Irish Tax Institute

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Julie Burke
Editor

Regular Articles

We are delighted to include new regular articles in this issue, as highlighted below, in keeping with our commitment to delivering leading tax technical content to our members.

New for 2022: Legal Monitor

Caroline Austin details Acts passed, Bills initiated and Statutory Instruments issued that are of relevance to CTAs and their clients.

New for 2022: Tax Technology Update

John Curry and **Andrew Egan** cover the relevance of technology to tax and address the challenges faced by CTAs.

Key Tax Dates

Previously known as "Compliance Deadlines", this new feature is updated and reviewed by **Helen Byrne** and includes key tax dates for companies and individuals. Readers can select the month of interest using the drop-down function.

Policy and Representations Monitor

Lorraine Sheegar provides a comprehensive overview of key developments, including recent submissions by the Institute, and tax policy news. All Revenue eBriefs issued between 1 November 2021 and 31 January 2022 are listed. A summary of recent Tax Appeals Commission determinations is also included.

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

Fiona Carney

Irish High Court

» *Hanrahan v Revenue* [2022] IEHC 43 concerned an appeal against a determination of the Tax Appeals Commission in 2020 that a particular transaction was a "tax avoidance transaction" within the meaning of s811 TCA 1997.

Tax Appeals Commission Determinations

» 135TACD2021 dealt with the disposal by a Maltese-tax-resident company (MaltaCo) of its 100% shareholding in an Irish-resident trading company. MaltaCo was owned by an Irish-resident and -domiciled individual.

» 136TACD2021 considered whether a fishing licence qualified as a "specified intangible asset" under s291A TCA 1997.

» 131TACD2021 concerned the taxation of awards made to employees who completed their final set of professional body exams and attained the consequent professional designation.

» 132TACD2021 concerned the availability of business relief on the transfer of shares in a company that was engaged in a supermarket business from a father to a child in 2012.

» 136TACD2021 considered whether a GP had transferred his interest in a medical partnership to an unlimited company in 2011. The appellant contended that he had disposed of goodwill, and he declared the gain and paid capital gains tax to Revenue on this basis.

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

Stephen Ruane and **Patrick Lawless**

UK Cases

- In *Hargreaves Property Holdings Ltd v HMRC* [2021] UKFTT 390 (TC) the First-tier Tribunal determined that certain interest payments had a UK source as the interest was paid by a UK-resident debtor out of its assets situated in, and the profits of activities conducted in, the UK.
- In *Quinn (London) Ltd v HMRC* [2021] UKFTT 437 (TC) the FTT held that the company was not prevented from claiming relief for research and development costs under a particular scheme for SMEs.
- In *A D Bly Groundworks and Civil Engineering Ltd and CHR Travel Ltd v HMRC* [2021] UKFTT 445 (TC) the FTT determined that that the taxpayers were not entitled to a deduction in computing their trading profits for provisions in respect of their liability to make future pension payments to certain employees.
- In *TR Rogers and others v HMRC* [2021] UKFTT 458 (TC) the FTT determined that expenses incurred in defending the partners in a partnership against a criminal prosecution were incurred wholly and exclusively for the purposes of the trade because the purpose was to defend the business (lease, insurance and licences were in jeopardy if the conviction stood), notwithstanding that the expenditure also protected the personal reputation of the partners.

CJEU Case

- In case C-788/19 the Court of Justice of the European Union found that aspects of Spanish domestic legislation requiring Spanish tax residents to declare their foreign assets and rights were disproportionate and contrary to EU law.

Other International Cases

- In ruling SKM2021.546.SR the Danish tax authorities declined to confirm that a foreign company had no permanent establishment in Denmark by virtue of a sales agent working from home in Denmark who was carrying out sales activities for customers in Sweden, Finland and Norway.
- In *Glencore Canada Corporation v The Queen* [2021] TCC 63 the Tax Court of Canada determined that break fees received as a result of a failed merger were income from a business.

International Tax Update

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

- Recent BEPS developments:
  - After the agreement reached in October 2021, by more than 135 members of the OECD/G20 Inclusive Framework on BEPS, to a two-pillar solution to address the tax challenges arising from digitalisation and globalisation of the economy, work on the implementation of the two-pillar plan is well under way.
  - The UK Government has published a consultation on the implementation of the OECD Pillar Two minimum tax rules in the UK.
  - The 2022 version of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* has been published.
- US tax reform:
  - The US House of Representatives, supported by the Biden administration, has passed the Build Back Better Act.
- EU tax developments:
  - Two new Directives have been drafted – a Directive to implement the OECD Pillar Two Model Rules in a coherent and consistent way across Member States (Directive on Corporate Minimum Tax) and a Directive to prevent the misuse of shell entities for tax purposes (ATAD 3).

- The United Arab Emirates Ministry of Finance announced that a federal corporate tax on business profits will be introduced for financial years starting on or after 1 June 2023.
- An OECD update to the list of signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports dated 31 January 2022 indicates that Barbados signed the agreement on 23 December 2021 (to take effect for fiscal years beginning on or after 1 January 2021.
- Canada's Department of Finance released a draft of the new Digital Services Tax Act.

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- *ELVOSPOL, s. r. o. v Odvolací finanční ředitelství* C 398/20, wherein the provisions of Article 90 of the VAT Directive had to be interpreted in the context of a refusal by the Czech tax authority to allow an adjustment by Elvospol of a VAT amount;
- *Ferimet SL v Administracíon General del Estado* C 281/20, which was a referral by Spain in relation to the interpretation of Article 168 and related articles of the VAT Directive and the principle of fiscal neutrality;
- *Amper Metal Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* C 334/20, which involved the Hungarian tax authority disallowing a VAT repayment claim by Amper Metal Kft in relation to VAT incurred on advertising costs; and
- *Autoridade Tributária e Aduaneira v Termas Sulfurosas de Alcafache SA* C-513/20, which concerned the exemption in Article 132(1)(b) of the VAT Directive.

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President's Pages

Karen Frawley
Irish Tax Institute President

Introduction

It's been a bizarre start to 2022. We were inching our way back to near normality, after two years of pandemic restrictions, and then Russia launches a full-scale invasion of Ukraine. Suddenly, tragically, an old-style war is under way on the other side of Europe.

It is the worst act of aggression on European soil since the Second World War, and it has shocked and transfixed the world. On our side of the continent, the relentless real-time reporting of the military incursions on social and traditional media makes it feel close and personal. The brutality of this unprovoked attack on the Ukrainian people strikes at the heart of European liberal democracy.

A full-scale economic war has been triggered as the EU, the UK and the US impose increasingly tough sanctions on Russia. As a result, energy prices, already high before Putin's invasion, are spiralling out of control. Food prices, too, are set to soar as supply lines are choked off. This anachronistic war has cast a long shadow over the global economic outlook, and once again Ireland is in the crosshairs.

Implications for the Economy of Ukraine Crisis

It was all going so well: our economy has seen an extraordinarily strong recovery. We knew from the strong Exchequer returns and record export growth during the pandemic that some sectors were unaffected by the health crisis, but the speed and strength of the jobs recovery defied all forecasts. According to the latest Labour Force Survey, a record 2.5m were in work in the final quarter of 2021 – that's 150,000 more than the pre-pandemic level. The tech sector grew by over one-third in the last two years.

It's an astonishing performance, due in no small part to the Government's wage subsidy schemes, which kept employees connected to businesses through rolling lockdowns. The public finances are reaping the benefit, with the Government recording a surprise surplus of €900m at the end of February. Exchequer receipts for the first two months of the year were just over €10bn, with very healthy income tax and VAT returns, reflecting continued employment growth and strong consumer spending.

And yet, here we are again: a small, open economy bobbing on a wave of uncertainty and vulnerable to external shocks over which we have no control. Most immediately, spiralling energy and food prices will hit household income and increase business costs. There is also a risk of shortages of key materials. The Government can take some alleviating measures and has already introduced a temporary cut to fuel excise duties. But, as the Minister for Finance has said, it is not possible to cushion citizens and businesses from the entire impact of the war.

Sectors that would be particularly vulnerable to energy price increases or shortages include biopharma, microelectronics and medical devices. Mounting uncertainty may have a dampening effect on investment and consumer spending. Some forecasters suggest that the high level of household savings will bolster disposable income and provide the post-restrictions spending boom that our retail and hospitality sectors had hoped for. Perhaps – but uncertainty is the enemy of business, and in the prevailing geopolitical environment, possible solutions are in short supply.

Commission on Taxation and Welfare

When the terms of reference of the Commission on Taxation and Welfare were drawn up a year ago, a war in Europe did not feature in them, but planning for future challenges did, and we've had no shortage of challenges in recent years. The Institute made a substantial submission in response to the Commission's public consultation, which closed in mid-January. It contained 40 recommendations covering most tax heads and ran to 80 pages. A central theme was the need to broaden the tax base and reduce dependence on any one taxpayer group or sector, or on any single revenue source.

Personal tax

In this context, the Institute pointed to two fundamental flaws in the personal tax regime: Ireland's high marginal tax rates apply at relatively low income levels by international standards; and the Irish personal tax base is unusually narrow.

In 2022 Irish taxpayers will be paying personal tax at marginal rates of 48.5% on salaries above €36,800 and 52% on salaries above €70,044. Meanwhile, 28% of income earners will pay neither income tax nor USC. Put simply, the cost of exempting this group from the tax net falls on the shoulders of modest-income earners.

Rebalancing our economy

The Institute told the Commission that just as tax policy played a major role in attracting large multinationals to Ireland, it should now be fully deployed to incentivise the step change in productivity and innovation we need from Ireland's indigenous companies.

Highlighting over-reliance for revenue and employment on our outperforming multinational sector, we said that the need to rebalance our economy was never more pressing and that existing reliefs should be reviewed and reformed to attract investment in SMEs and make them more accessible to start-ups.

We also said that the Commission should consider reducing the headline rate of capital gains tax and argued that a reduction for active business assets would encourage innovation and productivity in our domestic sector, as well as increasing the yield.

Tipping the balance from direct to indirect taxes

Another structural weakness in our tax system is its over-reliance on economically regressive labour taxes. We said that there was a need to tip the balance in favour of indirect taxes, such as VAT and environmental charges, which would also support the Government's climate action targets.

As a rule, over-dependence on any one revenue source undermines the stability of our tax system. We learnt that the hard way during the financial collapse over a decade ago, when the construction sector collapsed. The narrowness of our tax base left us woefully exposed at that time. A broad tax base is fair to taxpayers and protects the Exchequer.

Keeping our tax code competitive

Another theme in the Institute's submission was the competitiveness of our tax system. The most effective element of our business tax code has been the 12.5% corporation tax rate. Now that Ireland has signed up to the global minimum corporate tax rate, we must find new ways of making our tax system attractive for foreign direct investment. In that context, we said that the Commission should explore how Ireland's corporation tax code could be simplified and made more user-friendly. Clear, simple and efficient business taxes could be a real differentiator for our small, open economy. Simplification would make it easier and more attractive to do business in Ireland. It would also increase compliance and engender trust in the system among taxpayers.

We also predicted that, in the new international corporate tax environment, investors would sharpen their focus on the competitiveness of personal tax regimes. Our effective personal tax rates at average salaries and above are high by international standards, and Irish workers continue to pay more income tax than workers in Sweden, Switzerland, the UK and the US. Any long-term strategy aimed at attracting and retaining foreign direct investment must include a reduction in the marginal cost of employment in Ireland for both businesses and individuals.

The Commission held a virtual public meeting and a stakeholder consultation over three days in the first week of March. The Institute was ably represented at the sessions by Anne Gunnell, Director of Tax Policy and Representations, and Council member Brian Brennan. I note that the submission from the Department of Finance, published after the stakeholder sessions, was very similar to our own. Let's hope that this is a good omen and that some of our recommendations will be reflected in the Commission's final report, which is to be delivered to the Minister for Finance in July.

International Tax Reform

In mid-February the OECD published its report to the G20 Finance Ministers updating them on progress in the implementation phase of the two-pillar international tax reform package that was agreed last October. The report said that the technical design of the Pillar Two Model Rules had been approved and that the working group was finalising commentary to provide tax administrations and taxpayers with guidance on the interpretation and application of those rules.

The report noted that while the EU had already started the process of agreeing a Directive to adopt a global minimum effective tax rate of 15% for large groups operating in the EU by the second quarter of 2022, Switzerland has announced that it will change its Constitution to establish a minimum tax by January 2024.

Meanwhile, the Biden administration's tax reform proposals to fund the President's Build Back Better agenda have been stalled in the Senate since Democratic Senator Joe Manchin scuppered the passage of the legislation last December. The irony is that despite his having injected powerful momentum into the OECD process a year ago and pushed for the agreement that was reached last October, it is far from clear that President Biden will get his own tax reform proposals through Congress.

Meanwhile a rolling consultation with stakeholders on various aspects of Pillar One is under way. Negotiations on the Multilateral Convention that will incorporate the work on its technical elements began in mid-January, and the target date for agreement is July. Given the complexity of the work involved in creating the new rules for the reallocation of profits and granting new taxing rights to market countries, that deadline seems daunting, to say the least. We shall have to wait and see.

Public Consultation on Territorial System of Taxation

Since Christmas, the Tax Policy and Representations team have been kept busy with submissions in response to a plethora of consultations issuing from the Department of Finance, the Department of Enterprise, Trade and Employment and the OECD. Of particular interest is the consultation on a possible move to a territorial system of taxation. This had been recommended in the Coffey Report as far back as 2017, and stakeholders' views on such a move, among other recommendations in the Coffey Report, were sought in 2018.

In its response to the latest consultation, the Institute pointed out that the implementation of a global minimum effective tax rate, on top of the adoption of extensive ATAD measures – including controlled foreign company rules – to protect against foreign base erosion risks, greatly diminishes the need for a worldwide tax system.

We called for a change to a territorial tax system with a participation exemption for dividends and a foreign branch exemption to be adopted into Irish tax law to simplify the corporation tax code, to protect the country's ability to attract foreign direct investment, and to encourage international growth and development by Irish-headquartered multinationals. We recommended that both exemptions should be at the election of taxpayers.

If policy-makers do not intend to include measures in Finance Bill 2022 to introduce both exemptions, we would urge the Government to give a firm commitment to do so, at the very least, setting out a clear timeline for implementation. Business needs clarity from the Government on this critical issue, which is already a key factor in the decision-making process of those considering their long-term future investments in Ireland.

Conclusion

It's sobering to recall that this time two years ago we were getting our heads around the idea of a new pandemic. By St Patrick's Day 2020 the country had entered its first lockdown. Nobody predicted that it would be two years before all restrictions were lifted. And nobody forecast the remarkably strong recovery that we now see in our economy. As we enter another difficult, worrying and unpredictable crisis, this time in geopolitics, let us hope for an early resolution for all our sakes but particularly for the people of Ukraine.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

Welcoming our team back to the office after nearly two years was truly enjoyable. The sound of catch-ups and "nice to meet you" introductions as new colleagues met each other for the first time gave a sense of normality. The Institute will be operating a hybrid model going forward, blending the old and new ways of working to achieve the ideal work environment for the team while ensuring that members continue to receive an excellent level of service.

The lifting of most restrictions also gave society and the economy a boost, with businesses and individuals finally being able to see light at the end of the long tunnel. The Irish economy rebounded better than expected, and employment levels are high. Yet the good feeling was muted with rising inflation, and even more so by the sickening scenes emerging from Ukraine and the resulting humanitarian crisis that brings a new sense of uncertainty across the globe.

There is no telling what will happen. But the Institute will continue to focus on the known horizon for our members – managing the upcoming changes in national and international tax legislation and negotiating the complexities as we face them.

Education

There was a typical busy start to the year for our students, with winter courses nearing their end and preparation for the April/May exams well under way. Registration for our summer courses opened last week and will close in April, when the lectures begin.

In early March we were delighted to be the main sponsor of the 30th President's Cup, an international intervarsity debating competition, hosted by UCD's Literary and Historical Society. It is part of our ongoing work to promote the career in tax to third-level students from a wide range of disciplines. Before the lively debates began, we addressed more than 100 students in attendance, highlighting the importance of tax to the economy and the possibilities that a career in tax could offer them.

The entries for Fantasy Budget 2022, a competition aimed at third-level students, were of a very high standard this year. The judging panel managed to narrow them down to a top three, who will be announced in April and will be presented their prizes, along with their lecturers, at a small in-person event in our offices.

Commission on Taxation and Welfare

During 2021 we formed a working group on the Commission on Taxation and Welfare to help formulate our response to the important public consultation "Your Vision, Our Future". We made 40 recommendations identifying areas of Ireland's tax code that we believe are not working as intended or need reform. Our recommendations looked at the personal tax system and broadening the tax base, increasing the growth and productivity of indigenous business, simplifying the tax code to remain attractive to FDI, strengthening the dispute resolution procedures and the continued investment in Revenue's online services and IT infrastructure. You can read the whole submission here.

At the start of March the Commission held a public meeting at which our Director of Policy and Representations, Anne Gunnell, was a panellist. This was followed by a two-day stakeholder forum attended by a delegation from the Institute.

Our latest episode of Tax Talk is dedicated to the work of the Commission. We had an excellent panel discussion, with the chair of our Commission Working Group, Brian Brennan, Dónal de Buitléir and Lucinda Creighton, who brought insights into the challenges of implementing some of the recommendations received by the Commission.

We eagerly await the Commission on Taxation and Welfare's report, due in July.

Policy and Representations

It has been a submission filled Q1, and I would like to thank our member firms and their representatives for the invaluable insights that enable us to formulate the various responses. In addition to the bumper submission to the Commission on Taxation and Welfare, the Institute responded to the Department of Enterprise, Trade and Employment consultation on the Public Country-by-Country Reporting Directive, the OECD consultation on Pillar One Draft Model Rules for Nexus and Revenue Sourcing in respect of Amount A, and the Department of Finance consultation on a Territorial System of Taxation. You can find our submissions on taxinstitute.ie or a summary of the submissions in TaxFax.

TALC meetings are under way across the sub-committees and Main TALC. The Institute is delighted to be chairing Main TALC for 2022, with Council Member Kieran Twomey as the chairperson. We will update you on developments via TaxFax.

In early February Revenue published the new Code of Practice for Revenue Compliance Interventions. We have engaged extensively with Revenue over the last eight months at the TALC Audit Sub-Committee and bilaterally during the development of the revised Code. Revenue agreed to extend the notification period for risk reviews from 21 to 28 days and deferred the introduction of the revised Code from 1 February to 1 May, in response to our concerns. As this is an important update for many members, we have published three articles on the topic in this issue – by Sarah Waters, Mark Barrett and Mary Healy.

We will continue to provide you with information about the new Compliance Intervention Framework and revised Code as we draw nearer to the implementation date, 1 May, including in Stream 3 of the Annual Tax Summit 2022 with Aidan Lucey. A speaker from Revenue's Accountant General's and Strategic Planning Division, which developed the revised Code, will participate in the Q&A on the day.

