. Ordinarily, what constitutes the interests of a company will be a subjective test, and the courts will not look behind what a director determines to be in its interests unless there is some evidence of mala fides. The Companies Act 2014 (s228(f)) also places a duty on each director to avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting.

A breach of duties can render a director liable to account to the company for any benefit accruing to the directors as a consequence and require the director to indemnify the company for any loss or damage resulting from that breach. In this regard, careful consideration should be given in advance whenever the directors of a company are considering a decision in regard to a share scheme involving a director of the company or a person connected to him or her.

Directors' resolutions

Unless its constitution provides otherwise, a director of a private company may vote in respect of any contract, appointment or arrangement in which he or she is interested and be counted in the quorum present at the meeting. In contrast and subject to certain exceptions, unless its constitution provides otherwise, a director of a public company may not vote in respect of any contract or arrangement in which the director has an interest and may not be counted in the quorum present at the meeting. Where a director is permitted to vote in respect of a contract in which he or she is interested, there is nevertheless a duty to have declared the nature of that interest at a meeting of the directors.

Is Shareholder Consent Required?

Shareholder consent

As a consequence of some of the statutory requirements referred to above, it may often be necessary to obtain shareholders' consent before the adoption of a share scheme. The need for shareholder consent can also arise under the provisions of a pre-existing shareholders' agreement, so it is also critical to review its terms, should one be in place between shareholders. In the case of public companies listed on a stock exchange, the stock exchange listing rules may also require that shareholders' consent be obtained.

Listing rules

The listing rules of Irish Stock Exchange plc, trading as Euronext Dublin, require that shareholders' consent be obtained before the establishment of any employee share scheme that may involve the issue of new shares or the transfer of treasury shares. In addition, shareholders' consent is required for any long-term incentive scheme in which one or more directors is eligible to participate (other than in the case of "all employee" schemes or an arrangement established specifically to facilitate, in unusual circumstances, the recruitment or retention of an individual director). Shareholders are also required to approve the grant of discretionary options over unissued shares if the exercise price is below the market value at the time of grant. Such consents must be obtained by way of a shareholders' resolution after a circular has been despatched to shareholders giving details of the proposed scheme.

Institutional guidelines

For many public companies listed on a stock exchange, the guidelines set out by institutional investor representative bodies will establish parameters within which their share schemes, in particular for executives, are shaped. The dominant guidelines for Irish listed companies are The Investment Association's Principles of Remuneration. Although they are not mandatory, companies with a large institutional shareholder base generally abide by them. For companies that are not listed, they also represent a useful guide to adopting a share scheme the terms of which shareholders are likely to regard as reasonable. The guidance in the Principles of Remuneration includes that executives' awards should: not vest any earlier than three years after the date of grant; in the case of options, not be exercisable more than ten years from the date of grant; vest only if performance conditions have been satisfied; in the case of a good leaver, vest only to the extent the service period has been completed, but subject to the achievement of relevant performance criteria; in the event of a change of control, vest depending on underlying financial performance and on a time pro rata basis; not be granted over more than 5% of the company's share capital in a rolling ten-year period; and be subject to malus (forfeiture or withholding all or part of an award before it has vested) and clawback (recovery of sums already paid) in certain circumstances.

What Are the Considerations in Establishing a Trust?

Trust

Where the operation of a share scheme requires the establishment of a trust or it is proposed that an employee benefit trust be established to facilitate the grant and settlement of awards (particularly relevant to public companies listed on a stock exchange that may not be able to dilute their share capital by issuing new shares and instead wish to fund an employee benefit trust to purchase shares on the market to satisfy awards under a share scheme), there are a number of considerations to take into account. Although any Revenue requirements and the tax treatment applicable to the trust's assets will likely drive a decision on where the trust will be resident, the settlor company will also need to make decisions around, in particular, who should act as trustee (a corporate trustee or a group of individual trustees) and how the trust is to be funded (e.g. by way of loan from the company). From a legal perspective, it is essential that the trust deed contains provisions giving the trustee(s) the powers necessary to deal with the trust's assets. It will also be necessary in the case of trusts established for the purposes of Revenue-approved schemes that the trust deed and associated rules reflect the requirements of the applicable tax legislation. Consideration is also required in the case of a public company listed on a stock exchange of whether the listing rules require establishment of the trust to be approved by way of shareholder resolution.

Trustee(s)

Once established, operation of the trust will be a matter for the trustees(s) (who may decide to take independent legal advice regarding its/their responsibilities), albeit in practice the company will make recommendations to the trustee(s) regarding the disposition of the trust assets in the context of the grant and settlement of share scheme awards. The trustee(s) will be subject to its/their own set of fiduciary duties and will at all times be required to act in the interest of the trust's beneficiaries.

Beneficial ownership

Note that the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021 (requiring information relating to the beneficial ownership of certain trusts to be submitted to the Central Register of Beneficial Ownership of Trusts) apply to express share scheme trusts established in Ireland other than those established in connection with a profit-sharing scheme or employee share ownership trust approved by Revenue and trusts for restricted shares (within the meaning of s128D of the Taxes Consolidation Act 1997).

What Considerations Impact the Employee or Award Holder Directly?

Employment law

Most companies establishing share schemes will want do so on the basis that the operation of the scheme is entirely within the discretion of the company, so that the allocation of shares to employees under the scheme may be terminated at any time. To minimise the risk of an entitlement to participate in a particular share scheme becoming a contractual right, therefore, it is advisable for employers not to refer to share schemes in offers of employment and in employment contracts. Clear language should also be included in share scheme rules and award agreements (and related materials) setting out that the scheme is discretionary and employees have no contractual right to participate in it, excluding liability for loss in the event of awards lapsing on termination, and to ground a robust defence against future employment law claims (for example, a claim that the value of the award forms part of remuneration in the context of an unfair dismissal claim).

Notwithstanding these steps, there will remain some risk that employees acquire implied rights in respect of a share scheme if the company has been operating it consistently in the same manner over a period of time. In operating a share scheme, a company should also keep in mind that part-time employees are entitled to be treated no less favourably than full-time employees and that fixed-term employees are entitled to be treated no less favourably than permanent employees. Care should also therefore be taken to ensure that part-time and fixed-term employees are not treated less favourably in the operation of the share scheme.

Data protection

The administration of share schemes will involve the processing of personal data of award recipients and, often, the transfer of personal data for that purpose either between group companies or to a trustee or a third-party service provider who is assisting the company with the administration of the share scheme. Therefore, it is important that share scheme documentation contains appropriate data protection provisions and that the EU General Data Protection Regulation's (Regulation (EU) 2016/679) transparency and other obligations are complied with. In many group company instances, this will include specific acknowledgement of the possible sharing of personal data outside of the European Economic Area and the related need to take supplementary data protection measures.