Annual Tax Summit 2022

The Annual Tax Summit 2022 takes place on three mornings between 25 March and 1 April. With the upcoming changes at local, European and global level, this year's summit focuses on helping you to manage those changes and negotiate the inherent complexity. You can attend all three sessions or just the mornings most relevant to you. Booking is still open on our website, or you can contact us at cpd@taxinstitute.ie.

Professional Services

We began 2022 with the last webinar of the Finance Act series, an informative and well-attended session. Soon our consolidated editions of the Finance Act 2021 legislation will be available. Thank you to the four editors for their tremendous work in consolidating the legislation: David Fennell, *Direct Tax Acts*; Maria Reade, *Law of Value-Added Tax*; and Aileen Keogan and Emmet Scully, *Law of Capital Acquisitions Tax, Stamp Duty and Local Property Tax*. Your essential legislation titles can be pre-ordered from taxinstitute.ie or by contacting Michelle Byrne (mbyrne@taxinstitute.ie).

Our well-established relationship with the Harvard Kennedy School is still offering great opportunities to our members. I am delighted that we can continue this collaboration and bring you the Global Tax Policy Webinars 2022 – Connecting You to the Future.

As the public health restrictions are lifted after 24 months, we look forward to welcoming you back to in-person seminars and events, such as the Annual Dinner, which will be held on Thursday, 2 June. The well-received flexibility that our webinars have provided over the last two years will influence our CPD programme in the future, with the potential for a mix of online and hybrid sessions.

Policy and Representations Monitor

Lorraine Sheegar
Tax Manager, Tax Policy & Representations, Irish Tax Institute

News Alert

European Commission proposes Directive to implement Pillar Two in the EU

In the last edition of Irish Tax Review, Anne Gunnell, Director of Tax Policy and Representations, Irish Tax Institute, and Clare McGuinness, Senior Tax Policy Manager, Irish Tax Institute, examined the position adopted by Ireland towards the *Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, the public consultation on the proposals, and the key components of the two-pillar solution in their article "Ireland Joins OECD Agreement to Reform International Corporate Tax". Outlined below are some further important updates in this area.

On 20 December 2021 the OECD published *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* ("the Model Rules"). The publication of the Model Rules followed the *Statement on a Two-Pillar Solution to Address the Tax Challenges of the Digitalisation of the Economy* that was agreed by 137 member jurisdictions of the OECD/G20 Inclusive Framework on BEPS, including Ireland, in October.

The Institute issued a Bulletin to members on 21 December, bringing their attention to the publication and highlighting key features of the new Model Rules. They provide for a coordinated system of taxation that imposes a top-up tax on profits arising in a jurisdiction whenever the effective tax rate, determined on a jurisdictional basis, is below the minimum rate of 15%.

The Model Rules consist of two interlocking domestic rules:

- 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 payments rule (UTPR)**, which denies deductions or requires an equivalent adjustment to the extent that the low-taxed income of a constituent entity is not subject to tax under an IIR.

The Model Rules are intended to be a template that individual countries can use to translate the Pillar Two GloBE rules into their domestic law as from 2022. The aim is for Pillar Two to be brought into law in 2022, to be effective in 2023, with the UTPR to come into effect in 2024.

The GloBE rules will apply to multinational enterprises (MNEs) that have consolidated revenues of €750m or more in at least two of the last four years. Government entities, international organisations, non-profit organisations, pension funds or investment funds that are ultimate parent entities of an MNE group (and certain holding vehicles of such entities) are excluded entities that are not subject to the GloBE rules. This exclusion does not affect the MNE group owned by such entities, which will remain in scope of the GloBE rules if the group, as a whole, otherwise meets the consolidated revenue threshold.

On 22 December the European Commission proposed a Directive to implement the OECD

Model Rules into EU law. The Commission proposal closely follows the Model Rules; however, the Directive extends the scope of the Model Rules to large-scale purely domestic groups to ensure compliance with EU fundamental freedoms.

In addition, the Directive provides that the Member State of a constituent entity applying the IIR (which is usually the jurisdiction of the ultimate parent entity) is required to ensure effective taxation at the minimum agreed level not only of foreign subsidiaries but also of all constituent entities resident in that Member State and permanent establishments of the MNE group established in that Member State. The OECD Model Rules provide that the jurisdiction that applies the IIR takes into account the effective tax rate of only foreign constituent entities.

The implementation of the GloBE Model Rules in the EU could have implications for existing provisions of the Anti-Tax-Avoidance Directive (ATAD), specifically the controlled foreign company (CFC) rules, which could interact with the IIR. The proposal confirms that, in practice, ATAD CFC rules will apply first and any additional taxes paid by a parent company under a CFC regime in a given fiscal year will be taken into consideration in the Model Rules, by attributing them to the relevant low-taxed entity for the purpose of computing its jurisdictional effective tax rate.

Next steps

The European Commission is now seeking feedback on this proposed Directive. The feedback will be summarised by the Commission and presented to the European Parliament and Council to inform the legislative debate.

It is expected that in early 2022 the OECD will release commentary on the GloBE rules and will address co-existence with the US Global Intangible Low-Taxed Income (GILTI) regime.

As part of the next steps in the process, the Inclusive Framework intends to consult stakeholders on the following:

- For **Amount A of Pillar One**, OECD Secretariat Working Documents will be released in the coming months on the separate building blocks of Amount A.
- For **Amount B of Pillar One**, a public consultation document will be issued in mid-2022, with a public consultation event to follow the period for submitting comments.
- For **Pillar Two**, a public consultation on the implementation framework will be held in February 2022, focusing on the particular issues to be agreed by the end of 2022 (i.e. administration and compliance).
- For the **subject-to-tax rule (STTR) of Pillar Two**, the draft model provision and its commentary will be released in March 2022, with a defined set of questions released for input. The multilateral instrument to facilitate the implementation of the STTR will be released for comment at the same time.

The Institute will keep members updated on developments throughout 2022.

Institute responds to Commission on Taxation and Welfare public consultation

On 17 January 2022 the Institute responded to the Commission on Taxation and Welfare (CoTW) public consultation "Your Vision, Our Future". The CoTW has been tasked by the Government with independently considering how best the taxation and welfare systems can support economic activity and promote increased employment and prosperity in Ireland.

The CoTW launched the consultation on 20 October to gather broad perspectives about the way in which Ireland's tax and welfare systems should be structured. It is due to submit its final report to the Minister for Finance by 1 July 2022.

The CoTW's consultation was in the form of an online questionnaire covering fiscal sustainability, employment, climate, housing, supporting economic activity, tax expenditures and administration. The Institute's submission included Tax and Social Insurance International Tables 2021 prepared in association with KPMG.

The tables examine the tax and social insurance contributions paid in Ireland in 2021 compared with seven competitor countries (France, Germany, Sweden, Singapore, Switzerland, the UK and the USA), highlighting the progressivity of the Irish personal tax system.

In our submission we made 40 recommendations based on feedback we received from members of the Institute's Commission on Taxation and Welfare Working Group, identifying areas of the Irish tax code that are not working as intended or are in need of reform. Our recommendations cover a broad range of areas, from the need to ensure that the Irish personal tax system is internationally competitive to measures to support indigenous business and foreign direct investment. In respect of housing, we emphasised the need to restore certainty to the property market. On the issue of environmental taxes, we highlighted the need to consider new incentives to support businesses in reducing their carbon emissions while exploring opportunities to replace revenues from environmental taxes as a result of the decarbonisation of the Irish economy. On tax administration, we stressed the need for continued investment in Revenue's online services and IT infrastructure and identified areas of tax compliance in need of simplification.

Finally, we proposed measures to strengthen the country's dispute resolution procedures and recommended that an independent external body be established that could intervene on behalf of taxpayers where there is an issue regarding Revenue's approach to handling their tax affairs and in exceptional cases where there is inherent inflexibility in the tax system, such as interest charges, time limits and penalties.

This submission is available on the Institute's website, https://taxinstitute.ie/institute-news/submission-to-the-commission-on-taxation-and-welfare/.

Public consultations launched on a territorial system of taxation and transposition of public CbCR Directive

On 22 December 2021 the Department of Finance launched a public consultation seeking stakeholder views on a possible move to a territorial system of taxation. The consultation delivers on the commitment to consider a territorial regime, which was included in "Ireland's Corporation Tax Roadmap: January 2021 Update".

The Department of Finance highlighted in a press release on the same day that the recent OECD Inclusive Framework agreement to address the tax challenges arising from digitalisation of the economy will introduce significant changes to the international tax framework, making this an appropriate time to consider the wider tax system in Ireland.

The consultation document comprises 25 questions. The purpose of the consultation is to seek broad direction from stakeholders, which will inform potential further consultation on this matter in the future. It is mainly intended as a scoping exercise to identify the benefits, costs, opportunities and risks of a move to a territorial system of taxation. The Department of Finance has indicated that it may also invite stakeholders to meet with it, including representative bodies, tax professionals and other interested groups or individuals. The consultation period runs until **7 March 2022**.

On 11 November 2021 the European Parliament formally adopted Directive 2021/2101/EU amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, commonly referred to as the public country-by-country reporting (CbCR) Directive. The Directive was published in the *Official Journal of the European Union* on 1 December and entered into force on 21 December 2021. Member States will have until 22 June 2023 to implement the Directive into domestic legislation. The rules will apply, at the latest, from the commencement date of the first financial year starting on or after 22 June 2024.

The public CbCR Directive aims to enhance corporate transparency by requiring multinational companies with revenue of more than €750m to disclose publicly in a specific report the income tax that they pay. For the first time, 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 stipulates that Member States must provide rules on who bears responsibility for ensuring compliance with the reporting obligation.

The Department of Enterprise, Trade and Employment (DETE) is now seeking the views of interested parties on the transposition of the Directive into Irish law. The Directive allows two policy options for Member States to consider when transposing, and these options are the focus of this consultation. However, the consultation document notes that respondents are free to address any related issues in submissions. The closing date for submissions to the DETE is Friday, 18 February 2022.

At the time of writing, the Institute is drafting its submissions in response to both of these public consultations.

Updated Revenue guidance on exchange-traded funds

Revenue updated the following manuals regarding the taxation of investors in exchange-traded funds (ETFs) and exchange-traded commodities (ETCs) in September 2021:

- "Part 27-01a-02: Investment Undertakings" has been updated to include guidance on how investors in Irish regulated ETFs pay the tax arising on a chargeable event.
- "Part 27-02-01: Offshore Funds" has been updated to clarify that the offshore funds rules apply to ETFs and ETCs in the same way as to other offshore funds; that is, whether an investment in an ETF or an ETC is a material interest in an offshore fund should be determined by following the decision trees set out in this manual.
- "Part 27-01a-03: Exchange Traded Funds" has been updated to direct users to the above-mentioned manuals rather than providing separate guidance on the taxation of investments in ETFs and ETCs.

The Institute has been engaging with Revenue regarding the potential issues for taxpayers arising from the withdrawal of the guidance that had been in place for ETFs. We submitted a Technical Paper to Revenue in August 2021, before the updated manuals were published in September 2021. Revenue confirmed at a meeting of the TALC Direct and Capital Taxes Sub-Committee in December that where the eight-year deemed-disposal rule now applies to an ETF purchased before 1 January 2022, the clock does not begin to run for the purposes of the rule until 1 January 2022.

Revenue had clarified in the September TALC Direct/Capital Taxes Sub-Committee minutes that the updated guidance would apply for tax returns due for filing in 2022 and subsequent tax years. The Institute subsequently sought further clarification from Revenue regarding the effective date of the updated guidance as the ETF Manual stated that the guidance is effective from 1 January 2022.

Revenue Legislation Services sent a paper to the Institute on 21 December to provide additional background on the updated guidance contained in "Part 27-01a-03: Exchange Traded Funds" and to respond to practical concerns that we raised. In the paper, Revenue clarified that the change in guidance applies with effect from 1 January 2022 and that taxpayers who invest in ETFs domiciled in EEA or OCED Member States with which Ireland has a double taxation agreement must carry out the same analysis as those who invest in any other offshore products in those territories to determine the appropriate Irish tax treatment.

Revenue also noted in the paper that, in general, the earliest return for which this analysis should be completed by individuals is the 2022 Form 11 filing in 2023 (generally, in October, with extension to November for online filing), and by companies (with a December year-end) is the 2022 Form CT1, which is due to be filed in September 2023.

The Institute updated members of these clarifications via TaxFax.

Policy News

European Commission proposes Directive to prevent misuse of shell entities for tax purposes ("ATAD 3")

On 22 December 2021 the European Commission adopted a proposal for a Directive (also known as "ATAD 3") on preventing the misuse of shell entities for tax purposes. The proposed Directive sets out certain criteria (referred to as "gateway" criteria and substance requirements) that will allow tax administrations to designate an entity as a shell.

Under the proposals, an entity that is presumed to be a "shell" will not be able to access tax relief and the benefits of the tax treaty network of a Member State and/or qualify for the treatment under the Parent–Subsidiary and Interest and Royalties Directives. To facilitate the implementation of these consequences, either the Member State of residence of the company will deny the shell company a tax residence certificate or the certificate will specify that the company is a shell. Entities that do not meet all substance indicators will have the opportunity to rebut the presumption of being a shell.

The Commission is seeking feedback on the proposed ATAD 3 Directive, and the feedback will be summarised by the Commission and presented to the European Parliament and Council to inform the legislative debate.

Public consultation on new taxation measures to apply to outbound payments

On 5 November 2021 the Department of Finance launched a public consultation seeking stakeholder input on the introduction of new taxation measures to apply to outbound payments. The consultation sought the views of stakeholders on the introduction of potential new measures into Irish law to prevent double non-taxation in relation to outbound payments of interest, royalties and dividends.

On 20 December 2021 the Institute responded to the consultation. In our response, we highlighted the extensive domestic and international tax reforms that have been put in place in recent years and the further measures that are in the process of being implemented or will shortly be transposed into Irish law.

Considering the analysis in the report *The Changing Nature of Outbound Royalties from Ireland and Their Impact on the Taxation of the Profits of US Multinationals* by Seamus Coffey, which shows that the destination of outbound payments from Ireland has changed significantly, a trend that is likely to continue for some time, we recommended that time be taken to evaluate the full impact of recent tax reforms before implementing further domestic defensive measures.

Furthermore, given Ireland's commitment to implementing Pillar Two of the OECD Agreement, which seeks to coordinate the implementation by countries of a minimum effective tax rate for in-scope companies, we noted that it would be prudent for Ireland to await the publication of the proposed EU Directive on the transposition of the Pillar Two provisions before determining whether additional domestic defensive measures are required. The Department of Finance is currently reviewing the submissions received in response to this consultation.

Definition of transfer pricing guidelines broadened to include guidance on financial transactions from 1 January 2022

On 8 December 2021 the Minister for Finance, Paschal Donohoe TD, signed the Taxes Consolidation Act 1997 (Section 835D(3)) Order 2021 to designate *Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS Actions 4, 8–10*

(Paris: OECD, 2020), approved by the OECD's Committee on Fiscal Affairs on 20 January 2020, as being comprised in the transfer pricing guidelines for the purposes of Part 35A of TCA 1997. The relevant Statutory Instrument, SI 686 of 2021, was published on 14 December 2021.

New rules governing VAT rates in the EU agreed at ECOFIN in December

At a meeting of the Economic and Financial Affairs Council (ECOFIN) on 7 December 2021 EU Finance Ministers reached an agreement to update the rules governing VAT rates for goods and services. The new legislation is intended to provide governments with more flexibility in the rates that they can apply and to ensure more equality between EU Member States. The updated rules will also bring VAT rules into line with EU priorities, such as the fight against climate change, digitalisation and public health protection.

The new rules:

- Update the list of goods and services (Annex III to the VAT Directive) to which all Member States can apply reduced VAT rates. New products and services added to the list include those that protect public health, are good for the environment and support the digital transition. Once the rules come into force, Member States will for the first time also be able to exempt from VAT certain listed goods and services considered to cover basic needs.
- Remove the possibility by 2030 for Member States to apply reduced rates and exemptions to goods and services deemed detrimental to the environment and to the EU's climate change objectives.
- Make derogations and exemptions for specific goods and services that are currently in place for historical reasons in certain Member States available to all countries to ensure equal treatment and avoid distortions of competition. However, existing derogations that are not justified by public policy objectives will need to be wound down by 2032.

European Commission launches public consultation on VAT in the digital age

On 20 January 2022 the European Commission launched a call for evidence on a legislative proposal for 2022 on "VAT in the Digital Age", with the feedback period running until 17 February 2022.

The Commission also launched a public consultation on this initiative on 21 January. The consultation seeks stakeholders' views on whether the current VAT rules are adapted to the digital age and on how digital technology can be used both to help Member States fight VAT fraud and to benefit businesses. Views are being sought on:

- VAT reporting obligations and e-invoicing,
- VAT treatment of the platform economy and
- single EU VAT registration.

The consultation is in the form of an online questionnaire, and interested parties can contribute to the consultation until 15 April 2022.

Revenue eBriefs Issued from 1 November 2021 to 31 January 2022

No. 201 National Employer Helpline – Revised Telephone Opening Hours

Revenue confirmed that the National Employer Helpline now provides a telephone service from 9.00am to 1.30pm, Monday to Friday, on 01 7383638.

Revenue reminds employers of the facility on MyEnquiries to submit a new enquiry and to view the status of or provide additional information on an existing enquiry. To ensure that the enquiry is sent to the correct team for response, employers should select "Employers' PAYE" for "My Enquiry relates to" and then the closest match from "More specifically".

Revenue also noted that callers to the helpline may be required to confirm the details that they provide by submitting them via MyEnquiries, to ensure that enquiries or requests are dealt with correctly.

No. 202 Incapacitated Child Tax Credit

Revenue's manual "Incapacitated Child Tax Credit" has been updated to include a table of contents and further instructions on how to claim the relief. The manual has also been updated to include consideration of the child's capacity for independent living, in para. 3.

No. 203 Local Property Tax Direct Debit Guidelines

The "Local Property Tax Direct Debit Guidelines" have been amended to reflect current property valuations and dates.

No. 204 Agent's Guide to the Collector-General's Division

Revenue has amended the "Agent's Guide to the Collector-General's Division" as follows:

- **Appendix 1: Due Dates for Submission of Returns and Payments** – The local property tax (LPT) table has been amended to reflect the current LPT valuation date and key payment dates for 2022.
- **Appendix 3: Agent Authorisation for a Phased Payment Arrangement (PPA)** – This appendix has been removed as it was a duplicate document. The consent form is the form used in the PPA process and can be downloaded via the "Agent Declaration" link on ROS when setting up a PPA. The link to the consent form is available in paras 6 and 15.

No. 205 Guide to C&E Reports Available on Revenue's Online System (ROS)

Revenue has created a new manual, "C&E TAN Reports Available on Revenue's Online Service (ROS) for C&E Traders", providing details of the various reports available in ROS to customs and excise registered customers who are actively importing and/or exporting.

No. 206 Main Features of Income Tax Self-Assessment

Revenue has archived the "Main Features of Income Tax Self-Assessment" manual as the contents are no longer relevant. A comprehensive guide to self-assessment is available in "A Guide to Self-Assessment".

No. 207 ePSWT

Revenue's ePSWT manual has been updated at paras 4.2.1 and 5 regarding the correct reference numbers to use for notifications and in the CSV file upload, where taxpayers have multiple tax registrations.

Paragraph 5.1 has been updated for the CSV file validations, including an upper limit of 4,000 line items and updates about error messages and valid/invalid symbols. Paragraph 12 has been updated to include information about claims for interim refunds from non-resident specified persons.

No. 208 Commercial Importation of Live Animals and Products of Animal Origin

Revenue's "Manual on the Commercial Importation of Live Animals and Products of Animal Origin" has been updated. The revisions include updated advice, locations where live animals and products of animal origin may be imported, updated legislative references and a list of contacts.

No. 209 Relief for Energy Efficient Works

Revenue has archived the manual "Relief for Energy Efficient Works" as the provisions set out in s477A TCA 1997 ceased to have effect from 1 January 2014.

No. 210 Surcharge (Income Tax and Capital Gains Tax) for Non-compliance with Local Property Tax (LPT)

Revenue has issued a reminder of the application of the local property tax (LPT) surcharge to self-assessed taxpayers. An LPT surcharge is triggered when the Form 11 tax return is filed if an LPT return or payment is outstanding. For the 2020 Form 11 return, any outstanding LPT returns or payments for **2021 or earlier years** will result in an LPT surcharge's being triggered. Outstanding LPT returns or payments for 2022 will not trigger a surcharge for the 2020 return.

No. 211 Revenue Announces Extension to ROS Pay and File Deadline 2021

Revenue confirmed a short extension to the extended ROS pay and file deadline until 5pm on 19 November. In light of Covid-19-related developments, Revenue acknowledged the ongoing efforts by taxpayers and agents working to meet the previous midnight, 17 November, deadline.

No. 212 PAYE Services – Manage Your Tax

Revenue has updated the "PAYE Services: Manage Your Tax" manual at section 2.3 to add information on the facility for customers to claim certain credits in real time. In addition, system screenshots have been updated throughout the manual.

No. 213 Concessional Treatment for Corporation Tax – Presence of Individuals In, or Outside, the State

Revenue has confirmed that the concessional treatment whereby Revenue will disregard presence in the State or presence in another jurisdiction for corporation tax purposes where such presence is due to Covid-19 travel restrictions will remain valid up to 31 December 2021. The Covid-19 information on the Revenue website has been updated accordingly.

No. 214 Professional Services Withholding Tax

Revenue has updated the manual "Professional Services Withholding Tax (PSWT) General Instructions" to include material on the electronic Professional Services Withholding Tax (ePSWT) system. This manual should be read in conjunction with the "ePSWT" manual. Relevant material that was previously included in the "Administration of Professional Services Withholding Tax" manual has been incorporated in this manual.

No. 215 RLS Guide to Interpreting Legislation

Revenue has updated the "Revenue Legislative Services' Guide to Interpreting Legislation" as follows:

- Guidance on VAT has been provided in the newly introduced Part 3.
- Guidance has been provided on what caseworkers should do when taxpayers raise EU law arguments in Part 6 or double taxation agreement arguments in the newly introduced Part 7.
- Updates have been made to take account of the Supreme Court's determination in *Bookfinders v Revenue Commissioners* [2020] IESC 60.

No. 216 Liquidation of Companies and Other Company Law Issues

Revenue's "Collection Manual: Liquidation of Companies and Other Company Law Issues" has been amended to reflect the extension of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 ("the Act") to 31 December 2021.

Section 4 (Procedure for Liquidation) has been updated at para. 4.3 to reflect the increased minimum amount for a demand to €50,000 to 31 December 2021. The Act increased the minimum amount for a demand from €10,000 for one creditor or €20,000 for two or more creditors to €50,000.

Section 14 (Examinership) has also been updated. Examinership allows companies that are experiencing financial difficulties to seek the protection of the High Court from creditors for a limited period, to a maximum of 100 days. The Act increased the maximum to 150 days.

No. 217 Local Property Tax: Implications of Sales and Transfers of Residential Properties

Revenue created two new local property tax (LPT) manuals to update and replace the guidelines published on the Revenue website titled "Guidelines for the Sale or Transfer of Ownership of a Relevant Residential Property" ("the Guidelines").

A new manual titled "Change of Liable Person During a Valuation Period" has been created to include material from the first part of the Guidelines dealing with the requirements for vendors and purchasers relating to the sale of a property. The material in the manual will continue to be relevant in relation to the second valuation period.

A new manual titled "LPT Clearance Procedures on the Sale or Transfer of Residential Properties" has been created to include the material from the second part of the Guidelines dealing with the Revenue tax clearance procedures in relation to sales of properties. These clearance procedures will continue to operate until 31 December 2021. Revised clearance procedures are being considered in respect of sales of properties after 31 December 2021.

No. 218 Stamp Duties Consolidation Act 1999: Part 9

Revenue's manual "Stamp Duties Consolidation Act 1999 Part 9: Levies" has been updated to remove guidance on the pension schemes levy that was provided for under s125B SDCA 1999 as it is no longer charged.

No. 219 Local Property Tax: Income Tax, Corporation Tax and Capital Gains Tax Surcharge

Revenue has updated the "Local Property Tax (LPT) Surcharge" manual, which outlines the surcharge that can be imposed in respect of income tax, corporation tax and capital gains tax for non-compliance with LPT obligations.

Section 3.3 has been updated to reflect the change in the cap on the LPT surcharge, reduced from 100% to 50% of the LPT liability where a person becomes fully LPT compliant. The surcharge cap was reduced to 50% by s30 of Finance (Local Property Tax) Act 2012 (as amended).

Section 4 of the manual has been updated to include a link to eBrief No. 210/2021, issued on 12 November 2021, stating that outstanding LPT returns or payments for 2022 would not trigger an LPT surcharge for the Form 11 2020 return.

No. 220 Tax Reference Numbers

Revenue's manual "Filing and Paying Stamp Duty on Instruments – Chapter 3: Tax Reference Number" has been updated as follows:

- Section 1.1 provides clarification in relation to deceased non-resident persons.
- Section 1.4 has been updated with the new requirement to include associated companies' tax reference numbers, in addition to existing requirements.
- Section 1.5 now covers both bodies corporate and unincorporated, in addition to the new requirement to include associated companies' tax reference numbers.
- Section 2 on tax types has been removed.
- Section 5 provides clarification on the need to file stamp duty returns for deeds of assent.
- Section 7 has been added regarding the requirement for embassies to register for tax with Revenue on Form TR2 (FT).
- Section 9 has been updated regarding the requirement for a written application for an exemption from electronic filing of stamp duty returns in favour of a paper form.

No. 221 Local Property Tax: Meaning of a "Residential Property"

Revenue has created a new LPT manual titled "Meaning of a 'Residential Property'". This covers matters including:

- whether a property is a "building" (as defined);
- the exclusion of certain types of structure;
- what constitutes a "dwelling";
- the use of a property as a dwelling or its suitability for such use;
- the inclusion of associated buildings and land; and
- the extent of the associated land to be included.

The manual also addresses some ancillary matters, such as valuation issues and appealing Revenue determinations.

No. 222 Customs Manual on Preferential Origin

Revenue released an updated "Customs Manual on Preferential Origin" following the UK's exit from the EU, to confirm that the transitional rules for Pan-Euro-Med (PEM) are in operation since 1 September 2021. In addition, section 1.13 of the manual now includes a link to the PEM Convention matrix table for diagonal cumulation and section 2.8 includes the wording necessary for a statement on origin for exports to the UK.

Appendix 2 of the related manual has also been updated to include the text of the statement on origin for the EU–UK Trade and Cooperation Agreement (TCA) and the text of the statement on origin for the EU–Socialist Republic of Vietnam free trade agreement.

Finally, a new manual, "Customs Manual on Preferential Origin: Appendix 3", has been created to provide guidance on:

- product-specific rules (PSRs),
- origin quotas and alternatives to PSRs and
- transitional PSRs for electric accumulators and electrified vehicles as set out in the EU–UK TCA.

No. 223 Home Carer Tax Credit

The examples contained in Revenue's "Home Carer Tax Credit" manual have been updated, primarily to reflect the credit available in the current year of assessment.

No. 224 Value Added Tax (VAT) Repayment Offset

The "Value Added Tax (VAT) Repayment Offset" manual has been updated to reflect changes to the offset options available when claiming VAT repayments on ROS. Screenshots have also been added to the manual to provide further clarity.

No. 225 COVID-19 Measures Related to Personal Tax Matters

In March 2020 a range of concessionary measures relating to personal tax matters were introduced given the unprecedented impact of the Covid-19 pandemic. In an eBrief in December 2020 Revenue confirmed that some of the measures introduced in March 2020 would cease to apply on 31 December 2020, whereas others would be retained for the 2021 year of assessment.

In an eBrief in January 2021 Revenue further confirmed that a number of concessionary measures related to benefit-in-kind would also be retained for the 2021 tax year.

Revenue reviewed a number of the Covid-19 concessions relating to personal tax matters that were retained for the 2021 year of assessment following the recent changes in public health guidelines. The following measures were reviewed:

- **Transborder Workers Relief:** After clarification from the Minister for Finance, this temporary concessionary measure will continue to apply for the period of time in 2022 during which public health measures require an employee to work from home, unless their employment requires that they attend the workplace in person. See section 11 of the "Transborder Workers Relief" manual for further information.
- **Benefit-in-kind on the provision of Covid-19 testing and facilitation of flu vaccination:** These measures will be retained for 2022 and subsequent years and will be provided

for on a statutory basis following the enactment of Finance Bill 2021. See section 16 of the manual "Chapter 12 – The Provision of Miscellaneous Benefits" for further information.

- **Benefit-in-kind on employer-provided vehicles and use of company cars by employees in the motor industry:** These measures will remain in place while public health guidance advises employees to work from home. Once public health guidance no longer requires employees to work from home, the legislation will apply in the usual manner. See sections 8 and 9 of the manual "Chapter 2 – Employer-Provided Vehicles" for further information.
- **Payment of taxi fares by an employer:** This measure will remain in place for now and will be subject to further review by 30 June 2022. See section 28 of the manual "Chapter 12 – The Provision of Miscellaneous Benefits" and section 4.5 of the manual "Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees" for further information.
- **Small-benefit exemption:** This measure, allowing more than one voucher to be given to an employee, will be retained for 2022. See section 3 of the manual "Chapter 5 – The Small Benefit Exemption" for further information.
- **Benefit-in-kind on employer-provided accommodation:** This measure will be retained for 2022 on the basis that "temporary", for the purpose of this measure, means a continuous period of no more than three weeks. See section 4 of the manual "Chapter 3 – The Provision of Free or Subsidised Accommodation" for further information.

At present, Revenue does not intend to reintroduce any of the concessionary measures that ceased to apply on 31 December 2020. However, Revenue will continue to review regularly all Covid-19-related matters, and if any further measures are considered necessary in the future, published guidance will be updated accordingly.

No. 226 Research and Development (R&D) Tax Credit

Finance Bill 2019 introduced measures to enhance the research and development (R&D) tax credit for small and micro companies, such as increasing the R&D tax credit rate from 25% to 30% and enhancing the method of calculation of the payable credit. These measures are subject to a commencement order, as the enhancements to the R&D tax credit for small and micro companies require State Aid approval from the European Commission.

Revenue has updated section 11 of the "Research and Development (R&D) Tax Credit" manual to reiterate that measures to enhance the R&D tax credit for small and micro companies have not yet been commenced and that claims should only be made in accordance with legislation that is in effect.

The updated manual confirms that claims incorrectly made at the 30% rate by small and micro companies under s766 TCA 1997, which has not yet been commenced, will be allowable at the 25% rate provided for in the legislation where all conditions for claiming the R&D tax credit are met.

The updated manual also confirms that s766C TCA 1997, which allows small and micro companies to submit a claim for the R&D tax credit where they have not yet begun trading, has not been commenced; therefore, no relief is available at this time in respect of that section. Any claims for relief made in excess of that allowed under legislation that is in effect will be clawed back by Revenue.

No. 227 Crest Manual

Revenue's manual "CREST: Electronic Share Trading – Rules, Procedures, Practices, Guidelines and Interpretations" has been updated to reflect the change of name for Euroclear UK and Ireland Limited, which is now Euroclear UK & International Limited.

No. 228 Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees

Revenue has updated the manual "Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees" at Appendix 1, with related changes in Appendix 2, to include the revised standard domestic subsistence rates with effect from 1 December 2021.

No. 229 PAYE Exclusion Orders

Revenue has updated the "PAYE Exclusion Orders" manual as follows:

- **Section 2: What is a PAYE exclusion order?** has been amended to highlight that an employer is relieved of the obligation to deduct both income tax and USC where an exclusion order has issued.
- **Section 10: Making a payroll submission where a PAYE exclusion order has issued** has been added to highlight the requirements for payroll submissions where an exclusion order is in place, or is not in place, during a tax year.
- **Section 11: COVID-19 PAYE exclusion order concession** has been amended to include specific guidance relating to the Covid-19 concession applicable to PAYE exclusion orders in 2020.

No. 230 Relief for Certain Income from Leasing of Farmland

Revenue's manual "Relief for Certain Income from Leasing of Farmland" has been updated to confirm that "lease", "lessee", "lessor" and "rent" have the same meanings as in Chapter 8 of Part 4 TCA 1997.

New examples have been included in section 5 to clarify the position where a lessee dies and rights under the lease are assumed by a successor in title (Example 3), and where a lessee retires and rights under the lease are assigned to another person (Example 4).

No. 231 Employee Payroll Tax Deductions in Relation to Non-Irish Employments Exercised in the State

Revenue has updated the manual titled "Pay As You Earn (PAYE) System – Employee Payroll Tax Deductions in Relation to Non-Irish Employments Exercised in the State" as follows:

- Chapter 4, "Temporary Assignees – 1 January 2020: Release for Employers from the Obligation to Operate Irish PAYE", has been revised as follows:
  - para. 4.2 has been updated to give clearer guidance on scenarios where an employer is released from the obligation to operate PAYE with regard to temporary assignees;
  - additional narrative has been included in para. 4.3 with respect to the technical interpretation of Article 15(2) of the OECD Model Convention;
  - the narrative regarding the timelines for which a PAYE dispensation should be sought has been updated in para. 4.5; and
  - para. 4.7 has been updated to reflect that information relating to procedures in place for the period to 31 December 2019 has been moved to Appendix F.
- Chapter 5 has been updated to include worked examples to reflect the 2021 tax year.
- Chapter 9 has been added to provide details of the Covid-19 concessions published by Revenue with respect to the Irish tax treatment of foreign employments exercised in the State.
- Appendix C has been amended to include references to the UK where relevant.

No. 232 Customs Valuation

Revenue's "Customs Manual on Valuation" has been updated at section 16 to include changes to the valuation indicators: since the introduction of the AIS (Automated Import System), completion of DE 4/13 replaces the requirement to provide a paper version of DV1(G563). In addition, Appendix C – Annex 23-01 now includes the UK (excluding Northern Ireland).

No. 233 Irish Real Estate Fund (IREF) January 2022 Filings – Updated Form IREF Available

Irish real estate funds (IREFs) with accounting periods ending between 1 January 2021 and 30 June 2021 are required to file an updated Form IREF on or before 30 January 2022, as provided by s739R TCA 1997. A new version of the Form IREF is now available on the Revenue website, in the "Related Forms" panel, which has been updated as follows:

- The "Notes" tab clarifies that "Material Transactions", as required to be disclosed in Part 1 of the form, includes transactions affecting the financing or capital structure of the IREF, such as changes in rights attaching to units.
- The "Pay and File" tab clarifies that:
    - financial statements must be filed at the sub-fund level rather than the umbrella fund level;
    - legislation provides for penalties where the financial statements are not filed by the due date or in a format set out in regulations; and
    - payment instructions are required to ensure correct and prompt allocations of payments made by way of EFT.

No. 234 Review of Opinions/Confirmations

Taxpayers who wish to continue to rely on opinions or confirmations provided by Revenue in 2016 must apply to Revenue seeking a renewal or extension of the opinion by 31 March 2022. Revenue's "Review of Opinions or Confirmations" manual has been updated to reflect this deadline.

No. 235 Finance Act 2021 – VAT Notes for Guidance

Revenue published the "Finance Act 2021: Value-Added Tax Notes for Guidance" on the Revenue website.

No. 236 Guidelines for Requesting Mutual Agreement Procedure ("MAP") Assistance in Ireland

Revenue has updated the "Guidelines for Requesting Mutual Agreement Procedure ('MAP') Assistance in Ireland" to incorporate Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.

This manual also reflects s959AW TCA 1997, which enables the collection of disputed tax to be suspended where, on foot of an assessment or amended assessment raised by Revenue, the taxpayer makes a MAP request within 30 days after the date of the notice of assessment and has paid any undisputed tax amounts.

Guidance relating to correlative adjustment claims has been removed from this manual as this guidance has been included in "Guidelines for Article 9 Correlative Adjustment Claim".

No. 237 Concessional Treatment for Corporation Tax – Presence of Individuals In, or Outside, the State

Revenue confirms that the concessional treatment whereby Revenue will disregard presence in the State or presence in another jurisdiction for corporation tax purposes where such presence is due to Covid-19 travel restrictions will remain valid up to 31 January 2022. The Covid-19 information on the Revenue website was updated accordingly. Revenue will keep the position under review to determine whether any further extension will be required.

No. 238 Stamp Duty Insurance Levies (SDIL) January 2022 Filings – Updated SDIL Forms Available

Revenue has updated several stamp duty insurance levies (SDIL) forms in respect of January 2022 filings, which are now available on the Revenue website:

- A new version of the Form SDCA125 in respect of filings for levies on certain premiums of insurance (non-life) and contributions to insurance compensation funds. Insurers returning a statement of assessable amounts for the quarter ended 31 December 2021 are required to file this updated Form SDCA125 on or before 25 January 2022, as provided by s125 SDCA 1999.
- A new version of the Policies of Insurance (Non-Life) Form. Insurers returning stamp

duty on policies of insurance (non-life) payment under a composition agreement (s5 SDCA 1999) for the quarter ended 31 December 2021 are required to file this updated Policies of Insurance (Non-Life) Form on or before 25 January 2022.

- A new version of the Form SDCA124B in respect of filings for levies on certain life assurance premiums. Insurers returning a statement of assessable amounts for the quarter ended 31 December 2021 are required to file this updated Form SDCA124B on or before 25 January 2022, as provided by s124B SDCA 1999.