Valuation and market for the shares

In establishing a share scheme, a company will need to consider how awards are to be valued (in particular, for the tax consequences) and, importantly, how the employee or award holder will be able to achieve value. In the case of a public company listed on a stock exchange, it is possible for award holders at any particular time to ascertain the value of the relevant shares by reference to the prices on the official list of the stock exchange. In the case of a private company, there is no such facility, and valuing shares in this type of company can be quite complicated and costly for the company if required to be undertaken frequently. This, in addition to the lack of a market for the shares, can act as a barrier to the establishment of share schemes by private companies unless an initial public offering or a trade sale is anticipated. Where a future market for a private company's shares is not anticipated, a private company can establish an internal market for its shares. From the company's perspective, although it will want to ensure that the internal market operates so that employees get the best possible price for their shares in the circumstances, it cannot underwrite the share price without giving rise to further issues. Therefore, the operation of an internal market can be somewhat trial and error, with the potential for employees to be disappointed in circumstances where there are few, if any, internal purchasers of the shares and an anticipated price is not achieved in the internal market.

Market abuse

A public company listed on a stock exchange operating a share scheme must consider the impact of the EU Market Abuse Regulation (Regulation (EU) 596/2014) ("the MAR"), in particular when planning the timing of the grant of awards under a share scheme and settlement arrangements. Ordinarily, an employee of such a public company who is in possession of information that is not generally known but, if it were, would be likely to have a significant effect on the public company's share price may not deal in those shares. In addition, persons discharging managerial responsibility (PDMRs) are not permitted to conduct any transactions in shares on their own account, or for a third party, directly or indirectly, within a closed period (i.e. the period of 30 calendar days before the announcement of interim or year-end results). It is generally considered that this does not prevent a transaction happening automatically (e.g. automatic vesting) or pursuant to instructions issued by the PDMR before the start of the closed period (e.g. an irrevocable instruction in respect of sell-to-cover arrangements), however.

Disclosure

The MAR also includes requirements for PDMRs and persons closely associated with PDMRs of public company listed on a stock exchange to notify certain transactions in shares to the issuer public company and to the Central Bank promptly and no later than three business days after the date of the transaction. In addition, the regulations in Ireland giving effect to the EU Shareholder Rights Directive (Directive (EU) 2017/828) require a public company listed on a regulated stock exchange to prepare a "clear and understandable" remuneration report each year detailing its directors' remuneration (and to hold a vote on same). This must include details of the number of shares and share options granted or offered, and main conditions for exercise of rights, including exercise price and date, and any change thereof. These disclosure requirements are in addition to the disclosure obligations that can arise for a director or secretary of a company under s261 of the Companies Act 2014 in respect of a "disclosable interest" as a result of a share scheme award grant or settlement, and that are required pursuant to the Companies Act 2014 in respect of directors' remuneration in a company's annual financial statements.

What Documentation Will a Share Scheme Typically Require?

The rules

The principal document involved in a share scheme will be the scheme rules. This will either be a single document setting out the rules of the scheme (which may include provisions dealing with matters such as good and bad leaver treatment, the impact of corporate transactions, malus and clawback, tax withholding provisions, etc.) or, where a trust is involved, will include a trust deed together with a set of rules. For an international parent company share scheme, it may involve documenting a local sub-plan. Usually, where the share scheme involves only a set of rules, these rules are not executed or signed by any person but instead are tabled at a meeting of the directors of the company and are formally adopted by a resolution of the directors. Where the share scheme includes a trust deed, it will be necessary for the trust deed to be executed by all of the participating companies as well as the initial trustee(s). Before the execution of the trust deed by the relevant companies, it will be necessary for such execution to have been approved by the directors of the company.

Employee documentation

Whether an employee share scheme is to be operated on a contractual or, more usually, discretionary basis, whenever any rights are conferred under the share scheme, it is important that these are documented clearly. This will likely involve awardees' having signed a form of contract of participation or, in the case of a share option scheme, an option certificate. Where performance conditions attach to an award, they will likely also form part of a schedule to this contract of participation or certificate. These documents will constitute a contract between the company and the awardee, and it is important therefore that their terms are clear and, in particular, that the employee acknowledges that he or she is bound by the rules of the scheme whether or not they are set out in the contract. Usually, the rules of the scheme will not be set out in the contract and will instead be available for inspection by employees should they require them.

Even where there is no legal requirement for an employee share scheme to have an explanatory booklet, given the technical nature of much of what is provided in the rules of an employee share scheme, it is often helpful to provide employees with such a booklet so as to assist them in understanding the rules of the scheme and the relevant tax treatment of any allocations made to themunder the scheme. As an explanatory booklet will necessarily be only a synopsis of the principal terms of the scheme, it is important that a statement be included in the booklet to the effect that the rules of the scheme shall prevail in the event of there being any inconsistency.

Securities law

The "new" EU Prospectus Regulation (Regulation (EU) 2017/1129) regime has fully applied in respect of the obligation to publish a prospectus in Ireland since July 2019. Whether an award may constitute a security that falls within its scope will depend on its particular terms/structure. In that context (just as for application of the appropriate tax treatment), it is important to fully understand the actual terms/structure of share scheme rather than relying on its title/description, which can on occasion be misleading.

Even if the form of the award is determined to be a security that falls within its scope, there are various exemptions to the requirement to publish a prospectus that may likely be applicable. By way of example, no prospectus is required if the offer is made to fewer than

150 persons in each EU Member State at any time, and an offer of securities to the public with a total consideration in the EU of less than €8m (calculated over a 12-month period) is exempt from the obligation to publish a prospectus in Ireland. In addition, there is the "employee share plan" exemption, in that where securities are offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking, there is no obligation to publish a prospectus provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment. The revised and broader form of "employee share plan" exemption introduced pursuant to the EU Prospectus Regulation has been particularly helpful in the case of non-EU-incorporated or -listed issuers.

Service providers

In circumstances where the company is appointing a professional corporate trustee as a trustee of the a share scheme-related trust or is proposing to contract with an administrative services provider to administer the operation of a share scheme, there will be a services agreement and contractual terms and conditions that apply to such appointment. These will usually be in a form proposed by the service provider but should always be subjected to legal review on behalf of the company.

Other

Other documentation that may require drafting include company, board, remuneration committee and trustee resolutions and minutes; irrevocable agreements in respect of sell-to-cover arrangements; and correspondence evidencing instructions between the company, trustee, third-party administration providers, registrars or brokers.

As the above demonstrates, comprehensive legal input on share schemes is necessarily multi-disciplinary in nature, requiring, in addition to tax, expertise in company law, securities law, employment law, and contracts and trust law, among other areas. Although not exhaustive, the issues highlighted reflect a core checklist of non-tax issues that legal advisers on the establishment and operation of a share scheme will likely focus on. With increasing regulatory, disclosure and reporting obligations, it is a checklist that continues to grow in length.

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Local Property Tax: Back to Basics

Introduction

The Finance (Local Property Tax) Act 2012 ("the Principal Act")[1] introduced a then new tax on all Irish residential properties known as "local property tax" (LPT). LPT was intended to operate as an annual self-assessed tax commencing from 2013 and replacing the previous household charge. It had the stated aims of providing a stable funding base for local authorities and delivering significant structural reform by broadening the tax base in a manner that would not directly impact on employment.

The tax is calculated based on the market value of the property on the applicable valuation date. The first valuation date was 1 May 2013, with the next set for 1 November 2016. Given property price developments since 2013 and after a review of LPT in 2015, the then Government agreed to postpone the revaluation date to 1 November 2019, with a further postponement to 1 November 2020 ensuing. In June 2020 the Programme for Government committed to bringing forward new legislation for LPT. The updated system

1 Finance (Local Property Tax) Act 2012.

was to ensure that most property owners would face no increase,that properties outside of the LPT charge (for example, due to the fact that they were newly built) would be brought into the LPT system and that all money collected locally would be retained within the relevant local authority jurisdiction.

In line with this commitment the Finance (Local Property Tax) (Amendment) Act 2021 ("the 2021 Act")[2] was signed into law on 22 July 2021. The main thrust of the 2021 Act is to update the LPT base with a focus on equity. To this end, certain exemptions have been removed to bring the majority of property owners within the charge to LPT and all new properties built between valuation dates into the system each November.

The Charge and Scope of LPT

LPT operates as an annual self-assessed tax charged on Irish residential property on the liability date. The liable person is the owner of the property on the liability date, which is 1 November of the preceding year. Therefore, with respect to 2022, the LPT liability date is 1 November 2021, and the property must fall within the definition of a residential property on that date for a charge to LPT to arise.

"Residential property" is a defined term and means any building or structure which is in use as, or is suitable for use as, a dwelling and includes any shed, outhouse, garage or other building usually enjoyed with a residential property. The definition also includes the part of any yard, garden or lands most suitable for occupation and enjoyment with the dwelling up to a total area of 0.4047 hectares (exclusive of the area, at ground level, of the building). This means that for the purpose of valuing the property, account must also be taken of any lands or buildings that are associated with the property that have a domestic or residential purpose such as a yard, garden or patio; driveway or parking space; garage, shed or greenhouse; garden room or home office. For the year 2022 and subsequent years the above definition is incorporated in the legislation. Revenue's website[3] clarifies that the part of the land that is to be valued for LPT purposes is the part that is most suitable for enjoyment with the house and states that this is generally the land nearest to the house that is used as a garden. It provides an example of a lawn or garden forming part of the residential property as liable to LPT, whereas a farmyard or a commercial glasshouse would not be liable.

The heads of the Bill initially flagged that "co-living" developments would be defined to ensure that these structures would be regarded as suitable for use as a "dwelling" and would accordingly come within the definition of residential property. No definition was included in the 2021 Act. Nevertheless, based on information published on their website, Revenue regards any "self-contained dwelling in its own right" as a residential property that should be valued separately. Revenue go on to state on their website that where a single building contains several separate residential properties within it, such as apartments or flats, each apartment or flat that can be used as a "self-contained dwelling in its own right" should be valued separately, whereas a building containing units that are not self-contained, such as bedsits, should be valued for LPT purposes as a single building.

To fall within the charge to LPT on a liability date, the property must be suitable for use as a dwelling. Revenue confirm on their website that a property that is both unsuitable for use as a dwelling and unoccupied on the liability date is not within the charge to LPT. Revenue go on to provide a non-exhaustive list of criteria, set out below, that should be considered when determining whether a property is unsuitable for use as a dwelling:

- Is the property structurally sound?
- Has any of the property collapsed?
- Is the inside of the property exposed to the elements?

2 Finance (Local Property Tax) (Amendment) Act 2021.

3 Revenue, "Residential Properties That Are Liable for LPT".

- Does the property have a sound roof?
- Does it have sanitary facilities?
- Does it have a water supply?
- Does it have an electricity supply connected?

Revenue also note that a water supply or electricity supply that is simply turned off or temporarily disconnected does not mean that a property is considered unsuitable for use as a dwelling.

If a property owner forms the view that a property isnot within the scope of LPT for 2022 on the basis that it is unsuitable for use as a dwelling and unoccupied on 1 November 2021 Revenue should be notified. Revenue will then determine whether the property is in fact liable for LPT. Revenue confirm that for properties that have become unsuitable for use as a dwelling since the previous liability date (i.e. 1 November 2020), supporting documentation will be required to confirm that no LPT is due for 2022, this could include:

- engineers' reports,
- architects' reports,
- photographs.

Liable Person

The designated liable person must file the LPT return and pay the LPT liability. The legislation at section 11 of the Principal Act stipulates that anyone in the following categories will be a liable person for LPT:

- owners or joint owners of residential property (the place of residence is not relevant);
- a person having an equitable or beneficial estate, interest or right in the residential property that entitles the person to the possession or receipt of rents or profits from the property;
- a person having an exclusive right of residence in the residential property for his/her life (or the life or lives of others) or for a period equal to or exceeding 20 years;
- a person occupying the residential property with a *prima facie* right to apply to be registered, pursuant to the Registration of Title Act 1964, in respect of any estate, interest or right that entitles the person to the possession or receipt of rents or profits from the property;
- lessors, where the residential property is rented under a short-term lease of less than 20 years;
- lessees of residential properties under long-term leases of 20 years or more, with the exception of lessees that are local authorities or approved housing bodies;
- lessors of residential properties leased to local authorities or approved housing bodies;
- personal representatives of a deceased owner of residential property;
- trustees where a residential property is held in a trust; and
- local authorities, approved housing bodies or social housing organisations that own and provide housing.

Where a property has more than one liable person, such as a jointly owned property, Revenue has the ability under s43(5) of the Principal Act to designate a liable person. Where such a designation is made Revenue must notify all of the liable persons of the designation for the year 2022 and subsequent years. A liable person has a right to appeal against a designation to the Tax Appeals Commission.

New Valuation Period

The valuation date is the date on which the chargeable value of a residential property is determined for the purpose of calculating the LPT liability. From its introduction in 2013, LPT was charged annually based on the property's value as at 1 May 2013. By default this became the valuation date that applied for all years from 2013 to 2021. This meant that new houses built since 1 May 2013 did not fall within the charge, leaving a large cohort of property owners outside the scope of LPT. To address this issue the 2021 Act confirms the introduction of a new valuation date of 1 November 2021 to apply for four years. Therefore, the value attributed on 1 November 2021 is the chargeable value subject to LPT for the years 2022 to 2025 inclusive A new valuation date will arise every four years thereafter, i.e. on 1 November in the year preceding the first year of any 4 year period after 2025.