No. 239 Vehicle Registration Tax Manual – Section 1

The following vehicle registration tax (VRT) manuals have been updated to reflect Finance Act 2021 amendments:

- "Vehicle Registration Tax: Manual 1 – Procedures and Processes in Revenue" at section 3.4.2, "Verification of CO_2 emissions";
- "Vehicle Registration Tax: Manual 1A – Vehicle Classification and Tax Categories" at section 4.2, "VRT categories, EU categories and tax";
- "Vehicle Registration Tax: Manual 1C – Conversions" at section 8, "Calculating the VRT due on conversion";
- "Vehicle Registration Tax: Manual Section 3 – Repayment Schemes and Procedures for Processing Repayment Claims" at section 3.4, "Electric vehicles including motorcycles"; and
- "Vehicle Registration Tax: Manual Section 8 – Valuation System for New and Used Vehicles" at section 3.7.1, "Calculate the CO_2 element"; section 4, "Example of a VRT calculation"; section 6, "Calculations for recently registered Category A vehicles"; and Appendix 2, "Minimum VRT amounts in VRT Category A (M1/N1)".

No. 240 VAT Groups

Revenue's "VAT Groups" manual has been updated to reflect amendments contained in Finance Act 2021.

In addition, the "VAT and Charities" manual has been archived. This manual is no longer relevant as the contents are available on the Revenue website.

No. 241 Share Schemes Manuals

Several updates have been made to the share schemes manuals:

- "Chapter 2 – Restricted Stock Units (RSU)" includes additional information in section 2.6 regarding the exemption from employer's PRSI. Section 2.7.4 is updated in respect of the temporary filing concessions due to Covid-19 for cases where real-time foreign tax credits are claimed. Confirmation of the optional RSU reporting fields is included in section 2.8.
- "Chapter 3 – Unapproved Share Options" includes refreshed examples throughout the manual.
- "Chapter 8 – Restricted Shares" includes refreshed examples. Section 8.5 confirms changes to employer payroll obligations where additional tax is due on the lifting or altering of blocking/clog periods by the employer. The chapter has also been updated to include reference to the UK as an allowable location for a trust and trustees used for the retention of restricted shares, within the meaning of s128D TCA 1997, as provided for in the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.
- "Chapter 9 – Key Employee Engagement Programme (KEEP)" has been updated at sections 9.1 and 9.3.2 to reflect the amendment to the definition of a qualifying share option, including changes to the award criteria. Due to the name change, references to the "Enterprise Securities Market" are amended throughout the manual to the "Euronext Growth Market". References to "a similar or corresponding market of the stock exchange" are amended to include the UK, as provided for in the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.
- "Chapter 15 – Filing Guidelines for Share Scheme Reporting (SSR)" has been updated

to include examples of common filing issues/errors in respect of Form ESA in section 4.3.10. Links to Chapter 15 are included in the chapters listed above.

No. 001 Section 481 Film Corporation Tax Credit

Revenue has updated the manual “Section 481 Film Corporation Tax Credit” to reflect Finance Act 2021 amendments. The amendments confirm that payments made directly by a qualifying company in respect of labour-only services by an individual for the purposes of a qualifying film qualify as eligible expenditure.

No. 002 Amendments Made by Finance Act 2021 to Section 486C TCA 1997, Start-up Relief for Companies

The “Tax Relief for New Start-up Companies” manual has been updated to reflect the changes to the relevant time periods for which the relief can be claimed (outlined in section 6 of the manual).

Finance Act 2021 extended the scheme to 31 December 2026 and extended the period of availability of the relief from the first three years to the first five years of trading, for qualifying companies that began to trade on or after 1 January 2018. This change was made in recognition of the difficulties that qualifying companies have had in using the relief over the past two years due to the impact of Covid-19-related wage supports on employer’s PRSI payments.

No. 003 Repayment of Appropriate Tax to First Time Purchasers – Section 266A TCA 1997

Revenue has archived the manual “Repayment of Appropriate Tax to First Time Purchasers – Section 266A TCA 1997” as the contents are no longer relevant. Claims under s266A were to be made in the period from 14 October 2014 to 31 December 2017.

No. 004 Pre-letting Expenditure in Respect of Vacant Residential Premises

The manual “Pre-letting Expenditure in Respect of Vacant Residential Premises” reflects the extension to the period for a deduction of certain “pre-letting” expenses for a further three years to 31 December 2024.

No. 005 Charitable Tax Exemption

The manual “Charitable Tax Exemption: Tax Exemption for Charities under Sections 207 and 208 Taxes Consolidation Act 1997” has been updated (at para. 7) to reflect that the Charitable Donation Scheme can be availed of by eligible charities that have amalgamated or reorganised and have previously been granted exemption, hold Revenue authorisation and have met all conditions before restructuring for a period of at least two years.

No. 006 Credit in Respect of Tax Deducted from Emoluments of Certain Directors and Employees

The manual “Credit in Respect of Tax Deducted from Emoluments of Certain Directors and Employees” has been amended to reflect the update to the debt warehousing scheme to allow certain directors/employees to warehouse Schedule E tax liabilities.

No. 007 Sea-going Naval Personnel Tax Credit

The manual “Sea-going Naval Personnel Tax Credit” reflects the extension of the Sea-going Naval Personnel Tax Credit to the 2022 year of assessment. The value of the credit and qualifying criteria remain unchanged.

No. 008 Charitable Donation Scheme Tax Relief for Donations to Approved Bodies

The manual “Charitable Donation Scheme: Tax Relief for Donations to Approved Bodies” has been updated (at para. 6) to provide that where a body with the exemption has restructured, the successor body will be deemed exempt and will inherit the authorisation to operate the Charitable Donation Scheme provided the authorisation was held for at least two years before reorganisation by a charity or charities. The manual has also been updated at para. 7 to clarify the steps for authorisation.

No. 009 High Income Individuals' Restriction – Income Chargeable to Tax at the Standard Rate in Joint Assessment Cases

The manual "High Income Individuals' Restriction: Income Chargeable to Tax at the Standard Rate in Joint Assessment Cases" reflects the increase in the standard rate cut-off point for spouses and civil partners, both of whom are in receipt of income, from €26,300 to €27,800 for 2022 and subsequent years.

No. 010 Pensions Manual Update

The Pensions Manual has been amended (at section 4.9 of Chapter 4) to reflect the Finance Act amendment to s774(6) TCA 1997. This amendment provides that tax relief is available for pension contributions made by a company, described as a "relevant contributor", to occupational pension schemes to benefit current or former employees of another company where the contributions are paid under the terms of a legally binding agreement between two or more companies, and not only in cases where the other company is a party to that agreement.

No. 011 Revenue Documentation to Verify Personal Addresses for Non-Revenue Purposes

Some Revenue-produced documentation may be used by a taxpayer to verify their address to a third party, for example, when opening a bank account. Revenue has created a new manual titled "Revenue Documentation to Verify Personal Addresses for Non-Revenue Purposes", which outlines different types of documentation produced by Revenue that could be used to verify an address to a third party. Revenue staff are not in a position to certify or stamp such documents for any external, non-Revenue purpose.

Revenue has also updated the "Addresses in Company Cases" manual to reflect that ROS Administrators can update official and/or business addresses in their ROS profile. A company or agent updating an address on ROS must notify the Companies Registration Office of any change in the address of the company's registered office within 14 days of the change of address.

No. 012 eCG50 – Guide for Applicants

Revenue's "eCG50 – Guide for Applicants" has been amended to reflect updates to the system:

- References to "market assets" have been deleted from paras 4 and 6.
- Figure 4 has been updated.
- Additional information has been included in para. 4.8 on the issuing of a copy of the clearance certificate to the agent's/adviser's ROS record. Since the end of July 2021, a copy of the CG50A certificate is issued to the ROS inbox of the agent/adviser who submitted the application. The copy is available in the Revenue record the day after the certificate is approved and issued (following an overnight update).

No. 013 Non-Residents and Tax Credits

Revenue's "Non-Residents and Tax Credits" manual has been updated to reflect the amendments made by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

No. 014 Universal Social Charge

The "Universal Social Charge" manual has been updated to reflect the following Finance Act 2021 amendments:

- increase in the USC rate threshold in line with increases to the national minimum wage (para. 4);
- exemption of income in respect of the Pandemic Placement Grant (s197I TCA 1997) and certain profits of micro-generation of electricity (s216D TCA 1997) (para. 12.2); and
- extension of the reduced rate of USC for medical card holders for a further year (extended to 2022) (para. 13).

No. 015 Exemption of Certain Income Arising to Specified Non-commercial State-Sponsored Bodies

The manual "Exemption of Certain Income Arising to Specified Non-commercial State-Sponsored Bodies" has been updated to reflect the Finance Act 2021 amendment to Schedule 4 TCA 1997. This relates to the inclusion of The Approved Housing Bodies Regulatory Authority in Schedule 4. Schedule 4 specifies the non-commercial State-sponsored bodies that are exempt from tax on certain income under s227 TCA 1997.

No. 016 PAYE/USC Regulations – Emergency Tax

The manual "PAYE/USC Regulations – Emergency Tax" has been updated to reflect the increase in tax bands introduced by Finance Act 2021. In addition, examples throughout the manual have been updated, including relevant references to information available on the Revenue website.

No. 017 Part 42-04-55 – National Co-op Farm Relief Service Operators

Revenue's manual "National Co-op Farm Relief Service Operators" has been updated at para. 2 to reflect the PRSI treatment of labour-only operators in line with the "Code of Practice on Determining Employment Status", which was published by the Department of Social Protection in July 2021.

No. 018 Capital Acquisitions Tax – Exemptions from CAT

The "Exemptions from Capital Acquisitions Tax (CAT)" manual has been updated at para. 23.12 to reflect a Finance Act 2021 amendment to s82 CATCA 2003. Section 82 CATCA 2003 provides for an exemption from CAT for bona fide winnings. The section was amended to provide that the exemption applies to winnings in non-cash form as well as winnings in cash form.

No. 019 Stamp Duty Manuals

Revenue has updated the Stamp Duty Manual folder to make it easier to navigate. The folder now includes the material contained in the Stamp Duty Manual and the Stamp Duty Manual (Replacement) folders. As a result, the Stamp Duty Manual (Replacement) folder has been removed from the Revenue website.

In addition, the manuals "Schedules" and "Part 08 – Sections 114–122", which were located in the Stamp Duty Manual folder and contained links to material in the Stamp Duty Manual (Replacement) folder, are no longer relevant and have been archived.

No. 020 Local Property Tax: Amendment of TDMs Part 09-01 (Appeals) and Part 07-02 (Surcharge)

Revenue has updated two local property tax (LPT) manuals.

The "Appeals: Part 09-01" manual has been updated to reflect changes made by the Finance (Local Property Tax) (Amendment) Act 2021 to appeals. The amendments include:

- specific rights of appeal to the Tax Appeals Commission (TAC) against a Revenue decision to refuse a claim for exemption and to specify a designated liable person for a jointly owned property;
- the making of appeals against certain assessments to the Land Values Reference Committee, instead of the TAC, where the matter in dispute involves the valuation of a property; and
- an exclusion from the restriction on surcharge appeals for appeals against an income tax assessment that contains an LPT-generated surcharge where the grounds for an appeal relate to LPT non-compliance.

In addition, the position of long leases to local authorities or approved housing bodies is referenced at section 4.1.2. Summaries of the published TAC determinations to date have also been included, with a link to the full determinations on the TAC website.

The "Surcharge (Income Tax, Corporation Tax, Capital Gains Tax): Part 07-02" manual has been updated to include a new section 7 on appealing an assessment that contains an

LPT-generated surcharge. Clarification has also been added that the date on which an LPT-generated income tax surcharge is triggered can be an earlier date than the usual 31 October return filing date, where an income tax return is filed before this date, and to correct Example 2 in this regard.

No. 021 Introduction to Stamp Duty Manual

The "Introduction to Stamp Duty" manual has been updated to reflect that all Registry of Deeds application forms (previously known as Memorials) and any associated fees should be sent directly to the Registry of Deeds service in the Property Registration Authority.

No. 022 Import of Motor Vehicles from the UK

From 1 January 2021 the importation of a motor vehicle from the UK (excluding Northern Ireland) requires the importer to complete a customs import declaration, pay customs duty, if applicable, and pay VAT on import before presenting the vehicle for registration.

Revenue has published a manual titled "Importation of Motor Vehicles from the UK" containing details on customs procedures, including the different requirements for vehicles first registered in Great Britain compared to those first registered in Northern Ireland.

Information is also provided on the requirements before importation and the information to include when making a customs import declaration, relevant CN codes and the importance of including the vehicle identification number (VIN) in the declaration. The manual also covers the procedure around the importation of a private motor vehicle when applying for transfer-of-residence relief. It outlines the requirements for a vehicle to be considered eligible for preferential tariff treatment and returned goods relief.

No. 023 Local Property Tax: Valuation of Properties and Non-liable Diplomatic Properties

Two new local property tax (LPT) manuals have been published.

- "The Valuation of a Residential Property: Part 04-01" addresses various issues associated with the valuation of residential properties for LPT purposes, such as whether a property is to be valued as a residential property, the way in which certain properties are to be valued and the components of a property that are to be valued.
- "Properties Used for Diplomatic Purposes: Part 02-00" sets out the basis on which residential properties used for certain diplomatic purposes are outside the scope of LPT.

Determinations of the Tax Appeals Commission Published from 1 November 2021 to 31 January 2022

Case reference	Tax head/topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
131TACD2021	PAYE, PREM, PRSI and USC	Appeal regarding payments made to employees in the form of awards for sitting and completing final professional examinations s112 TCA 1997; Sch E TCA 1997	Unknown
132TACD2021	CAT	Appeal regarding the availability of business relief on the transfer of shares in a company that was engaged in a supermarket business from a father to a child in 2012 s92 CATCA 2003; s93(3) CATCA 2003; s100(2) CATCA 2003	Unknown

133TACD2021	**CGT**	Appeal regarding repayment of tax outside the four-year limitation period s956 TCA 1997	Unknown
134TACD2021	**VRT**	Appeal relating to the availability of VRT "transfer of residence relief" in accordance with s134 Finance Act 1992	Unknown
135TACD2021	**CGT**	Appeal regarding notice of assessment to CGT following the disposal by a Maltese-tax-resident company of its 100% shareholding in an Irish-resident trading company. The Maltese company was owned by an Irish-resident and -domiciled individual. s590 TCA 1997	Unknown
136TACD2021	**Corporation tax**	Interpretation of s291A and whether a fishing licence qualified as a "specified intangible asset" s291A TCA 1997	Yes
137TACD2021	**VRT**	Appeal regarding the classification of a vehicle as a "van" for VRT purposes	Unknown
138TACD2021	**VRT**	Appeal regarding payment of VRT following the correct designation of the vehicles as category N1 and not M1	No
01TACD2022	**Income tax**	Appeal regarding whether a GP had transferred his interest in a medical partnership to an unlimited company in 2011. The appellant contended that he had disposed of goodwill, and he declared the gain and paid CGT to Revenue on this basis s52 TCA 1997; Sch D TCA 1997	Yes
02TACD2022	**Income tax**	Appeal regarding the payment of tax in the year of receipt s112 TCA 1997	Unknown
03TACD2022	**Income tax**	Appeal regarding repayment in the context of the four-year statutory limitation period – repayment of income tax paid on social welfare income that was paid in error s865 TCA 1997	Unknown
04TACD2022	**LPT**	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown

05TACD2022	**PAYE**	Appeal regarding repayment in the context of the four-year statutory limitation period – challenging personal circumstances s865 TCA 1997	Unknown
06TACD2022	**Income tax**	Appeal regarding treatment of pension contributions and statutory deadlines s776 TCA 1997	Unknown
07TACD2022	**Income tax**	Appeal regarding repayment in the context of the four-year statutory limitation period – challenging financial and medical circumstances s865 TCA 1997	Unknown
08TACD2022	**Income tax**	Appeal regarding loss relief relating to tourist trading losses governed by s48 Finance Act 1995 s381 TCA 1997	Unknown
09TACD2022	**Income tax**	Appeal regarding credit in respect of tax deducted from emoluments of certain directors s997A TCA 1997	No
10TACD2022	**Income tax**	Appeal regarding credit in respect of tax deducted from emoluments of certain directors s997A TCA 1997	No
11TACD2022	**VRT**	Appeal regarding date of vehicle importation and viability to VRT s132(3A) Finance Act 1992; Regulation 8 of the Vehicle Registration and Taxation Regulations 1992	No

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

Fiona Carney
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Tax Appeals Commission Determinations

01	CGT – Application of General Anti-Avoidance Rules	High Court
02	CGT – Attribution of Chargeable Gains to Participators	Tax Appeals Commission
03	Corporation Tax – Capital Allowances under s291A on Fishing Licences	Tax Appeals Commission
04	Payroll Taxes – Taxation of Exam Awards	Tax Appeals Commission
05	CAT – Business Relief on Transfer of Shares	Tax Appeals Commission
06	Income Tax – Transfer of Business to Company	Tax Appeals Commission

01 CGT – Application of General Anti-Avoidance Rules

The Irish High Court delivered its judgment in the case of ***Hanrahan v Revenue*** [2022] IEHC 43 on 14 January 2022. It concerned an appeal against a determination of the Tax Appeals Commission in 2020 that a particular transaction was a "tax avoidance transaction" within the meaning of s811 TCA 1997. [This case was covered in "Direct Tax Cases" in *Irish Tax Review*, 33/3 (2020).]

In 2004 the appellant acquired preference shares in a company (Parnell), which resulted in the appellant and Parnell being connected parties for tax purposes. Parnell subsequently acquired a German Government bond from a third party for consideration amounting to *c.* €2.98m and entered into a call option agreement with another connected party (Securitisation) for a premium of €2.68m. The call option agreement granted Securitisation the right to acquire the bond.

Parnell sold the bond to the appellant, subject to the call option agreement with Securitisation, for consideration of *c.* €0.58m. Securitisation granted a put option to the appellant to sell the bond to it on the same terms as set out in the call option agreement between Parnell and Securitisation. The appellant exercised his put option requiring Securitisation to acquire the bond for consideration of *c.* €0.32m, giving rise to a loss of *c.* €0.26m.

For tax purposes, as the appellant was connected with Parnell at the time of the acquisition, he was deemed to have acquired the bond for market-value consideration of *c*. €2.98m under s549 TCA 1997. The market value was calculated as if the options did not exist. The appellant therefore claimed that the disposal gave rise to a CGT loss of *c*. €2.66m, which he set off against capital gains arising in 2004 and 2005 under s31 TCA 1997, which provides that "capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting…any allowable losses accruing to that person in that year of assessment…".

Revenue contended that the transaction was carefully arranged to take advantage of the CGT rules in relation to options and their interaction with the rules on disposals between connected persons. It conferred a substantial tax advantage by generating an artificial loss far above the actual monetary loss and was a "tax avoidance transaction" for the purposes of s811(2).

Revenue then considered whether the carve-out in s811(3)(a)(ii) applied:

> "in forming an opinion in accordance with [ss(2)]…as to whether or not a transaction is a tax avoidance transaction, the Revenue Commissioners shall not regard the transaction as being a tax avoidance transaction if they are satisfied that…the transaction was undertaken or arranged for the purpose of obtaining the benefit of any relief, allowance or other abatement provided by any provision of the Acts and that the **transaction would not result directly or indirectly in a misuse of the provision or an abuse of the provision having regard to the purposes for which it was provided** [my emphasis]".