The liable person self-assesses the market value of the property on 1 November 2021 and declares that value to Revenue by filing an LPT return by 7 November 2021[4]. For properties valued at under €1m, the Principal Act had provided that Revenue would not seek to displace a taxpayer's self-assessment where the valuation was made in accordance with Revenue guidance. However, the 2021 Act amends that treatment such that future LPT self-assessments will now be subject to the usual Revenue compliance regime that applies to other self-assessed taxes.

Before the 1 November 2021 valuation date, Revenue issued an estimate of LPT liabilities for 2022 to liable persons. These amounts became payable by default if the liable person did not deliver a return containing a self-assessment of the property's value and an election for a particular payment method by the due date. The 2021 Act amends the appeals procedure relating to the valuation of a property, which will now be decided by a specialist body called the Land Values Reference Committee[5], similarly to valuation appeals for capital gains tax, capital acquisitions tax and stamp duty disputes. Appeals against LPT assessments relating to non-valuation disputes will continue to be decided by the Tax Appeals Commission.

The 2021 Act amends the Principal Act at section 35 to provide that where the LPT is paid and the liability or payment method does not change over the valuation period, in most cases no further return filing will be required until 7 November 2025 (i.e. the return due date for the next valuation period – section 2 of the Principal Act defines "return date" to mean 7 November in the preceding year). This also applies to transactions within a valuation period where the purchaser of property is entitled to use the valuation in place at the previous valuation date. However, this treatment does not apply for the year 2022 and subsequent years where a property is purchased from a local authority or an approved housing body. In such a case the purchaser must prepare and deliver a return in relation to the first liability date after the change of ownership and pay LPT on the actual value of the property. This is to ensure that purchasers of such properties cannot rely on the lower deemed valuation (band 1) available to local authorities and approved housing bodies.

The 2021 Act also amends section 35 of the Principal Act to provide that for the year 2022 and subsequent years all new properties built (including those properties refurbished to a habitable condition) between valuation dates will now be chargeable to LPT as they are completed/refurbished instead of waiting until the next valuation date. The completed/refurbished property will be valued retrospectively based on a notional value as if it had existed on the preceding valuation date and will become liable on the next liability date (1 November). The liable person in relation to such properties will be required to deliver a return to Revenue on or before the next return date (7 November) after completion or refurbishment. Unlike the old regime, this will ensure that all property owners fall within the scope of LPT as early as possible. Such properties will then be valued on the normal basis from the following valuation date.

Bands Widened

The 2021 Act introduces fixed charges for bands 1 and 2 of €90 and €225 respectively (maintaining the 2013 charge), widens the other bands by 75% and reduces the standard rate of LPT from 0.18% to 0.1029%. The revised bands and LPT liabilities per band are set out in Appendix 1 below.

4 Revenue extended the deadline for LPT returns to 5pm on Wednesday 10th November 2021.

5 For the year 2022 and subsequent years.

Local authorities can adjust annually (upwards/ downwards by 15%) the standard LPT rate (0.1029%). The 2022 local adjustment factor applied by each local authority is shown in Appendix 2 below. The LPT liabilities for the years 2022 to 2025 will be calculated based on these new bands, and this should ensure relative stability in the application of LPT for these years. It is anticipated that the majority of property owners already paying LPT should face no increase, and where increases arise, the majority should be by a single band.

Deferral

A liable person can defer the payment of LPT if certain "hardship" conditions are satisfied. A qualifying person may opt either to fully or to partially defer. A deferral is not an exemption. The 2021 Act increases the income thresholds for deferral of LPT (including marginal relief) for both single persons and married/co-habiting couples. The deferred LPT remains a charge on the property until it is paid, and interest accrues on the unpaid amount. The 2021 Act also reduced the interest rate on deferred payments from 4% to 3% per annum (an 8% interest rate applies to the late payment of LPT in the absence of such a deferral). The current deferral interest rate of 4% applies up to 31 December 2021, and the 3% rate will apply on all deferred amounts for the year 2022 and subsequent years.

Non-compliance

A taxpayer chargeable to income tax/ corporation tax (or capital gains tax) may be subject to an LPT-generated surcharge where an LPT return remains outstanding or an LPT liability remains unpaid as at the date of the relevant income tax/corporation tax (capital gains tax) return. The surcharge is 10% of the amount of tax contained in the income tax/ corporation tax (capital gains tax) assessment. Where a person incurs an LPT-generated surcharge and subsequently files the LPT return and/or pays the required LPT amount, or enters into an agreed payment arrangement, the surcharge shall not exceed 50% of the LPT liability (under the Principal Act, the capped amount was 100% of the LPT liability). This applies for the year 2022 and subsequent years. Outstanding LPT liabilities for each year are aggregated before the cap is applied.

As unpaid LPT (including any interest and penalties) will be a charge on a property. Tto sell a property, Revenue LPT clearance must be obtained, and such clearance cannot be obtained where an LPT return is outstanding and/or there are outstanding or deferred LPT liabilities (including the household charge). This clearance mechanism enables the vendor to prove to the buyer that there are no outstanding LPT issues impacting the property. It is hoped that Revenue will rebase the qualifying clearance criteria for the next valuation period.

Exemptions from LPT

The 2021 Act introduces a return filing obligation for those persons claiming one of the residual exemptions from LPT, including a declaration of value. Certain supporting documentation may also need to be filed. The value declared will enable exempt properties that cease to qualify for exemption between valuation dates to be charged to LPT on the basis of the value declared at the preceding valuation date. The standard right of appeal to the Tax Appeals Commission is given where Revenue refuses a claim. For the years 2022 to 2025, exemptions from LPT are limited to:

- properties fully subject to commercial rates;
- properties unoccupied for an extended period by reason of the long-term mental or physical infirmity of the owner where the property was his/her sole or main residence. The 2021 Act modifies the exemption to allow occupation by a person such as a tenant, relative or friend. The exemption does not apply if the property is occupied by another joint owner/liable person;
- properties purchased, built or adapted for use by permanently and totally incapacitated individuals;
- properties used by a charity or public body providing special needs accommodation;

- properties owned by charities for recreational services;
- registered nursing homes;
- properties certified as having pyritic damage. This exemption is being phased out and will not be available to property owners who meet the current eligibility conditions after 22 July 2023. Properties that become eligible for this exemption on or before that date will still benefit from the exemption for six years;
- properties constructed using defective concrete blocks; and
- properties owned by a North–South implementation body (within the meaning of the British–Irish Agreement Act 1999).

Certain exemptions that applied for the years 2013 to 2021 inclusive will expire on 31 December 2021:

- new or unused property purchased from a builder or developer,
- builders or developers with properties built or unsold,
- properties in unfinished housing estates and
- property purchased in 2013 occupied as the sole residence.

Transactions with Local Authorities and Approved Housing Bodies

Special treatment applies to transactions with local authorities/approved housing bodies:

- In the case of a lease (including long leases of 20+ years) to a local authority or a social housing body, the lessor remains the liable person. This ensures that the property does not become chargeable at the lowest rate of LPT, i.e. €90.
- As noted above, the purchaser of a property from a local authority or a social housing body that would have been chargeable under the band 1 valuation must pay LPT based on the actual value of the property and file an LPT return by the next return date.

Recap of LPT obligations in respect of 2022

Date	Action	Comment
1 November 2021	Liable person determines market value of property as at 1 November 2021	The market value determines the LPT liability for 2022–2025
By 7 November 2021 (extended to 10 November 2021)[6]	Liable person files LPT return	The LPT return covers the valuation period 2022–2025 An LPT return must be submitted online (rather than in paper form) if: • the valuation is greater than €1.75m or • the liable person owns more than one property or • the liable person is already required to submit returns for other taxes online

6 Revenue extended the deadline for LPT returns to 5pm on Wednesday 10th November 2021.

Date	Action	Comment
January 2022	Liable person pays 2022 LPT For 2022 the due date for payment of LPT depends on the payment option notified to Revenue on filing the return	• January 2022 – phased payments start for deduction at source and regular cash payments through a payment service provider • 12 January 2022 – latest date for paying in full by cash or cheque • 15 January 2022 – monthly direct debit payments start and continue on the 15th day of every month • 21 March 2022 – deduction date for annual debit instruction (ADI) payment.

Appendix 1: New Valuation Bands

Valuation band number	Valuation band (€)	LPT charge, basic rate (€)
1	1 – 200,000	90
2	200,001 – 262,500	225
3	262,501 – 350,000	315
4	350,001 – 437,500	405
5	437,501 – 525,000	495
6	525,001 – 612,500	585
7	612,501 – 700,000	675
8	700,001 – 787,500	765
9	787,501 – 875,000	855
10	875,001 – 962,500	945
11	962,501 – 1,050,000	1,035
12	1,050,001 – 1,137,500	1,189
13	1,137,501 – 1,225,000	1,408
14	1,225,001 – 1,312,000	1,627
15	1,312,501 – 1,400,000	1,846
16	1,400,001 – 1,487,500	2,064
17	1,487,501 – 1,575,000	2,283
18	1,575,001 – 1,662,500	2,502
19	1,662,501 – 1,750,000	2,721

Appendix 2: Local Adjustment Factors for 2022

Local authority	Reduction in base rate	Increase in base rate
Carlow County Council	Nil	5%
Cavan County Council	Nil	15%
Clare County Council	Nil	15%
Cork City Council	Nil	9%
Cork County Council	Nil	7.5%
Dun Laoghaire Rathdown County Council	15%	Nil
Donegal County Council	Nil	15%
Dublin County Council	15%	Nil
Fingal County Council	10%	Nil
Galway City Council	Nil	Nil
Galway County Council	Nil	Nil
Kerry County Council	Nil	7.5%
Kildare County Council	Nil	10%
Kilkenny County Council	Nil	15%
Laois County Council	Nil	10%
Leitrim County Council	Nil	15%
Limerick City & County Council	Nil	15%
Longford County Council	Nil	15%
Louth County Council	Nil	Nil
Mayo County Council	Nil	10%
Meath County Council	Nil	Nil
Monaghan County Council	Nil	15%
Offaly County Council	Nil	15%
Roscommon County Council	Nil	15%
Sligo County Council	Nil	15%
South Dublin County Council	15%	Nil
Tipperary County Council	Nil	10%
Waterford City & County Council	Nil	10%
Westmeath County Council	Nil	Nil
Wexford County Council	Nil	10%
Wicklow County Council	Nil	6%

Áine Flynn
Director of the Decision Support Service

Assisted Decision-Making (Capacity) Act 2015: Matters Arising in Legal and Financial Services

This article is intended as an overview of certain parts of the Assisted Decision-Making (Capacity) Act 2015 and related matters and should not be relied on as legal advice or opinion.

Background

On 30 December 2015 President Michael D. Higgins signed into law the Assisted Decision-Making (Capacity) Act ("the 2015 Act"; "the Act"). According to its long title, it is:

> *"An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether immediately or in the future…".*

This Act fundamentally changes how we interact with and support adults who have difficulties with their decision-making capacity. It was passed after extensive consultation and has been broadly welcomed as reforming legislation that marks a shift away from paternalism to a rights-based approach to decision-making.

Although fully enacted, the 2015 Act is largely not operational yet. Practical preparatory work is ongoing, and the Department of

Children, Equality, Disability, Integration and Youth (DCEDIY) has committed to full commencement of the Act in mid-2022.

It has been estimated that, at present, more than 200,000[1] adults could potentially benefit from the new statutory framework. This baseline figure includes adults with decision-making capacity difficulties due to intellectual disability, acquired brain injury, enduring mental illness and neurodegenerative disorders. It would be wrong, however, to presume that any one of this number will necessarily come within the ambit of the Act. That will depend on their individual circumstances. Equally, it would be a mistake to think that this legislation is targeted at or belongs to a particular cohort of people. Any of us could experience difficulties with our decision-making capacity in the future, due to illness or injury, and the Act provides important tools for advance planning. Therefore, this is an Act for everyone.

Commencement of the Act has been identified as a priority in the current programme for government and essential to compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by Ireland in 2018. The 2015 Act is regarded by the State as the principal legislative reform required to give full effect to its obligations under Article 12 of the CRPD, which requires that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

It is expected that the 2015 Act will have impacts across many sectors, including financial and legal services.

Key Reforming Features of the 2015 Act

Abolition of wardship for adults

The Act abolishes the wards-of-court system under the Lunacy Regulation (Ireland) Act 1871. When a person is taken into wardship, the court declares the person to be "of unsound mind and incapable of managing his or her person or property". The court moves into the role of decision-maker, with "committees" of the estate and the person, who are usually family members, authorised to manage day-to-day affairs.

Wards' funds are lodged in court and are invested and managed by the office of the Accountant of the Courts of Justice. Wardship has often been described as a blunt instrument. In 2019 the Supreme Court acknowledged the "over-broad" and "disproportionate" impact of an order for wardship, which can "deprive a person of the power to make many of the choices which are fundamental and integral to day-to-day life" (MacMenamin J, *HSE v A.M.* [2019] IESC 3).