Revenue formed the opinion that the transaction must be considered to be a blatant misuse or abuse of the relief afforded by s31 as there are no rules in the CGT code that confer an entitlement on a taxpayer to claim artificial losses or to claim losses in excess of those actually incurred.

The Appeal Commissioner upheld Revenue's assessment, stating that he was satisfied that the intent of the Oireachtas, in providing relief for losses accruing to a person, is to provide relief to assist with actual financial hardship.

However, Justice Stack in the High Court did not agree with this analysis. She noted that a number of interlocking provisions resulted in the allowable loss that was claimed. It was in fact the application of the connected-party rules of s549 – which is an anti-avoidance provision and not a relieving provision – that benefited the appellant rather than the interpretation of s31. A key question was therefore whether s811 would allow s549 to be disapplied given that, as Revenue contended, it has given rise to a consequence that was not intended by the Oireachtas when s31 was enacted.

In the judge's view, s811 cannot be used to go so far as to disapply the express provisions of s549. This is despite the fact that a "gap" or anomaly might have flowed from it that the appellant took advantage of to create an artificial loss. The judge concluded that s811 does not permit a finding that the appellant had misused or abused the relief provided for in s31. The tax advantage was achieved by using provisions that were anti-avoidance provisions specific to the question of which artificial losses would be accepted for the purposes of deducting losses pursuant to s31. The transaction was therefore not a "tax avoidance transaction".

The judge was also required to consider whether the Notice of Opinion was prohibited as being out of time by reason of s955 TCA 1997. Revenue contended that s955(2) did not apply because the appellant had not made "a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period" in his tax returns. In any event, Revenue contended that s811(5A) applied to set aside the time limits in s955(2). The judge agreed that the time limits in s955(2) do not apply to the Notice of Opinion, or any part of it, by reason of s811(5A).

02 CGT – Attribution of Chargeable Gains to Participators

Tax appeal **135TACD2021** concerned the disposal by a Maltese-tax-resident company (MaltaCo) of its 100% shareholding in an Irish-resident trading company. MaltaCo was owned by an Irish-resident and -domiciled individual.

Revenue raised an assessment on the appellant under s590 TCA 1997 for the gain arising on the disposal. This section operates to attribute to participators certain chargeable gains accruing to a company that is not Irish resident and that would be a close company if it were so resident.

The appellant submitted that, if MaltaCo were an Irish-resident company, the disposal of the ordinary shares would be within s626B TCA 1997. The combined effect of s590(15) and s626B(2) is that no “chargeable gain” accrued to the Malta company for s590 purposes, with the result that there is no “chargeable gain” in existence to treat subsequently under s590(4) as accruing to the appellant.

The appellant also submitted that the taxing rights on the gain accruing to MaltaCo are allocated to Malta under the Ireland–Malta double taxation agreement (DTA). He also argued that s590 is incompatible with EU law as it constitutes a restriction of the free movement of capital, which is prohibited under Article 63 of the Treaty on the Functioning of the European Union (TFEU).

Revenue submitted that s590 charges to tax the Irish-resident participator and not the non-resident company. Consequently, s626B cannot exempt a charge to tax that does not exist on the non-resident company. Revenue also submitted that, as it is the Irish-resident individual who is assessed to tax under s590, the Ireland–Malta DTA is not relevant and the lawfulness of s590 is not a matter within the remit of an Appeal Commissioner.

The Appeal Commissioner determined that the computation of the gain is, in accordance with the taxing statute in s545 TCA 1997, subject to the provisions of the CGT Acts operative at the material time. The gain accruing was not a chargeable gain as the requirements in s626B had been satisfied. Therefore, the Commissioner determined that s590 does not operate to attribute chargeable gains to the appellant.

For completeness, the Appeal Commissioner also considered the other submissions made. She found that the gain accruing to MaltaCo on the disposal of the shares is taxable only in Malta under the Ireland–Malta DTA.

In considering the jurisdiction point raised, the Commissioner noted that the appellant had contended that s590 is incompatible with EU law and that she must address that contention, as it is relevant to the matter under consideration. She found that, as there had been a movement of capital between Member States, Article 63 TFEU is prima facie engaged. The effect of s590 is that the appellant is charged to tax on the gain accruing to the Malta company whether or not he actually receives the gain. By contrast, if he were a participator of an Irish-resident close company, he would not be charged to tax on the chargeable gain accruing to that company, but could be charged to tax on a distribution of the gain made by that company or on a disposal of his interest in the company. The appellant would be charged to tax on the amount actually received by him. These contrasting situations are comparable and disclose a difference in treatment.

The Commissioner was satisfied that no interpretation of s590 in conformity with EU law proved possible at the material time. She therefore determined that the application of s590 in the circumstances of this appeal is incompatible with EU law and that s590 must be disapplied.

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

03 Corporation Tax – Capital Allowances under s291A on Fishing Licences

Tax appeal **136TACD2021** concerned whether a fishing licence qualified as a "specified intangible asset" under s291A TCA 1997. Two taxpayer companies owned fishing vessels and had incurred expenditure on the acquisition of fishing capacity. Capital allowances were claimed on the basis that the licences were within s291A(1)(h), which covers:

> "any authorisation without which it would not be permissible for (i) a medicine, or (ii) a product of any design, formula, process or invention, to be sold for any purpose for which it was intended, but this paragraph does not relate to a licence within the meaning of section 2 of the Intoxicating Liquor Act 2008".

Revenue submitted that the purpose of s291A is to support the development of the knowledge economy by encouraging companies to locate the management and exploitation of their intellectual property in Ireland. An interpretation that the acquisition of fishing capacity to meet national and EU licensing requirements constitutes the acquisition of a specified intangible asset within the scope of s291A is artificial and strained. However, the appellant contended that s291A applies broadly and without limitation to the type of company or trade. It is not confined to the knowledge economy. The inclusion of "customer lists" in ss(g) and the reference to liquor licences in ss(h), for example, are indicative of this.

Revenue also contended that the licence is not akin to an "authorisation", which must relate to the subject matter of research, and that fish are not a product of "design, formula, process or invention". However, the appellant argued that fish are the product of a process and that the sale of that product would not be permissible had the companies not purchased the fishing capacity.

Section 291A(1) provides that "'intangible asset' shall be construed in accordance with generally accepted accounting practice [GAAP]". Revenue also submitted that, in construing the term, the asset must meet all of the criteria to be regarded as an intangible asset under GAAP, including the recognition criteria. The licences in this case do not meet the criteria as they were not recorded in the accounts of the two companies. The appellant contended that the wording in ss(1) is "construed" rather than "recognised" and that the question of recognition of the cost of an intangible asset is neither explicit nor implicit in the definition in s291A(1).

The Appeal Commissioner concluded that s291A(1)(h) has a broader significance than that submitted by Revenue. Having regard to the wording of the section and applying the principles of statutory interpretation, the Commissioner considered the key question to be whether, absent the authorisation, it would not be permissible for the product to be subject to any process and sold for any purpose. Under the legal framework for fishing, no sales of fish could be made without the licence. The Commissioner therefore determined that the licences are within the scope of s291A(1)(h) TCA 1997 and that the refusal of the capital allowances claim should not stand.

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

04 Payroll Taxes – Taxation of Exam Awards

Tax appeal **131TACD2021** concerned the taxation of awards made to employees who were successful in completing their final set of professional body exams and attained the consequent professional designation. The key question was whether the awards fall within s112(1) TCA 1997, which provides that "income tax under Schedule E shall be charged…on every person having or exercising an office or employment of profit…in respect of all salaries, fees, wages, perquisites or profits whatever therefrom".

The appellant contended that the awards were not taxable under s112 as they were not made to the individual recipients in respect of their services as an employee and were not remuneration derived from "having or exercising an office or an employment". They were instead payments made in recognition of a significant personal and meritorious achievement in passing a significant milestone.

The appeal considered several UK cases, including *Hochstrasser v Mayes* [1959] 38 TC 673, where, in the House of Lords, Lord Radcliffe held that a payment to an employee "is assessable if it has been paid to him in return for acting as or being an employee". The Appeal Commissioner considered it appropriate to determine the appeal by applying the test used by Lord Radcliffe. He accepted that sitting and passing the professional exams in a timely manner was a key and essential duty imposed on the trainees by their employment contracts. He found that the awards were payments made to the employees for acting as employees, thus meeting the test formulated by Lord Radcliffe. They were not a merely personal present or gift from the appellant to the recipients. The Commissioner therefore concluded that the awards were liable to tax under Schedule E pursuant to s112(1).

The Appeal Commissioner distinguished the present case from the UK case of *Ball v Johnson* [1971] 47 TC 155, where the High Court found that exam awards did not constitute remuneration for services, based on the fact that there was no contractual obligation on Mr Johnson to sit or pass the exams in that case.

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

05 CAT – Business Relief on Transfer of Shares

Tax appeal **132TACD2021** concerned the availability of business relief on the transfer of shares in a company that was engaged in a supermarket business from a father to a child in 2012.

Revenue sought to disallow a portion of the business relief claimed on the basis that some assets of the company were "excepted assets" as they were "not used wholly or mainly for the purpose of the business concerned throughout the whole of the last 2 years of the relevant period…", under s100 CATCA 2003. These included surplus cash, investment assets and properties.

The appellant argued that a substantial portion of the cash funds was required for the day-to-day running of the business and to fund plant replacements. The remaining cash, together with the investment assets and the properties, were held as part of a project to expand and develop the supermarket premises (which had been planned for a number of years and for which planning permission was obtained in 2015). The properties were acquired for the purpose of expanding the supermarket premises and were rented to business staff in the interim.

In Revenue's view:

- the company had separate businesses aside from the supermarket business, including dealing in stocks or shares and renting property;
- after accounting for debts, only a portion of the cash (*c*. 25%) was required for liquidity purposes, and the remainder was an "excepted asset";
- the investment assets were non-qualifying as the holding of stocks and shares is excluded from relief – also, the appellant failed to show that they were used for the purpose of the supermarket business; and
- the fact that the properties were let meant that they were not used wholly or mainly for the purposes of the supermarket business throughout the whole of the previous two years.

The Appeal Commissioner found in favour of the appellant, determining that the assets were not subject to any exclusions and that they qualified for business relief. He was satisfied that the cash and investment assets were accumulated and held to finance the development of the premises and that there was evidence that these development plans were part of a long-standing project. He also determined that the properties were used "wholly or mainly" for the purposes of the business as they were required for the purposes of the expansion.

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

06 Income Tax – Transfer of Business to Company

Tax appeal **01TACD2022** considered whether a GP had transferred his interest in a medical partnership to an unlimited company in 2011. The appellant contended that he had disposed of goodwill, and he declared the gain and paid capital gains tax (CGT) to Revenue on this basis.

Of the appellant's medical fee income, 80% comprised General Medical Services Scheme (GMS) income from patients under the appellant's contract with the Health Service Executive (HSE). The balance arose from private patients. The HSE was instructed to make future payments payable to the appellant under his GMS contract to a new company bank account. The appellant's GMS number continued to apply to all payments from the HSE.

Revenue contended that the incorporation of the appellant's GP practice was ineffective, and it raised assessments on the appellant for tax years 2012 and 2013 on the basis that any income assigned to the company was assessable directly on the appellant. Revenue submitted that the income-generating asset, the GMS list, could not be transferred to the company and therefore the contract remained with the appellant. Revenue also challenged the valuation of the practice goodwill.

The Appeal Commissioner was required to determine whether there was a disposal of an interest in the medical partnership and associated goodwill to the company.

The Commissioner agreed with Revenue's submission that no legally effective transfer of the appellant's GMS contract took place in 2011. As goodwill cannot be separate from the asset, the related goodwill did not transfer. The instruction by the appellant to the HSE to pay the related contract monies to the company bank account was an assignment of income and not a disposal of goodwill. The Commissioner concluded that the appellant should therefore be assessed to income tax on the income from the HSE contract, as its assignment to a shell company does not remove this charge to tax.

The Commissioner determined that there was no contractual impediment to prevent the appellant from transferring private patients to the company and that this portion of the income is therefore assessable only on the company. The Commissioner therefore determined that the assessments to income tax on the appellant should be reduced by that amount.

The Commissioner noted that there was a possible disposal of goodwill related to private patients. Absent evidence of the market value of any goodwill associated with the private patient list, it was incumbent on the parties to resolve this issue between themselves or, if necessary, through an appeal to the Tax Appeals Commission.

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 – "UK-source" interest**	UK First-tier Tribunal
02	**Corporation Tax – Expenditure Incurred**	UK First-tier Tribunal
03	**Corporation Tax – Deductibility of Pension Provisions**	UK First-tier Tribunal
04	**Corporation Tax – Deductibility of Legal Costs**	UK First-tier Tribunal
05	**Spanish Disclosure Regime for Offshore Assets**	Court of Justice of the European Union
06	**Danish Case – Home Office Permanent Establishment**	Danish tax authorities
07	**Canadian Case – Break Fees as Income?**	Tax Court of Canada

01 Corporation Tax – "UK-source" Interest

In ***Hargreaves Property Holdings Ltd v HMRC*** [2021] UKFTT 390 (TC) the First-tier Tribunal (FTT) determined that certain interest payments had a UK source as the interest was paid by a UK-resident debtor out of its assets situated in, and the profits of activities conducted in, the UK. Having determined that the interest payments had a UK source, the FTT went on to consider whether the interest was "yearly" or "short" in nature. (Under s246 TCA 1997, if a payment of "yearly" interest with an Irish source is made by a company, then the company (or the person through whom the payment is made) must, on making the payment, deduct withholding tax.)

The facts in this case revolved around Hargreaves Property Holdings, a UK-tax-resident parent of a group of companies involved in property investment, construction and redevelopment activities in the UK. Hargreaves Property Holdings drew down several loans from connected parties. The interest paid was intended to be short interest as the loans were to be repaid within one year of the advancement of the loan (or shortly after). To achieve this, the loans were refinanced on an annual basis (it was admitted that the refinancing structure had no real commercial purpose other than obtaining the tax advantage of avoiding withholding tax).

The loans were also structured in a manner that was intended to ensure that the interest did not have a UK source, with the agreements requiring that:

- all payments were to be made outside of the UK;
- the loan agreement was to be governed by Gibraltar law; and
- Gibraltar would have the sole and exclusive jurisdiction in relation to the relevant loan.

Considering the arrangements, the FTT found that:

- The "underlying commercial reality" was that the interest payments had a UK source since the interest was always going to be paid by a UK-resident debtor out of its assets situated in, and the profits of activities conducted in, the UK (application of source principle as seen in *Ardmore Construction Limited v the Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ. 1438).
- The interest on the loans that were repaid within a year in circumstances where the original lender would relend the same amount or more shortly after the original loan was repaid was yearly interest.

The case illustrates the application of the source principle for interest. The judgment underlines the importance of the residence of the debtor, and the location of the assets used to pay the interest, when determining the source of interest. It also demonstrates that if the intention is to provide long-term funding for the borrower, the interest payments will likely be "yearly" in nature.

02 Corporation Tax – Expenditure Incurred

In ***Quinn (London) Ltd v HMRC*** [2021] UKFTT 437 (TC) the First-tier Tribunal (FTT) held that the company was not prevented from claiming relief for research and development (R&D) costs under a particular scheme for SMEs. The FTT dismissed HMRC's contention that the expenditure in question had been met by the company's clients.

The taxpayer, Quinn, was a construction company that operated across the UK through separate divisions, each of which had a specific target market. It tendered for work and, for each project for which it was successful, entered into a fixed price contract, based on standard industry terms. In the course of a number of projects, the company incurred R&D expenditure. For instance, in undertaking a refurbishment and conservation project on a mid-17th-century mansion, it developed a number of innovative techniques to deliver the project. The company claimed relief for some of these costs under the particular R&D scheme for SMEs. HMRC disputed the claim.

HMRC contended that relief was denied as a consequence of the expenditure's being "otherwise met directly or indirectly by a person other than the taxpayer". This formula of words is also seen in Irish tax legislation – for example, s317 TCA 1997. HMRC argued that the expenditure was met by the taxpayer's customers. It contended that the clients "indirectly" met the expenditure by paying the company for its services.

However, the FTT held that the amounts were not caught by the "subsidised" restriction. It considered that the restriction did not apply as there was not a clear link between the price paid by the client and the expenditure on R&D. In the overall context of the scheme, the legislative provision in question was designed to catch expenditure that would be "otherwise met" in a similar manner to that in which expenditure may be "met" by State aid or a grant or subsidy. The plain meaning of "meeting" expenditure was held not to be expanded by the word "indirectly" in the legislation.

03 Corporation Tax – Deductibility of Pension Provisions

In ***A D Bly Groundworks and Civil Engineering Ltd and CHR Travel Ltd v HMRC*** [2021] UKFTT 445 (TC) the First-tier Tribunal (FTT) determined that that the taxpayers were not entitled to a deduction in computing their trading profits for provisions in respect of their liability to make future pension payments to certain employees. The contributions were calculated with reference to the estimated pre-tax profits of the businesses, and in both cases the aggregate amount of pension was set at 80% or 100% of estimated profits. Both companies made provisions in their accounts in respect of their liability to make pension payments to employees in the future. Each appellant claimed a deduction in calculating its profits to reflect that provision.

HMRC disputed the deduction and argued that the expenditure was not incurred wholly and exclusively for the purposes of the trade. In the alternative, HMRC sought to invoke certain pension anti-avoidance provisions.

The FTT rejected the taxpayers' appeals, applying the "wholly and exclusively" test and the test set out by the Upper Tribunal in *Scotts Atlantic Management Ltd v HMRC* [2015] UKUT 66. The decision in *Scotts Atlantic* required the tribunal to determine the object of each appellant in incurring the liability to pay future pensions. In doing so, the tribunal had to look into the minds of the companies (i.e. the minds of the directors) when they decided to provide for the pension payments. The "object", or aim, in entering into the pension agreement is to be distinguished from the incidental effect or consequences of doing so.

For the appellants to succeed, they had to show that the purpose of obtaining a corporation tax deduction was no more than an incidental purpose or effect of some trading purpose. However, the tribunal established that "tax was at the forefront of the appellants' minds" when they decided to provide for the pension payments. The FTT concluded that the appellants' primary purpose in entering into the pension arrangements was to reduce their liability to pay tax without incurring any actual expenditure. Therefore, the deduction was denied.

04 Corporation Tax – Deductibility of Legal Costs

In ***TR Rogers and others v HMRC*** [2021] UKFTT 458 (TC) the First-tier Tribunal (FTT) determined that expenses incurred in defending the partners in a partnership against a criminal prosecution were incurred wholly and exclusively for the purposes of the trade because the purpose was to defend the business (lease, insurance and licences were in jeopardy if the conviction stood), notwithstanding that the expenditure also protected the personal reputation of the partners.