After commencement of the 2015 Act, there will be no further applications for wardship, and all current adult wards will have their cases reviewed by the wardship court and will exit wardship within three years. These wards may have their assets and their autonomy fully restored or, where appropriate, will transition to the new supports available under the 2015 Act. It is understood from the Office of Wards of Court that there are approximately 2,150 adult[2] wards at present, of whom the majority are older persons with decision-making capacity difficulties due to dementia. Approximately €1.7bn[3] is currently managed by the courts on behalf of adult wards, subject to whatever additional orders the court may make.

It is worth noting here the common misapprehension that an adult's next-of-kin enjoys some presumed status as a substitute decision-maker. In relation to adults, "next-of-kin" has meaning only in succession law. A survey conducted by Sage Advocacy in January 2018[4] found that 57% of respondents believed that their next-of-kin could make healthcare decisions or consent to treatment on their behalf

1 Department of Justice and Equality, *Assisted Decision-Making (Capacity) Bill Regulatory Impact Analysis*, 13 June 2013.

2 https://www.courts.ie/content/annual-report-2020.

3 https://www.courts.ie/content/annual-report-2020.

4 https://www.sageadvocacy.ie/media/1702/sage-red-c-next-of-kin-survey-final.pdf.

and 32% believed that their next-of-kin could access their bank accounts and assets. There is no authority for this proposition. The next-of-kin has no automatic right to access information and to make decisions on behalf of an adult who lacks decision-making capacity.

Functional assessment of capacity

Under the 2015 Act, capacity has a singular meaning and is defined in a time-specific and issue-specific way. Section 3(1) states that:

> *"….a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time".*

Incapacity is not a fixed status, as in wardship, and is not linked to a medical diagnosis. In this respect the 2015 Act differs from the Mental Capacity Act 2005 in England and Wales, which defines incapacity as deriving from "an impairment of, or a disturbance in the functioning of, the mind or brain". The term "mental capacity" does not appear at all in the 2015 Act. The intention of the drafters was to adopt a disability-neutral approach, so that a person lacks capacity in respect of a particular decision if he or she is unable to:

- understand the information relevant to the decision;
- retain that information long enough to make a voluntary choice;
- use or weigh up the information; or
- communicate his or her decision, with whatever assistance is necessary.

This functional assessment of capacity is already the standard at common law, having been articulated by the High Court in 2008 in *Fitzpatrick v K.* [2008] IEHC 104.

The decision under consideration could be one about financial or legal affairs. The de-medicalised approach means that the Act is not exhaustive or prescriptive about who may assess capacity. Established practice may be to refer the person whose capacity is in question to a clinician, such as a consultant psychiatrist or geriatrician. Adopting the functional approach, however, a legal or financial services professional may be the person best placed to assess whether a client has capacity to make the decision in question. It is this professional who is in possession of the relevant information that needs to be understood.

Guiding principles

Section 8 of the Act sets out a number of important guiding principles to protect the rights of the "relevant person", who is defined as "a person whose capacity is in question or may shortly be in question in respect of one or more than one matter". These guiding principles are broadly aligned with the CRPD and include:

- a relevant person is presumed to have capacity unless the contrary is shown;
- a relevant person shall not be considered to lack capacity to make a decision unless all practicable steps have been taken to help him or her to do so;
- a relevant person is not considered to lack capacity on the basis of having made or being likely to make an unwise decision;
- minimal restriction of rights and freedom of action;
- respect for dignity, bodily integrity, privacy, autonomy and control over one's financial affairs and property;
- give effect as far as is practicable to the relevant person's past and present will and preferences; and
- act in good faith and for the benefit of the relevant person.

There is no mention of acting in the relevant person's "best interests", which is the familiar standard in other legislation and policy. Respect for will and preferences has been identified by the UN Committee on the Rights of Persons with Disabilities[5] as essential to compliance with the guarantee of equal legal capacity.

The principle relating to unwise decisions may appear challenging to professionals accustomed to adopting a minimal-risk approach when dealing with clients who are considered to be "vulnerable". The principle is sometimes misleadingly abbreviated to "the right to be unwise". More accurately, what this principle states is that the fact that a person wants to do something that seems objectively unwise does not mean that he or she lacks the capacity to decide to do it. If a normally prudent person decides to do something out of character that seems very unwise, then this may raise concerns sufficient to prompt an assessment of capacity but it is not conclusive evidence of incapacity.

Three-tier framework of supports

"Decisions" under the Act are broadly defined and are divided into two categories: "personal welfare" and "property and affairs". Property and affairs includes:

- the custody, control and management of the relevant person's property;
- the sale, exchange, mortgaging or gifting of property;
- the acquisition of property;
- the carrying on of business;
- the carrying out of any contract entered into by the relevant person;
- the discharge of debts, tax and duty liabilities; and
- the conduct of court proceedings.

All such decisions are capable of being supported in the new graduated framework. A legal or financial services professional may therefore have to interact with parties to these new decision support arrangements.

At the lowest, least formal, level of the framework, the relevant person may appoint a decision-making assistant to help obtain and interpret information and communicate the relevant person's decision. The relevant person is still the decision-maker.

At the middle level, a relevant person may register a co-decision-making agreement, under which specified decisions are made jointly with an appointed, trusted person. There are a number of preconditions to registration, and co-decision-making agreements are subject to the supervision of the Decision Support Service. The co-decision-maker will be required to file periodic reports, detailing financial transactions within the scope of the agreement.

At the upper level, and as a last resort, any person who has a *bona fide* interest in the welfare of the relevant person may apply to the Circuit Court for a declaration in relation to the person's capacity to decide about a particular matter or matters. The applicant will often be a family member or carer. Foreseeably, there may be instances where it will be appropriate for a professional to make an application to court to resolve the issue of a client's capacity in respect of a property and affairs decision. If the court finds that the relevant person does not have capacity, the court may either make the decision itself, if that is the least restrictive solution, or appoint a decision-making representative (DMR) to make the specified decision(s) on behalf of the person, under the supervision of the Decision Support Service.

Ideally, the DMR will be a person in a relationship of trust with the relevant person. The court is obliged to take certain matters into account. It must consider the wishes of the relevant person regarding whom is appointed as DMR, the desirability of preserving existing family relationships, the ability of a proposed DMR to carry out the role and any conflicts of interest. In property and affairs matters, the court must also have regard to matters including:

5 Committee on the Rights of Persons with Disabilities, *General Comment No.1: Article 12: Equal Recognition Before the Law*, 11th Session May 2014.

- the size, nature and complexity of the relevant person's affairs;
- any professional expertise that will be required; and
- the financial expertise and support available to a proposed DMR.

Where the court finds that there is nobody suitable, available and willing to carry out the role of DMR, it may request the Director of the Decision Support Service to nominate two DMRs from a panel of professionals and may appoint one of these nominees to act. In more than a quarter of current wardship cases, the General Solicitor for Minors and Wards of Court has been appointed to act as the committee for the ward, in the absence of a suitable family member. This may be a reasonable indicator of the percentage of decision-making representation orders in which the court will make an appointment from the panel of DMRs. Recruitment to the panel will start in the coming months.

Subject to the order of the court, a DMR is entitled to the reimbursement of expenses and, in the case of a professional DMR, to remuneration from the assets of the relevant person.

There has been occasional commentary that, for all of its limitations, the wardship system has at least the advantage of ensuring that a vulnerable person and his or her assets are protected by the court from abuse and exploitation. There is some apprehension that new DMRs might have improper motives and will be subject to inadequate supervision. However, significant protections are provided by the new Act. A DMR may take only those decisions specified in a time-limited court order and will report to the Decision Support Service. Within three months of appointment, a DMR with responsibility for property and affairs must submit to the Decision Support Service a schedule of the relevant person's assets and liabilities and a projection of income and expenditure. There is an obligation to keep proper accounts and records and to make these available for inspection by the Decision Support Service. Annual reports detailing all transactions, costs, expenses and remuneration must be submitted, and the Director of the Decision Support Service may re-enter the matter before the court in the event of non-compliance.

The Director may also investigate complaints by third parties and apply to the court to remove a DMR where a complaint is well-founded. It may be a legal or financial professional who is alerted to a problem and raises a complaint.

Heads of Bill[6] published by the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) on 22 November 2021 introduce a provision to allow the Director to apply to the court for the temporary suspension of a DMR to prevent further harm while an investigation is ongoing.

In the worst cases, the Act creates offences of fraud, coercion, abuse and neglect with penalties of up to five years' imprisonment on indictment.

Advance planning

The 2015 Act provides two tools for advance planning to allow a person to plan ahead in case he or she loses capacity in the future. These are the statutory advance healthcare directive and a new form of enduring power of attorney (EPA).

EPAs already created under the Powers of Attorney Act 1996 will remain valid. After commencement, any new EPAs will be executed and registered under the 2015 Act. An attorney under the 2015 Act will be subject to supervision by the Decision Support Service and, similarly to a DMR, will be required to submit periodic reports.

Establishment of the Decision Support Service

The 2015 Act establishes the office of the Decision Support Service as an independent statutory service. The following are among the functions of the Director:

6 gov.ie - Assisted Decision-Making (Capacity) (Amendment) Bill 2021: Draft General Scheme and Heads of Bill (www.gov.ie).

- to promote public awareness of the 2015 Act;
- to provide information and guidance;
- to establish and maintain registers of decision support arrangements, which will be searchable by appropriately authorised persons;
- to supervise decision support arrangements;
- to investigate complaints about these arrangements;
- to appoint panels – in addition to the panel of DMRs mentioned above, these will include a panel of suitably qualified "general visitors" to assist with the Director's supervisory functions and the investigation of complaints;
- to furnish reports to the Ministers and make recommendations for change; and
- to act as the Central Authority for the purposes of the Hague Convention on International Protection of Adults.

The Director may also publish codes of practice.

Section 103(13) of the 2015 Act states that:

> *"A person concerned shall have regard to a code of practice published or approved of under subsection (2) when performing any function under the Act in respect of which the code provides guidance."*

The Act further states that these codes or any breach of them may be taken into account in proceedings before any "court, tribunal or body concerned".

The National Disability Authority was commissioned by the Department of Justice to draft these codes and conferred with expert stakeholders from relevant sectors. The public consultation opened on 15 November 2021 in respect of the first tranche of draft codes of practice, including a general code to provide guidance on supporting decision-making and assessing capacity and specific codes for legal practitioners and financial services providers. Further information is available on the DSS website.

Issues for Legal and Financial Services Providers

From its engagement with professional stakeholders, the Decision Support Service has noted several issues that arise. These include:

- the compatibility of existing legislation, codes and policy with the 2015 Act;
- specifically, how the 2015 Act interacts with the Consumer Protection Code;
- 7concerns about data protection and confidentiality when dealing with parties to the new decision support arrangements; and
- the importance of ready access to the Decision Support Service's registers to ascertain the status and scope of arrangements.

The Decision Support Service will try to provide clarity on these and such other issues as may arise in the course of our stakeholder engagement. It is hoped that the codes of practice will provide further certainty. We believe that it is timely that existing legislation and policy are reviewed to take account of the reforms introduced by the 2015 Act and await the revised Consumer Protection Code, in particular, its provisions around "vulnerable" persons. Regulations to be published by DCEDIY will provide for inspection of the Decision Support Service's registers by certain bodies or classes of persons.

Conclusion

The Decision Support Service acknowledges the challenges presented by the Assisted Decision-Making (Capacity) Act 2015. The potential of the Act to deliver a rights-based system that incorporates necessary safeguards will be tested only when it is fully operational. We look forward to continuing dialogue as we seek to ensure that this important legislation, which promises much, can deliver effectively in practice.

The Decision Support Service website is www.decisionsupportservice.ie.

Jacky Fox
Managing Director, Security at Accenture in Ireland

Cybercrime: Know Your Enemy

Firms of every size need to measure their security capabilities against increasingly sophisticated cyber threats.

One of the few predictions that businesses can safely make for 2022 is that fighting cybercrime is not going to get any easier. All the evidence suggests that cyber threats are not just proliferating, they are becoming increasingly sophisticated and harder to thwart. We live in a world where criminals in one 'nation state' regularly launch carefully orchestrated attacks on organisations in another, a scale of illegal activity that takes corporate crime into unchartered waters that law enforcement agencies are struggling to navigate.

All of this has been exacerbated by the pandemic and 18 months of lockdowns. The pandemic has seen a surge in phishing attacks as cybercriminals targeted people working from home. Ransomware also increased, which we saw first-hand in Ireland when the HSE was targeted, and our national healthcare services disrupted. According to Accenture's recent State of Cybersecurity Resilience report[1], almost three in five (58%) large Irish companies have been the victim of an

1 https://www.accenture.com/_acnmedia/PDF-165/Accenture-State-Of-Cybersecurity-2021.pdf.

attempted external cyberattack in the last 12 months.

All of this is bad news for boardrooms still reeling from the high profile Solar Winds breach in 2020, a supply chain attack where criminals used a trusted supplier to infiltrate organisations. It's further evidence that a new and more organised criminal ecosystem has evolved, which has fundamentally changed the security landscape, not least the idea that smaller companies are less likely to be breached than large organisations. This is no longer true because of the way cyber criminals work together and the usage of smaller organisations as entry points to bigger targets.