After a criminal investigation, a number of charges were brought against the taxpayers, who ran a scrap metal business (accused of handling stolen goods). Both partners were ultimately found not guilty of all charges. However, significant legal costs had been incurred, and these were claimed by the partnership as a deduction from trading profits.

HMRC denied the deduction for the legal expenses incurred by the partnership on the basis that they had an intrinsic duality of purpose. Three potential motives were ascribed to the expenditure: defence of liberty, defence of personal reputation and defence of trade.

The FTT dismissed the notion that the defence of liberty was a reason for incurring the legal costs; the nature of the alleged crime was such that it was unlikely the defendants would go to prison. The partnership also produced evidence that demonstrated that a conviction would essentially destroy the scrap metal partnership trade. The FTT accepted this evidence but then had to contemplate whether there was also a subsidiary and intrinsic reason of defence of personal reputation. However, the tribunal determined that the defence of personal reputation was not an issue. The damage done to personal reputation had already occurred, during the time of the police operation and when the story was covered on local news. Although the tribunal accepted that some of the legal proceedings may have slightly improved the personal reputation of one of the partners, the fact remained that their personal reputations had already been damaged.

Therefore, the legal expenses were considered to have been incurred wholly and exclusively for the trade.

05 Spanish Disclosure Regime for Offshore Assets

In case **C-788/19** the Court of Justice of the European Union (CJEU) found that aspects of Spanish domestic legislation requiring Spanish tax residents to declare their foreign assets and rights was disproportionate and contrary to EU law. Since 2012, Spanish residents have been required to disclose foreign assets held by completing a particular form. The sanctions for failing to do so were significant, with numerous consequences for not complying with this obligation.

- failure to disclose the assets resulted in the classification of the assets as “unjustified capital gains” that are assessed to tax;
- a penalty of 150% of the tax calculated on the undisclosed assets was imposed; and
- high flat-rate penalties were imposed that were more severe than those laid down by the general rules on penalties for similar infringements.

The Commission started infringement proceedings. It challenged the regime on the basis that the consequences of not disclosing constituted a disproportionate restriction on the free movement of capital.

In its judgment the CJEU ruled that the consequences of non-compliance with the Spanish reporting obligations could deter Spanish taxpayers from investing abroad and, therefore, the obligations qualify as a disproportionate restriction on the free movement of capital, contrary to EU law. Although a restriction may be justified on the basis of public interest (i.e. to protect the tax base), the measures introduced by Spain were considered to be causing a disproportionate interference with the free movement of capital.

06 Danish Case – Home Office Permanent Establishment

In ruling **SKM2021.546.SR** the Danish tax authorities declined to confirm that a foreign company had no permanent establishment (PE) in Denmark by virtue of a sales agent working from home in Denmark who was carrying out sales activities for customers in Sweden, Finland and Norway.

The taxpayer (a foreign company) had requested an advance ruling. The plan was to hire a sales agent who would work from home in Denmark but serve customers in Finland, Norway and Sweden. The employee would not be engaging in any sales activities with customers in Denmark. It was estimated that the agent would be “on the road” 60–70% of the time, with his or her principal tasks involving contacting potential customers and making presentations. The agent would have no involvement in pricing or contract negotiation –

all were to be performed by the foreign company. The company wanted to confirm with the Danish tax authorities that the activities in Denmark would not lead to the creation of a PE in Denmark.

In determining that the activities would create a PE in Denmark, the Danish tax authorities did not concentrate on the fact that there was no Danish-source revenue. They focused instead on the value to the company of having the employee in that particular jurisdiction (i.e. close to the jurisdiction). Although it is not clear whether the foreign company required the employee to work from Denmark, the tax authorities referenced OECD guidance that distinguishes between situations where a company makes an office available in the employing State and situations where it does not. In the latter situation, it is much more likely that the home office would be deemed to be at the disposal of the company.

07 Canadian Case – Break Fees as Income?

In ***Glencore Canada Corporation v The Queen*** [2021] TCC 63 the Tax Court of Canada (TCC) determined that break fees received as a result of a failed merger were income from a business.

In 1996 the taxpayer's predecessor attempted to buy another company. The other company paid a commitment fee of CAD28,206,106 on execution of the merger offer agreement. The merger offer agreement also provided for a non-completion fee of CAD73,335,881.

After this arrangement was entered into, a competitor company entered the fray and acquired the target company. As a result, the target company paid the taxpayer the non-completion fee, together with the commitment fees.

The taxpayer argued that the fees were non-taxable capital receipts. The Canadian tax authorities did not agree and challenged the taxpayer. The tax authorities argued that the break fees were income or, in the alternative, a capital gain.

The TCC held that the break fees should be properly categorised as income. Consequently, the capital gain argument was not considered. The TCC found that although the taxpayer was not in the business of buying and selling companies, its business did involve the acquisition of mineral deposits (which the target company had). The fact that the transaction was a share deal did not alter this.

Consequently, the break fees were ancillary business income received in the course of earning income from business. The break fees were necessary and integral parts of the taxpayer's acquisition bid for the company, the main purpose of which was the acquisition of nickel deposits.


International Tax Update

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01 BEPS – Recent Developments

OECD Inclusive Framework on BEPS

After the agreement reached in October 2021, by more than 135 members of the OECD/G20 Inclusive Framework on BEPS, to a two-pillar solution to address the tax challenges arising from digitalisation and globalisation of the economy, work on the implementation of the two-pillar plan is well under way.

Pillar Two

The OECD released the long-awaited Pillar Two Model Rules (*Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)*) on 20 December 2021. Pillar Two looks to the introduction of rules to provide for a global minimum effective tax rate of 15% applicable to multinational enterprises (MNEs) with global revenues in excess of €750m.

As set out in the October 2021 statement by the OECD/G20 Inclusive Framework, the Model Rules are the first of three expected sets of guidance, with an explanatory commentary anticipated in the first quarter of 2022 and a more detailed implementation framework in the middle of 2022, at the earliest. These Model Rules cover the income inclusion rule (IIR) and undertaxed payments rule (UTPR), collectively referred to as “GloBE”. For the subject-to-tax rule (STTR) of Pillar Two, the draft model provision and its commentary will be released in March 2022, with a defined set of questions for input. The multilateral instrument to facilitate the implementation of the STTR will be released for comment at the same time.

The Model Rules released on 20 December are undoubtedly complex, and further guidance is expected on key concepts in due course. However, in the interim, the key points to are:

- The Model Rules outline the operation of the IIR and the UTPR as they are to apply to constituent entities[1] that are members of an MNE group that reports annual revenue of €750m or more in the consolidated financial statements of the ultimate parent entity in at least two of the four fiscal years immediately preceding the "tested" fiscal year.
- The term "constituent entity" includes an entity that is excluded from consolidated financial statements solely on size or materiality grounds or on the grounds that it is held for sale.
- Certain "excluded entities" are not subject to the GloBE rules, including pension funds, investment funds and real estate investment vehicles.
- The Model Rules focus on the application of the IIR and UTPR, with the IIR as the main rule and the UTPR to act as a "backstop". The calculation of GloBE income or loss is primarily based on the financial accounting net income or loss determined for a constituent entity in preparing consolidated financial statements of the ultimate parent entity. Where it is not reasonably practicable to determine this income or loss based on the accounting standard of the ultimate parent entity, the rules provide that the income or loss may be determined using another accounting standard.
- The total top-up tax amount is to be calculated for each low-taxed constituent entity of an MNE group. Further guidance on and examples of the calculation of the top-up amount are expected.
- The Model Rules provide for specific treatment with respect to permanent establishments and flow-through entities, while also providing an exclusion for international shipping income. Mergers and acquisitions, including instances where a constituent entity leaves an MNE group, are also addressed.
- The Model Rules provide for a substance-based income exclusion that will exclude an amount of income that is at least 5% of the carrying value of tangible assets and payroll. A transition period will apply during which 8% of the carrying value of tangible assets and 10% of payroll will initially be excluded, declining gradually over a ten-year period to 5%. The Model Rules also provide for a *de minimus* exclusion for those jurisdictions where the MNE has revenues of less than €10m and profits of less than €1m.
- While the IIR will operate as the primary rule, the UTPR remains as a backstop rule; in this regard the Model Rules allow for an exclusion from the UTPR of MNE groups in the "initial phase" of their international activity. The initial phase refers to instances where, for the fiscal year, the following conditions are met:
  - the MNE group has constituent entities in no more than six jurisdictions;
  - the sum of the net book values of tangible assets in all constituent entities located in five of those jurisdictions does not exceed €50m; and
  - the MNE group has been within the scope of the GloBE rules for no more than five fiscal years.

Pillar One

On 4 February 2022 the OECD launched the first building block under Pillar One for public consultation, and it is seeking public comments on the Draft Rules for Nexus and Revenue Sourcing under Pillar One Amount A. This approach, rather than waiting for a comprehensive document to be ready, will allow work to continue in parallel, to remain within the political timetable agreed in October 2021. Interested parties were invited to send their written comments by 18 February 2022. The stakeholder input received on the Draft Rules for Nexus and Revenue Sourcing will assist members of the Inclusive Framework in further refining and finalising the relevant rules.

1 Constituent entities are those group entities that are subject to the operative provisions of the GloBE rules. The term comprises all entities included in a group and permanent establishments (PEs) (Article 1.3.1). Any PE that is a constituent entity is treated as a separate constituent entity from the main entity and any other PE of the main entity (Article 1.3.2).

For Amount B of Pillar One, it is expected that a public consultation document will be issued in mid-2022.

Pillar Two: Co-existence with US GILTI rules

The October 2021 statement issued by the OECD/G20 Inclusive Framework notes that "[c]onsideration will be given to the conditions under which the US GILTI regime will co-exist with the GloBE rules, to ensure a fair playing field".

The Build Back Better Act in the US did not pass the Senate in 2021, and discussions regarding tax reform continue (see below). The Build Back Better Act proposed changes to GILTI such that it would apply on a jurisdiction-by-jurisdiction basis. GILTI is not currently determined on a jurisdiction-by-jurisdiction basis and applies a (nominal) effective rate of 10.5%.

- If US GILTI is treated as a compliant IIR, the UTPR would not apply to subsidiaries of US groups that are subject to the US GILTI regime. The UTPR could apply to low-taxed income in the US.
- If US GILTI is not amended to apply on a country-by-country basis and the rate is not increased, it is not clear whether other countries will agree to US GILTI co-existence.

UK public consultation

On 11 January 2022 the UK Government published a new consultation on the implementation of the OECD Pillar Two minimum tax rules in the UK. The consultation focused on how the policy design should be implemented and reflected in UK domestic legislation. The document notes that there may be limited areas where the rules need to be adapted to reflect concepts in UK law, but any required changes will respect the intended outcomes agreed by the Inclusive Framework. In line with the OECD's timetable, the UK's income inclusion rule is anticipated to have effect as from 1 April 2023, with the undertaxed payments rule expected to be introduced as from 1 April 2024.

The UK Government also is exploring the possible introduction of a domestic minimum tax, which also would apply as from 1 April 2024. A domestic minimum tax is an optional element of the OECD Model Rules. If introduced in the UK, this would lead to top-up tax arising on low-taxed UK profits being imposed by the UK rather than another country.

Views are sought on the administration of the rules in the UK, including whether information on tax liabilities should be reported through corporation tax returns or taken directly from Pillar Two information returns.

The consultation document also considers how Pillar Two interacts with existing UK tax measures to address base erosion and profit shifting (BEPS). The UK Government does not propose major reforms to wider BEPS measures.

The deadline for consultation responses is 4 April 2022, and the UK Government expects to publish draft legislation in summer 2022, with a view to legislation on the income inclusion rule being included in the Finance Bill later in the year.

OECD Transfer Pricing Guidelines

The 2022 version of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* was released on 20 January. The OECD Guidelines provide guidance on the application of the "arm's-length principle", which is the international consensus on the valuation of cross-border transactions between associated enterprises.

The January 2022 edition includes the revised guidance on the application of the transactional profit method and the guidance for tax administrations on the application of the approach to hard-to-value intangibles agreed in 2018, as well as the new transfer pricing guidance on financial transactions approved in 2020.

Finally, consistency changes have been made to the rest of the Guidelines. The OECD Transfer Pricing Guidelines were approved by the OECD Council in their original version in 1995.

02 US Tax Reform

Build Back Better Act

On 19 November 2021 the US House of Representatives supported by the Biden administration passed the Build Back Better Act. The proposals in the 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 the administration.

Although the House of Representatives had passed the Build Back Better Act, it still needed to pass the Senate in order for it to go to President Biden for his signature. However, progress stalled towards the end of 2021. This was because the Democrats control exactly 50 of the 100 seats in the Senate, and therefore all 50 of their votes would be needed for the vote to be tied and the tie to be broken by the casting vote of Vice-President Harris. However, before the Christmas break Senator Manchin made clear that he would not support the Bill in its current form.

Senator Manchin has various concerns about the Bill, regarding certain non-tax and tax aspects of the proposals. If changes are agreed with him, then the revised version of the Bill would still need to pass the Senate and would also need to be voted on again by the House of Representatives, as both Houses of Congress would need to pass the same version of the Bill. In summary, the fate of the Bill, and therefore the potential for further US tax reform, remains unclear at this point. However, President Biden told reporters at a press conference on 19 January 2022 marking the end of his first year in office that he is “confident” that “big chunks” of his signature $1.75 trillion tax-and-spending package can be enacted into law ahead of the 2022 mid-term elections.

03 EU Tax Developments

On 22 December 2021 the European Commission published two proposals for Directives in the field of direct taxation:

- a Directive to implement the OECD Pillar Two Model Rules in a coherent and consistent way across Member States (“Directive on Corporate Minimum Tax”); and
- a Directive to prevent the misuse of shell entities for tax purposes (“ATAD 3”).

Directive on Corporate Minimum Tax

The EU Directive on Corporate Minimum Tax (referred to as the “EU Pillar Two Directive”) **closely follows the OECD Pillar** Two Model Rules, with some adjustments to guarantee conformity with EU law. The Directive sets out how the principles of the 15% effective tax rate will be applied in practice within the EU and the rules on how to calculate the effective tax rate, so that it is properly and consistently applied across the EU.

The focus below is on some of the differences between the OECD Model Rules and the Directive.

- The proposed Directive would extend the scope of the GloBE rules to large-scale purely domestic groups, i.e. groups of which all entities are located in the same Member State, to ensure compliance with the fundamental freedoms and avoid any risk of discrimination between cross-border and domestic situations. All entities, which are located in a Member State that is low-taxed, including the parent entity that applies the income inclusion rule, would be subject to the top-up tax.
- This proposed Directive should apply only to entities located in the EU that are members of MNE groups or large-scale domestic

groups that meet the annual threshold of at least €750m of consolidated revenue in at least two of the four preceding years. This threshold would be consistent with the threshold of existing international tax rules, such as the country-by-country reporting rules. According to the proposal, various entities are excluded from the scope of the Directive: governmental entities, international organisations, non-profit organisations, pension funds and, provided that they are at the top of the group structure, investment entities and real estate investment vehicles. Entities that are owned at least 95% by excluded entities are also excluded.

Other rules that the Directive foresees are:

- a conditional five-year transitional phase for MNE groups in the initial phase of their international activity;
- a *de minimus* exclusion for MNE groups or large-scale domestic groups;
- an optional domestic top-up tax, allowing that the top-up tax is charged and collected in a jurisdiction in which a low level of taxation occurred; and
- provisions to determine the equivalence of laws of certain non-EU countries to the income inclusion rule and to set out conditions that need to be fulfilled for granting equivalence. (The Inclusive Framework is expected to verify in 2022 whether the US GILTI regime meets the equivalence conditions after the US tax reform is completed.)

The European Commission indicates that the Pillar Two Directive and ATAD controlled foreign company rules will apply in parallel.

In terms of the next steps, Member States will need to agree unanimously the text of the Directive and adopt the Directive in the Council of the EU under the special legislative procedure. The European Parliament and European Economic and Social Committee also will need to be consulted and give their opinion. The French Presidency of the Council of the EU is aiming for an agreement by June 2022 at the latest – and, ideally, even earlier – with a view to the Directive's applying as from 1 January 2023. The timing will be challenging for Member States, which must transpose the Directive into domestic law. It is important to note that EU members of the G20/OECD Inclusive Framework on BEPS already are supporting the global agreement that the Commission proposal is implementing. Cyprus is the only EU Member State that is not a member of the Inclusive Framework and therefore has not formally committed to the agreement; however, the European Commission expects Cyprus to support the Directive.

In 2022 the Commission will put forward a transparency proposal linked to this Directive, requiring certain large groups to publish their effective tax rates leveraging the calculations performed under the Directive implementing the OECD Inclusive Framework Model Rules.

ATAD 3 Directive

The European Commission has published a draft Directive, Unshell (also referred to as "ATAD 3"), designed to prevent "the misuse of shell entities for improper tax purposes". This initiative was announced by the Commission in its Communication on Business Taxation for the 21st Century, published in May 2021.

The proposed measures will establish transparency standards around the use of shell entities so that their abuse can more easily be detected by tax authorities. Using a number of objective indicators related to income, staff and premises, the proposal will help national tax authorities to detect entities that exist merely on paper. The proposal introduces a filtering system for the entities in scope, which have to comply with a number of indicators. These indicators constitute a type of "gateway", and three levels are proposed:

- The first level of indicators looks at the activities of the entities based on the income that they receive. The gateway is met if more than 75% of an entity's overall revenue in the previous two tax years does not derive from the entity's trading activity or if more than 75% of its assets are real estate property or other private property of particularly high value.

- The second gateway requires a cross-border element. If the company receives the majority of its relevant income through transactions linked to another jurisdiction or passes this relevant income on to other companies situated abroad, the company crosses to the next gateway.
- The third gateway focuses on whether corporate management and administration services are performed in-house or are outsourced.

The Directive is not yet final; but if it is adopted, it should be transposed into national law by EU Member States before 30 June 2023 and is expected to be applied from 1 January 2024.

However, for the purposes of reporting from 1 January 2024 onwards, the assessment of requisite substance will take into account the substance demonstrated by the entity in the previous two years. With these dates taken into consideration, an undertaking's position as of 1 January 2022 may be the first reference point in terms of whether the Directive will apply to it, and therefore an assessment may now be required even though the rules are not yet in force.

As ATAD 3 relates only to intra-EU situations, the European Commission had previously announced a new proposal to be published in 2022 to respond to the challenges linked to non-EU shell entities. More developments are expected in this area.

04 UAE: Introduction of Corporate Tax

On 31 January 2022 the United Arab Emirates (UAE) Ministry of Finance announced that a federal corporate tax on business profits will be introduced for financial years starting on or after 1 June 2023. The corporate tax will be payable on the profits of UAE businesses as reported in their financial statements prepared in accordance with international accounting standards, with minimal exceptions and adjustments. The corporate tax regime will incorporate best practices globally and minimise the compliance burden on businesses.