Criminal groups converge in criminal marketplaces, emulating the structure, hierarchies and supply chains of legitimate enterprises. Different people have different tasks. An attack often starts with a new breed of hacker, so-called 'initial access brokers', who takes advantage of widespread vulnerabilities to gain a foothold inside the perimeter of multiple organisations. They then sell that access to buyers on the dark web who pick and choose organisations that best fit their nefarious ends.

Caught in the crosshairs

The bad news for smaller firms is that they may not be targeted directly but could find themselves part of a 'job lot' because they happen to share a particular vulnerability that has been breached and sold on. A good example of this was the Microsoft Exchange Server attack. In March 2021 it came to light that over 300,000 email systems had been hacked by Hafnium, a group known to operate out of China and target the US. Victims included small businesses, large enterprises and government organisations.

Security-savvy companies would have been quick to initiate a response, but smaller firms with a backroom Exchange Server that they had largely forgotten about became unwitting victims. They could have been infiltrated for months without knowing it. This speaks to a bigger problem, a new breed of cybercriminals who will lay dormant inside a company's network perimeter, biding their time before going about their business undetected.

The way this plays out with something like a ransomware attack shows how calculating the criminals have become. If an attack is predicated on breaking in and encrypting data that the victim has to pay to retrieve, the criminal will want to know how much the target can afford to pay. Some firms will escape a ransomware demand because the hacker has looked around and decided that there's not enough value in the business to make blackmail worthwhile.

Conversely, a bullish business with best-practice security management might decide to ride out a ransomware demand and not pay up. Maybe they have backup systems that have replicated what's lost, or the data controller is confident that what's likely to be released into the public domain would not contravene any regulatory responsibilities. The business might conclude that the risk of reputational damage is not significant. The bad news is that cybercriminals will almost certainly have carried out the same calculations and be ready to escalate.

While they are inside a company's systems, formulating what data to target, they might also identify other vulnerabilities. When a target doesn't pay up, it's not uncommon for the cyber criminals to unleash a DDoS (Distributed Denial of Service) attack, throwing everything at the organisation to create as much disruption as possible. Basically, if a sophisticated gang has taken time to target an organisation, a multi-pronged attack may well have been pre-planned at the reconnaissance stage, even before any systems are encrypted.

Minding important assets

For smaller firms in particular, warding off global cyber threats will feel like a David and Goliath struggle. To extend the analogy, the equivalent weapon to David's sling is best practice security systems and processes. There are three principal tenets: quantifying your risks, protecting and monitoring them with the right controls and technology, and having a recovery plan if the worst happens and they are exposed.

Every organisation needs to know what its most valuable assets are and do the cyber security equivalent of digging a moat around them. This includes looking at the protections in place for sensitive client information and financial documentation, as well as looking at the suppliers that you work with and the robustness of their cybersecurity. Remote working adds a significant additional layer of complexity as there's no longer a finite perimeter around your network, but you still need to have the measures in place to stop unauthorised access to your networks and information.

Large corporations will have inhouse security teams to do the job, whereas smaller companies will typically rely on third parties to provide managed security services.

Security providers can also help enable the third tenet, the ability to recover a business after an attack. Because the threat landscape has evolved and every firm runs the risk of being a target, the onus is on businesses of every size to have a continuity plan. Recovery time, the speed at which an organisation gets back to normal (or something close to normal), becomes pivotal from both a financial and reputational perspective. Having a good plan in place can ultimately impact the survival of a badly hit organisation.

All this speaks to a wider truth about security: companies that do all the right things – invest in best practice solutions for prevention and recovery – will fare better in the court of public opinion than an organisation shown to have cut corners or neglected the key tenets. More importantly, customers are more likely to stick around if a company demonstrably did its best.

Tackling people problems

Phishing attacks are a stalwart of cybercrime that flourished during the pandemic when people worked from home. Scams involving fake emails and phone calls that steered people towards malicious links and websites have always been a numbers game, and the numbers rose dramatically during lockdown. Away from company offices that are inevitably more security conscious, there is more chance of catching people off-guard or exploiting a laptop that is less well protected.

Unfortunately, it's not just human gullibility that makes people the weakest security link - sometimes it's very deliberate actions. The insider threat of disgruntled employees is notoriously difficult to manage. Back in the day, an employee that missed out on promotion might have stuffed their Rolodex of client phone numbers into their briefcase and left. Now they can email gigabytes of data out of a building or copy it onto a USB key. Whole databases and intellectual property are much easier to steal or destroy.

Company security policies are the best defence. Every employee should be asked to sign up to them, and IT and security must ensure they are implemented – and regularly revisited to address a fast-changing threat landscape. Essentially, it's a list of rules and procedures involving data protection: where data resides, who can access it, and how it pertains to an individual's laptop or phone. All of this matters when an employer/employee relationship is irretrievably broken, and a dispute ends up in court – something that happens more often than people realise.

None of these challenges are new to businesses. Most organisations will have wrapped layers of security around their IT systems and embedded policies in the HR function. But what's more important than ever, because of increasingly sophisticated criminals, is that risk profiles are constantly re-evaluated and updated. Like it or not, cybersecurity has become as fundamental to the day-to-day operations of a business as supply chains and accounts.

Six security steps every business with a tax function should take:

Step 1	Identify your most valuable assets Identify every part of the business and assess what has the highest value and demands the most protection.	For example, your client files.
Step 2	Identify your most valuable assets Identify every part of the business and assess what has the highest value and demands the most protection.	For example, your client files.
Step 3	Set policies and procedures Embed security in the company culture with clearly defined policies that everyone can sign up to. Reinforce the message with ongoing training/communication.	Persistent phishing training could stop someone clicking on a rogue email targeted at accounting professionals.
Step 4	Monitor systems and stay up to date The ability to identify and track unusual activity and raise real-time alerts is fundamental, along with regular updates that address new threats.	Watch out for unusual access to sensitive client data by either unexpected individuals or unusual times.
Step 5	Control access to data Provide role-based access to data with multifactor authentication and rules on where it can and can't be stored.	Make sure that your client database access is limited on a need-to-know basis.
Step 6	Plan for worst-case scenarios Have disaster recovery and continuity plans in place; keep testing them and improving recovery times.	Keep offline copies of client data that you need to keep.

News and Moves

McCann FitzGerald LLP appoints Deirdre Barnicle as Consultant

McCann FitzGerald LLP is delighted to announce the appointment of **Deirdre Barnicle (CTA)** to the position of consultant to the firm in its financial services tax practice.

Deirdre, who joined McCann FitzGerald as a trainee solicitor in 2004, advises domestic and international clients on complex tax matters and the Irish tax aspects of key transactions, particularly in the debt capital markets/securitisation, investment funds and corporate banking sectors.