Although the law has not been issued yet, the Federal Tax Authority has publicly communicated the key design principles and policy choices of the new regime, which include:

- The tax will apply to all persons (individuals and legal persons) carrying out business activities under a commercial licence in the UAE. This includes entities operating in the banking sector. However, exceptions will apply to entities engaged in the extraction of natural resources.
- There will be a progressive rate:
  - 0% for taxable income up to AED375,000;
  - 9% for taxable income above AED375,000; and
  - a different tax rate might apply for large multinationals that meet specific criteria set with reference to Pillar Two of the OECD project.
- Foreign taxes will be allowed to be credited against the UAE corporate tax payable.
- Transfer pricing and documentation requirements will apply to UAE businesses with reference to the OECD Transfer Pricing Guidelines

05 Barbados: Country-by-Country Reporting

An OECD update to the list of signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) dated 31 January 2022 indicates that Barbados signed the agreement on 23 December 2021 (to take effect for fiscal years beginning on or after 1 January 2021). A total of 92 jurisdictions have now signed the CbC MCAA and committed to the automatic exchange of CbC reports.

06 Canada: Digital Services Tax

On 14 December 2021 Canada's Department of Finance released a draft of the new Digital Services Tax Act (DSTA). Canada's digital services tax (DST) at a rate of 3% is designed to tax businesses, Canadian and non-resident, that incorporate digital technology to engage with online users in Canada. The in-scope business models listed in the DSTA target digitalised businesses. However, the broad definitions are imprecise and may inadvertently capture other business models.

The draft legislation stipulates that the DST applies to businesses on 1 January 1 2022 but is payable in 2024. However, the amount is payable only if legislation to implement the OECD's Pillar One initiative has not come into force by 2024. Although the ambition is that Pillar One would be enacted by then, there is some uncertainty regarding whether the deadline will be met. Indeed, the DSTA would come into force only if the Pillar One legislation has not.

VAT Cases and VAT News

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VAT Cases

01 Reduction of Taxable Amount for VAT Purposes

The CJEU delivered its judgment on 11 November 2021 in the case of ***ELVOSPOL, s. r. o. v Odvolací finanční ředitelství*** C-398/20, wherein the provisions of Article 90 of the VAT Directive had to be interpreted in the context of a refusal by the Czech tax authority to allow an adjustment by Elvospol of a VAT amount. Article 90(1) provides that in the case of cancellation, refusal, or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is to be reduced, and this should be done in accordance with the conditions set down by the Member State. Article 90(2) allows Member States to derogate from Article 90(1) where, in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary.

The taxable amount includes everything that constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply as per Article 73. The equivalent provision in the Irish legislation is s37 VATCA 2010. Although Member States can deviate from the possibility of adjusting the taxable amount, such a deviation should not infringe the principle of fiscal neutrality.

On 29 November 2013 Elvospol supplied goods to MPS Mont a.s. ("MM"). On 19 May 2014 a Czech court declared MM insolvent. In May 2015 Elvospol adjusted the taxable amount in its VAT return as MM had not paid the invoice issued for the supply to it by Elvospol. The Czech tax authority disallowed the adjustment on the grounds that the unpaid claim had arisen during the six-month period preceding the declaration of insolvency of MM. Elvospol had not satisfied one of the conditions for bad-debt relief under the Czech VAT legislation.

The main question referred to the CJEU was whether para. 44(1) of the Czech VAT legislation was contrary to Article 90 of the VAT Directive as it contained a condition that the unpaid claim should not arise in the six months before a declaration of insolvency of the debtor company.

The court noted that Article 90(1) embodies one of the fundamental principles of the VAT Directive: that the taxable amount is the consideration actually received. In this context, the tax authorities may not collect an amount of VAT exceeding the tax that the taxable person received. In previous cases the court has stated that the option to derogate from the obligation to reduce the taxable amount in cases of total or partial non-payment is based on the idea that it may be difficult to establish non-payment or that non-payment is only temporary. Therefore the option to derogate is intended only to counteract the uncertainty related to the recovery of the sums owing. The court stated that Member States must allow the taxable amount to be reduced where the taxable person is able to demonstrate that the claim against the debtor is definitively irrecoverable.

In the current case, it had not been established that the claim was definitively irrecoverable. Although there may be uncertainty about how the claims would be dealt with under the insolvency proceedings, the six-month condition means that all unpaid claims are excluded, irrespective of whether the claim becomes definitively irrecoverable at the end of the insolvency proceedings. The court stated that such automatic refusal of the right to a reduction is contrary to the principle of the neutrality of VAT, as the taxable amount would not be the actual consideration received by the taxable person and the burden of the tax would be shifted to the taxable person and rather than the consumer.

The court noted that although Article 273 allows Member States to impose obligations that are necessary for the correct collection of VAT and to prevent evasion, any such measures should have as little effect as possible on the objectives and principles of the VAT Directive and should not have the effect of undermining the neutrality of VAT. Where an unpaid claim arises in the six months before the declaration of insolvency, in the absence of any additional evidence it cannot be presumed that the parties (creditor and debtor) are acting with the aim of committing tax evasion or avoidance. The exclusion provided for in para. 44(1) went beyond what is strictly necessary to achieve the objectives of Article 273, and the argument that it ensured the correct collection of VAT could not be maintained.

The court therefore held that:

> “Article 90 precludes a national provision which makes adjustment of the amount of VAT subject to the condition that the partially or totally unpaid claim must not have arisen during the six-month period preceding the declaration of insolvency of the debtor company, where it is not ruled out under that condition that such a claim may ultimately be definitively irrecoverable”.

The derogation under Article 90(2) can be used only where non-payment by the debtor is not certain or final.

The Irish VAT provisions relating to bad-debt relief are contained in Regulation 10(3) of the VAT Regulations 2010, and traders should carefully review the conditions contained therein and ensure compliance with them to avoid a refusal of a bad-debt claim.

02 Reverse-Charge Procedure Where Invoice Referred to Fictitious Supplier

On 11 November 2021 the CJEU delivered its judgment in the case of ***Ferimet SL v Administracíon General del Estado*** C-281/20, which was a referral by Spain in relation to the interpretation of Article 168 and related articles of the VAT Directive and the principle of fiscal neutrality. Article 168 sets out the entitlement to input VAT recovery, the Irish equivalent being s59(2) VATCA 2010. In exercising the right of deduction, the Directive sets out the requirement to hold a VAT invoice and to comply with the formalities set down by the Member State concerned.

In the case of scrap metal, the Directive provides that Member States may provide that the person liable to account for VAT is the recipient of the supply, i.e. the reverse charge applies (which is the case in Spain and also in Ireland). In 2008 Ferimet acquired scrap metal from Reciclatges de Terra Alta, applied the reverse-charge procedure and drew up the corresponding invoice (a self-billing invoice). During an audit it was found that the business named on the invoice as the supplier of the materials did not in fact have the materials and the human resources required to supply them, and it was concluded that the invoices issued by Ferimet had to be deemed to be false. It was accepted that the scrap materials had been supplied, but as the real supplier had been concealed, the input VAT deduction was refused.

The Spanish court had noted that although in principle, under the reverse-charge procedure, there is no loss of tax revenue, the right to deduct VAT is still subject to material conditions, including that the person mentioned should be the actual supplier. The Spanish Government argued that the mention of a fictitious supplier on an invoice demonstrates that the transaction is a sham, that concealment of the true supplier's identity must be considered to be connected both with VAT fraud and with direct tax fraud, and that Ferimet has failed to prove its assertion that there is no tax advantage.

A number of questions were referred:

Can a taxable person be refused the right to deduct VAT relating to the acquisition of goods where a fictitious supplier has been knowingly mentioned on the self-billing invoice?

Are the details of the supplier on the invoice purely a formal requirement?

What are the consequences for the entitlement to input credit where the identity of the supplier is concealed but the goods have been supplied and used for taxable transactions?

Can a taxable person acting in bad faith be refused the right of deduction only where there is a risk of loss of tax revenue for the Member State concerned and a tax advantage for that taxable person or for other parties involved in the transaction in question?

With reference to earlier decisions, the CJEU noted that the right to deduct VAT is subject to compliance with substantive conditions as well as formal conditions. The substantive conditions include that the concerned person must be a "taxable person" and that the goods or services must be used by the taxable person for the purposes of its own taxable supplies. The formal condition to be satisfied is that the taxable person must hold an invoice drawn up in accordance with the VAT Directive. The court stated that the name of the supplier on the invoice used to support the right to reclaim input VAT is a formal condition for the exercise of that right, whereas the status of the supplier of the goods or services as a taxable person is a substantive condition.

The court reiterated that the right of a taxable person to reclaim input VAT is a fundamental principle of the VAT system and that this principle cannot be limited where the substantive and formal requirements are satisfied. It referred to the fact that Member States can impose additional obligations where they are necessary for the correct collection of VAT and to prevent evasion, but they cannot go beyond what is necessary to achieve these objectives. So even where some formal conditions are not met, the right to deduct must still be granted, but this is provided that the substantive conditions can be proven to be satisfied. It is up to the taxable person to establish that the supplier is a taxable person and that the goods were actually supplied.

In the context of determining whether the supplier is a taxable person, the court made a distinction between establishing this information as a substantive condition and assessing whether fraud exists. In this case the taxable person in raising the invoice knowingly referred to a fictitious supplier, which could indicate knowledge of participating in a supply of goods connected with fraud. It will be for the referring court to determine this.

The court also considered whether there was any abusive practice. It indicated that for an abusive practice to exist, two must be satisfied (this issue has been considered in a number of other CJEU cases): the transactions concerned result in the accrual of a tax advantage contrary to the purpose of the Directive; and the essential aim of the transactions concerned is solely to obtain that tax advantage. As the name of the supplier on the invoice is a formal condition, the inclusion of a fictitious supplier means that the substantive conditions are not met. If there is a lack of information to verify that the supplier is a taxable person or it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew that the transaction was connected with fraud, then the right to input deduction can be refused.

The court therefore held that:

> "a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud".

This decision follows a long line of cases dealing with the right to input VAT recovery where the formal and substantive conditions required to exercise that right are not met. It highlights the necessity for businesses to ensure that they have carried out due diligence in relation to the customers and suppliers that they deal with. It is also worth noting the situations where the joint and several liability provisions contained in s108C VATCA 2010 can be imposed.

03 Right to Deduct where Cost Incurred Categorised as Excessively Expensive

The CJEU handed down its judgment in the case of ***Amper Metal Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*** C-334/20 on 25 November 2021. The Hungarian tax authority disallowed a VAT repayment claim by Amper Metal Kft ("Amper") in relation to VAT incurred on advertising costs.

Amper operated in the electrical installations sector. It entered into a contract with Sziget-Reklám Kft. ("SRK") for the supply of advertising services to it. The services comprised the affixing of advertising stickers bearing the name of Amper to rally cars at a motor racing championship in Hungary. Amper sought to reclaim the VAT charged on the invoices issued by SRK.

The tax authority was of the view that the costs relating to the advertising services did not constitute a charge linked to Amper's VATable output transactions and that the VAT paid by Amper was therefore not deductible. Amper's customers were mainly paper factories, hot-lamination workshops and other industrial plants. Experts engaged by the tax authority opined that the advertising services were too expensive and were not of relevance to Amper's business. The tax authority therefore stated that the services did not meet the "reasonable management" requirement in the Hungarian corporate tax law. The question referred to the CJEU was whether input VAT on advertising services was not deductible by a taxable person where the price charged for the services was excessive (based on a reference value of the tax authority) and the services did not result in an increase in taxable turnover for the taxable person.

The VAT Directive provides for input VAT recovery on goods or services acquired for the purposes of making taxable supplies. In line with previous decisions, the CJEU reiterated that in so far as the taxable person, acting as such at the time that the goods or services are acquired or received, uses those goods or services for the purposes of its taxed transactions, the person is entitled to deduct the VAT paid or payable in respect of those goods or services. The fact that the price paid for an economic transaction is higher or lower than the cost price, and therefore higher or lower than the open-market value, is irrelevant for the purpose of establishing whether it is a transaction effected for consideration. This is on the basis that it does not affect the direct link between the services supplied or to be supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria. The taxable amount is the consideration established between the parties and paid to the supplier, and not an objective value, such as the market value or a reference value determined by the tax authorities. The open-market value can be imposed under Article 80, but this applies only where the parties are connected (as defined in that provision).

The argument that the costs incurred did not increase the taxable turnover of the taxable person was not accepted. Input VAT recovery arises where the inputs are used for taxable output transactions unless the costs fall under the non-deductible category (i.e. luxuries, amusements or entertainment). There is no requirement that an increase in the taxable person's turnover or economic profitability be achieved in order to exercise the right to deduct input VAT. The court stated that the right to deduct is determined by the nature of the output transactions to which the input transactions are assigned. The existence of a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of its economic activities.

The supply of advertising services to Amper was a VATable supply. The fact that the price paid was higher than the market price or any reference value determined by the tax authorities for similar advertising services cannot justify a refusal to allow the right to deduct to the detriment of the taxable person. It will be for the referring court to assess whether the services have a direct and immediate link with an output transaction giving rise to the right to deduct. If not, it will need to assess whether the services have a link with Amper's general overheads or they constitute non-deductible entertainment expenditure. The fact that the services were expensive and/or did not increase the taxable turnover was irrelevant to the right to input VAT recovery.

04 Exemption for Hospital and Medical Care – Thermal Treatment

On 13 January 2022 the CJEU issued its judgment in the case of ***Autoridade Tributária e Aduaneira v Termas Sulfurosas de Alcafache SA*** C-513/20, which concerned Article 132(1)(b) of the VAT Directive. This provides exemption for hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis, and other duly recognised establishments of a similar nature. Under Article 134, exemption from VAT will not apply where the supply is not essential to the transactions exempted and where the basic purpose of the supply is to obtain additional income for the body in question through transactions that are in direct competition with VATable businesses.

The Alcafache (Portugal) thermal baths are a primary care unit (not part of the Portuguese national health service) and do not have the capacity to provide hospital care. The thermal baths were operated by Termas Sulfurosas ("TS"). TS invoiced its users for a service called "thermal registration". The services provided by TS were traditional thermal cure services and thermal spa services. In the case of thermal cure services, the client pays for a consultation with a doctor to receive a prescription for treatments to be undertaken, and a fee is also paid for thermal registration. VAT was not applied to this fee. A fee for thermal registration is not levied in the case of thermal spa services, and a medical consultation is optional. The fee effectively entitled clients to purchase treatments, and the service was summarised as compiling an individual file, including the user's clinical history, that entitles the user to purchase "traditional thermal cure" medical care. The matter at issue was whether the exemption in Article 132(1)(b) extends to the registration fee.

By reference to earlier decisions, the CJEU reiterated that hospital and medical care is exempt where it has as its purpose "the diagnosis, treatment and, in as far as possible, cure of diseases or health disorders" and that medical services that are supplied for the purpose of protecting, including maintaining or restoring, human health may benefit from the exemption. The Portuguese referring court considered the traditional thermal cure provided by TS to be exempt from VAT but questioned whether the registration fee came within the concept of medical care and closely related activities.

The CJEU noted that as Article 132(1)(b) does not further define "closely related activities", the context in which the term is used and the aims and scheme of the VAT Directive have to considered. By reference to the objective of the exemption, it stated that:

> "only the supply of services which are logically part of the provision of hospital and medical care services and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to 'closely related activities' within the meaning of that provision, since only such services are of a nature to influence the cost of health care which is made accessible to individuals by means of the exemption in question".

In considering whether the registration fee was a closely related activity, the court noted that the purpose of the services needs to be taken into account. Although there may be a time lapse between the service supplied and the medical care, this does not necessarily mean that it is not a closely related activity.

> "But transactions which are only liable, if certain eventualities come to pass, to be closely related to medical care that has not been performed, commenced or yet envisaged, cannot be regarded as being services which are 'closely linked' to medical care within the meaning of that provision".

The CJEU noted that the referring court needs to determine the nature of the activity and the information and purpose of the data contained in the file, but it stated that the activity could come within the scope of the exemption where it:

> "consists in compiling an individual file, including the user's clinical history, setting out data relating to the user's state of health and to prescribed care, which may therefore be regarded as planned, as well as the manner in which that care is administered, data which must be

> consulted for the provision of care and to achieve the therapeutic objectives pursued".

However, where all that is obtained in return for the payment of the thermal registration fee is the possibility to purchase prescribed care, or if the content of the individual file including the user's clinical history is not essential for the provision of the care and for achieving the therapeutic objectives pursued, then it may not be covered by the exemption.

The referring court will also have to ascertain whether the services provided by the thermal baths are carried out under social conditions comparable to those that apply to bodies governed by public law and also whether the baths are a centre for medical treatment or diagnosis or an establishment recognised as being of a similar nature.

The court held that:

> "Article 132(1)(b) of the VAT Directive must be interpreted as meaning that an activity consisting in compiling an individual file, including the user's clinical record, which entitles the user to purchase 'traditional thermal cure' medical care within a spa establishment, is liable to come within the exemption from VAT provided for by that provision as an activity closely related to medical care, where those files set out data relating to the user's state of health, planned and prescribed medical care as well as the manner in which that care is to be administered which must be consulted for the provision of care and to achieve the therapeutic objectives pursued".

Schedule 1 para. 2(1) of VATCA 2010 sets out the exemption applicable in Ireland in the following terms: the exemption applies to "hospital and medical care or treatment provided by a hospital, nursing home or similar establishment". Guidance on the application of this exemption and others related to the medical/health sphere is set out in Revenue's Tax and Duty Manual on "Medical Services" by reference to a number of CJEU decisions that establish the criteria to be met for exemption to apply.

VAT News

Ireland

VAT repayment offset

Revenue eBrief No. 224/2021, published on 13 December 2021, indicated the availability of the Tax and Duty Manual on "VAT Repayment Offsets" on the Revenue website. The manual outlines changes to the procedure on ROS for offsetting VAT refunds. Before 25 November 2019, a free text box was shown on the VAT3 return screen that enabled the taxpayer to insert details of the amounts and periods to be offset. The free text box is no longer included, but instead tick boxes are available to indicate the tax period or tax head. The manual contains screenshots to assist with completion of the form and indicates that the new process should result in quicker VAT repayments.

Review of opinions or confirmations

Revenue eBrief No. 234/2021 was published on 22 December 2021 to highlight the updating of the Tax and Duty Manual Part 37-00-41 in relation to "Review of Opinions or Confirmations". The manual sets out Revenue policy on the maximum period of validity of Revenue opinions/confirmations and provides information in respect of a review of opinions/confirmations that were issued more than five years ago. Where a taxpayer wishes to continue to rely on an opinion/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, an application for renewal or extension must be made on or before 31 March 2022.

Finance Act 2021

Revenue eBrief No. 235/2021, which was published on 23 December 2021, indicates the availability of the VAT Notes for Guidance to Finance Act 2021 on the Revenue website. "VAT Cases & VAT News" in *Irish Tax Review*, 34/4 (2021), contained details of the various VAT provisions of the Finance Bill 2021.

VAT groups

Revenue eBrief No. 240/2021 was released on 31 December 2021 and highlighted the update to the "VAT Groups" Tax and Duty Manual as a result of changes introduced by Finance Act 2021. Section 51 of the Finance Act 2021 amends ss15 and 115 VATCA 2010. It places a legislative requirement on VAT groups to notify Revenue when a significant change in the financial, economic and organisational links between persons in a VAT group occurs and applies a fixed penalty where this requirement is not met. It also includes the requirement that a VAT group contain at least one accountable person as a member.

The eBrief also highlighted that the Tax and Duty Manual "VAT and Charities" has been archived.

EU

VAT rates

On 7 December 2021 the European Commission welcomed the agreement reached by EU Finance Ministers at the meeting of ECOFIN in Brussels to update the rules governing VAT rates for goods and services. The new legislation will provide governments with more flexibility in the rates that they can apply and ensure greater equality between EU Member States. It is expected that the updated rules will bring VAT rules into line with EU priorities such as the fight against climate change, digitalisation and public health protection. The new rules will update the list of goods and services (Annex III to the VAT Directive) to which all Member States can apply reduced VAT rates. The rules will also remove the possibility by 2030 for Member States to apply reduced rates and exemptions to goods and services deemed detrimental to the environment and to the EU's climate change objectives. Finally, the new rules will make derogations and exemptions for specific goods and services that are currently in place for historical reasons in certain Member States available to all countries to ensure equal treatment and avoid distortions of competition. However, existing derogations that are not justified by public policy objectives will need to be wound down by 2032.

VAT reporting and collection

On 21 January 2022 the European Commission launched a public consultation ahead of a new legislative package later in 2022 to adapt the way in which VAT is reported and collected in the increasingly digital world. The consultation seeks feedback from businesses, academics, Member States and other interested parties and is open until 15 April 2022. The proposal will cover digital reporting requirements for businesses across the EU, new rules for the platform economy and a single registration for companies in the EU. It is expected that these measures will reduce the administrative burden for businesses, reduce costs and help to fight VAT fraud.

Accounting Developments of Interest

Aidan Clifford
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Ukraine: accountants' duties and obligations related to sanctions

It is a very fast-changing situation, and the list below is probably already out of date, but here are the sanctions issues identified by the Department of Justice to consider in respect of the invasion of Ukraine:

- restrictions on the export of maritime navigation goods and technology;
- expansion of the list of legal persons, entities and bodies subject to the prohibitions related to investment services, transferable securities, money market instruments and loans;
- further clarification (in respect of previous restrictive measures) that "transferable securities" include crypto-assets;
- limiting the financial inflows from Belarus to the EU by prohibiting the acceptance, from Belarusian nationals or residents, of deposits exceeding certain values; the holding of accounts of Belarusian clients by the Union central securities depositories; and the selling of euro-denominated securities to Belarusian clients;
- exemptions under the sanctions measures for Swiss, EU and EEA nationals in Belarus, in that deposits exceeding €100,000 can be accepted from them;
- introduction of clarifications on the exception for the provision of financing for small and medium-sized enterprises, as well as certain provisions relating to prohibited goods and technology;
- adding more members of the Russian Federation Council to the sanctions list, as those individuals ratified the Government decisions of the "Treaty of Friendship, Cooperation and Mutual Assistance" between Russia and the two break-away regions in Donetsk and Luhansk;
- adding more persons to the sanctions list, as they supported and benefited from the Government of the Russian Federation and/or provided substantial revenue to it, or are associated with listed persons or entities;
- prohibition on the listing and provision of services, on EU trading venues, in relation to shares of Belarus State-owned entities;
- prohibition on transactions with the Central Bank of Belarus;
- restrictions on the provision of specialised financial messaging services (SWIFT) to certain Belarusian credit institutions and their Belarusian subsidiaries – these are Belagroprombank, Bank Dabrabyt and the Development Bank of the Republic of Belarus; and
- additional obligations on the Network Manager for air traffic management network functions of the Single European Sky, particularly that the Manager rejects all flight plans that violate the Regulations.

The measures agreed at EU level are summarised at https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/history-ukraine-crisis/, with a timeline available here. The lists of persons and entities under EU restrictive measures over the territorial integrity of Ukraine were published in Council Decision (CFSP) 2022/411 of 10 March 2022 amending Decision 2014/145/CFSP. Additional information is available from the Central Bank of Ireland and the Department of Foreign Affairs – which also has domestic guidance on the implementation of sanctions at the bottom of that page. Additional CCAB-I guidance on sanctions – Ireland and CCAB guidance on sanctions – UK are also available.

Revision of auditing standard on fraud

The Irish Auditing and Accounting Supervisory Authority has revised ISA (Ireland) 240, "The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements". The new standard enhances auditors' responsibilities in respect of fraud detection and aims to clarify their responsibilities. The standard is effective for audits of financial statements for periods starting on or after 15 December 2021 and can be accessed here.

FRC review of IAS 37, "Provisions, Contingent Liabilities and Contingent Assets"

Provisions are recognised when probable, and contingent assets when virtually certain, notwithstanding that one might be the costs and the other the insurance proceeds arising from the same event. The area has become even more problematic with uncertainty over the quantum of climate change provisioning. IAS 37 is a recurring problematic area for accountants. In its Thematic Review of IAS 37 the UK Financial Reporting Council (FRC) reviewed several companies and made recommendations for improvements to their disclosures, including explaining how estimates had been made, the phasing of the actual outflows and a description of the underlying costs.

"Don't tell your accountant; he won't let you do it"

Investment recommendations made on social media platforms frequently come with advice that paradoxically appears to encourage retail investors to invest in highly speculative schemes and not take advice before doing so. One Irish person recently showed their accountant an outline of an investment scheme that included the advice not to tell their accountant "because he won't let you do it"; the person had lost €20,000 in the scheme. The European Securities and Markets Authority (ESMA) has made a statement on this issue and noted that some of the recommendations on social media may breach the EU Market Abuse Regulation. The difficulties identified by the ESMA centre on a lack of understanding by social media influencers of the difference between a recommendation and a personal opinion. The ESMA sets out EU rules, which are reflected in the Irish rules. These include disclosing identities, presenting recommendations in an objective way and disclosing all relationships or circumstances that would impair objectivity. There are additional rules for "experts", which will include social media influencers who post about investment options frequently.

Policing IFRS financial statements

The European Securities and Markets Authority (ESMA) has published its priorities for enforcement for financial statements of public-interest entities. The areas that will come under closer scrutiny are climate-related disclosures, Covid-19 disclosures and expected credit losses.

The Irish Auditing and Accounting Supervisory Authority published a paper with similar themes in September 2021.

Reporting ethical breaches by auditors

There is a requirement in para. 1.21 of the Irish ethical standards for auditors to report ethical breaches to their regulator. That means reporting to the Irish Auditing and Accounting Supervisory Authority for audits of public-interest entities (PIEs) and reporting to the professional body that regulates the auditor's work for non-PIE audits. Guidance is available here. In Ireland the requirement is to report all such breaches "at least" annually, and a negative report is not required. For GB and NI auditors the requirement, in para. 1.21 of the UK Ethical Standards, is to report "on a biannual basis", with the report being made to the professional body that regulates audit work for non-PIE audits and to the Financial Reporting Council for PIE audits. An example of when this reporting requirement might arise is accidentally availing of the PAASE (provisions available for audits of small entities) for a insurance broker.

ICAS and ICAE&W

The Institute of Chartered Accountants of Scotland and the Institute of Chartered Accountants in England and Wales have both surrendered their recognised accountancy body (RAB) status in Ireland. As of 31 December 2020, the ICAS had 73 members and 12 statutory auditors with an Irish audit registration, although none of those auditors were resident in Ireland. The ICAE&W had 473 members and 254 statutory auditors with an Irish audit registration, three of which were resident in Ireland. There is a requirement for Irish audit firms to be controlled by Irish auditors. If that control was achieved by virtue of an Irish audit registration held by an ICAE&W or ICAS member, then that firm may lose its Irish audit registration. ICAE&W and ICAS members can join one of the Irish RABs such as ACCA, Chartered Accountants Ireland and CPA Ireland and seek audit registration from that body, or they can simply cease to undertake Irish audits.

Definition of a listed client for auditor ethical standards

The Irish Auditing and Accounting Supervisory Authority has amended the definition of "listed" client in the ethical standard for auditors to include those admitted to trading on the Alternative Investment Market, Euronext Growth and the ISDX Market. Auditors have different responsibilities under the ethical standards for audits of unlisted, listed and public-interest entities (PIEs), and the amendment increased the number of entities in scope of the requirements applicable to listed entities. The definition of PIE is not changing.

What makes a good audit?

The UK Financial Reporting Council (FRC) has issued a report, which it describes as ground-breaking, highlighting what it considers to be the key attributes that contribute to audit quality. The attributes are split into those of a good audit and those of a high-quality audit practice. The audit process is examined in terms of risk assessment and planning, execution and completion, and reporting. High-quality audit practices are looked at through the lens of governance and leadership, ethical requirements, acceptance and continuation of appointments, engagement performance, resources, and information and communication. The report gives examples of good and bad practice and issues that have identified in audit inspection monitoring.

Limited assurance on sustainability information

For many customers, shareholders and other stakeholders, CO_2 emissions and other sustainability disclosures are more relevant than profit. For large companies, the Corporate Sustainability Reporting Directive is imminent and will mandate extensive sustainability disclosures. Even for smaller and micro companies, access to that supermarket shelf or retail outlet is available only if the company has a commitment to, and publishes information on, its sustainability. However, disclosures without accompanying independent assurance can lead to an undermining of the company's sustainability credentials and leave it open to charges of "greenwashing". Accountancy Europe has produced set of FAQs describing the levels of assurance that could be provided, with discussion of the difference between "limited assurance" and "reasonable assurance".

Auditors and European Single Electronic Format financial statements

The Committee of European Auditing Oversight Bodies has issued revised guidelines on auditors' involvement in ESEF financial statements. ESEF is the new electronic format for annual financial reports of certain listed companies for financial years beginning on or after 1 January 2021. EU law requires auditors to provide an opinion on whether the financial statements included in annual financial reports comply with the requirements of the ESEF Delegated Regulation (EU) 2019/815. The guidelines highlight specifications to be complied with by auditors in addition to the provisions of auditing standards.

Toolkits for sustainability

Small and medium practices (SMPs) have a large role to play in helping their SME clients become more sustainable. A new SME sustainability resource is available from ACCA to assist SMPs in discharging this important role. The International Federation of Accountants has a similar publication, Sustainability Information for Small Businesses: The Opportunity for Practitioners. The Irish Government also has a Climate Toolkit 4 Business resource.

Insurance accounting

The European Union has endorsed IFRS 17, "Insurance Contracts". The standard is effective for annual periods beginning on or after 1 January 2023. IFRS 17 replaces IFRS 4.

Unlimited company deadline

Unlimited companies that have limited liability subsidiaries must now file accounts with the Companies Registration Office. Up to now, an unlimited company with limited subsidiaries could avoid filing accounts, but s1274 of the Companies Act 2014, as amended, requires that public filings be made for accounting periods beginning on or after 1 January 2022. Filing can be avoided if the subsidiary is converted to unlimited, but there is a three-month time limit on this.

Auditors and CPD

New rules on auditors' continuing professional development (CPD) came into effect on 1 January 2022. From that date, records of both CPD attendance and CPD planning by auditors will change.

Both of these are legal requirements in s1489 of the Companies Act 2014, and new guidance has been issued by the Irish Auditing and Accounting Supervisory Authority on the topic.

- Auditors must now follow IES 8, where the auditor's CPD must be mapped against a list of 15 topics.
- Auditors with no audits must keep up their audit CPD in the same way as active auditors.
- Auditors must prepare a plan of audit CPD to show that all IES 8 categories will be met.
- Auditors must keep audit CPD records for six years (currently, three years).

Accounting for climate risk

Companies are being encouraged to consider climate risk in their financial statements. In particular, the carrying value of assets may be affected by changing customer preferences, increased costs, Government regulation and unavailability of bank finance for non-green businesses. Useful life may be affected, as will value in use, so impairment reviews will be triggered. Going concern may also be called into question as the company's products become unpalatable or even illegal. Companies may also see an increase in provisions and onerous contracts. A supply contract that becomes loss-making due to increased regulation, shortages or increased costs will need to be provided for once the loss becomes apparent. Remedial costs for environmental damage done in the past may pass the threshold for a provision as there is an increased focus by customers and the Government on such damage.

Sustainability reporting applies to small companies

In business-to-business sales, small companies are being asked to complete sustainability disclosure documents before their goods are stocked by their large-company customers. "Scope 3" suppliers to companies will be required to report under the Corporate Sustainability Reporting Directive.

In business-to-consumer sales, customers are refusing to do business unless the business can reliably claim to be sustainable. Although it is easy to see a finish date for businesses that sell open fireplaces and are unwilling to pivot, in the very near future every business that wants a long-term future will be expected to be sustainable and prove that it is sustainable. Sustainability reporting does indeed apply to small companies.

CDD for overseas clients

Accounting practices have a struggle to do customer due diligence (CDD) for anti-money-laundering purposes for an overseas client. Certified true copies of a passport and utility bill when there is no way of proving the identity of the certifier is poor evidence. Even if the overseas client visits the practice, most Irish practitioners are not expert in assessing the authenticity of a non-English-language passport or national identity card. Two suppliers are now offering online identity document verification. The practice sends an e-mail to the client with instructions and a link; the client does the CDD themselves online; and the practice is supplied with good-quality evidence of clients' identity.

Business interruption insurance and Covid-19

The Central Bank of Ireland (CBI) noted in Intermediary Times that 31,000 insurance policies were associated with the issue of business interruption and Covid-19. The CBI noted that "by the end of August, more than €130 million has been paid to 4,371 policyholders through settled claims and interim payments". But not all businesses will have been interrupted by Covid-19, so not all will make a claim. The CBI has said that retail insurance intermediaries are expected to assist their clients in making Covid-19-related claims and that it will be focused on ensuring that valid claims are paid promptly.

Companies under common ownership can be in a group

Loans between companies under common ownership are usually illegal, loans between companies in a group are legal. There is a common misconception that one company has to own 51% of another to make them a group structure and a natural person owning two different companies will not normally cause a group relationship to exist. However, s7 of the Companies Act 2014 provides that two companies "managed…on a unified basis" and under common ownership are in a group. Old UK GAAP defined "managed on a unified basis" as "the whole of the operations of the undertakings are integrated and they are managed as a single unit. Unified management does not arise solely because one undertaking manages another." This is quite a strict definition, requiring both integration of the businesses and management as a single unit. If it can be shown that the two businesses are managed on a unified basis, then the companies are in a group and lending between them is legal without the need for a summary approval procedure (SAP). Lending between companies that are not in a group but are under common ownership would be illegal without a SAP if the Dr entry exceeded 10% of the net assets in the lending company. Once two companies are in a group, they are considered as a whole for the purposes of group size when determining the need for consolidation and the entitlement to audit exemption. However, even if the group exceeds the consolidation limits, it may not require consolidation. Section 303 of the Companies Act 2014 allows a subsidiary to be excluded from a consolidation if "severe long-term restrictions substantially hinder the exercise of the rights of the holding company over the assets or management of that subsidiary undertaking". In the case of a "managed on a unified basis" group, neither company has rights to a dividend from the other, and therefore each has "severe long-term restrictions…over [access to] the assets" of the other.

Fairer and simpler taxation

The European Parliament's Committee on Economic and Monetary Affairs adopted by a large majority (43 votes in favour, 7 against and 9 abstentions) the draft own-initiative report by Luděk Niedermayer (EPP, Czech Republic) on fairer and simpler taxation, calling on the European Commission to present a series of proposals to better combat fraud and tax evasion. This includes addressing the changing post-Covid-19 economy, where teleworking and increased labour mobility increase the risk of double taxation.

Partnership law

Trading through a partnership is fraught with difficulties, including the unfairness of joint and several liability and the relative ease with which a person can become a partner versus the incredible difficulty of ceasing a partnership. A new publication providing guidance on this important area is available from ACCA and is free to download. The publication is authored by Bill Holohan SC and Alan Raftery, , and deals with all aspects of running a business through a partnership in Ireland. Matters discussed include salary versus equity partners; the power to bind the partnership; legal liability of partners; the dissolution of partnerships; and joint and several liability. The relevant Irish case law is also cited and explained.

Data analytics and audit

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published a thematic paper discussing the use of data analytics in Ireland's statutory audit market. Auditors are increasingly using data analytics in areas such as testing, sample selection and risk assessment. In one example an auditor was able to interrogate the client data to pull out all journals or postings by a named individual or list transactions with certain characteristics. In all cases the use of data analytics should reduce the cost of an audit and increase the effectiveness of audit procedures.

When reviewing audit files where data analytics were used, the IAASA identified that it will want to see that the audit team has the appropriate competence and capabilities to perform the data analytics procedures; the integrity of the data has been maintained throughout the data analysis process; and the work of data analytics specialists is adequately reflected in the audit working papers. A number of additional factsheets summarising insights from the thematic paper are available here.

The Technology Working Group of the International Auditing and Assurance Standards Board also released non-authoritative support material to help auditors understand how to plan an audit under ISA 300, "Planning an Audit of Financial Statements", when using automated tools and techniques (ATT) such as data analytics.

Corporate Enforcement Authority

The Companies (Corporate Enforcement Authority) Act 2021 was signed by the President on 22 December 2021. The Act will transform the Office of the Director of Corporate Enforcement into a statutory and independent agency and give the new Corporate Enforcement Authority additional resources to investigate and prosecute white-collar crime.

Expected credit loss disclosures by banks

The European Securities and Markets Authority (ESMA) has published a study on the application of IFRS 7, "Financial Instruments: Disclosures", and IFRS 9, "Financial Instruments", regarding banks' expected credit losses (ECL). ECL is a notoriously difficult and complex calculation for a bank, requiring very detailed calculation based on uncertain assumptions and future events. The study highlights opportunities for improvement in the level of compliance, comparability and transparency in the application of the IFRS requirements.

The Irish Auditing and Accounting Supervisory Authority (IAASA) has also issued an Information Note on accounting for ECL under IFRS 9, which is based on observed trends in the application of the standard by banks, in particular since the start of the Covid-19 pandemic. The key message of the Information Note is the need for careful review and analysis of the totality of ECL information disclosed by banks, particularly information about material post-model adjustments (management overlays); judgements surrounding significant increase in credit risk; and changes to forward-looking information, ECL allowances and ECL sensitivity.

The IAASA also indicated that it expects that, as Covid-19 pandemic relief measures and supports are withdrawn, there will be additional disclosures and greater transparency of these impacts on ECL in banks' financial reports.

New audit quality standards issued

The Irish Auditing and Accounting Supervisory Authority has issued new auditing standards that require enhanced systems of audit quality management to be designed and implemented by 15 December 2022; early adoption is permitted. The new standards are:

- International Standard on Quality Management (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 (Ireland) 220 (Revised December 2021), "Quality Management for an Audit of Financial Statements".

The new standards replace ISQC 1 and ISA (Ireland) 220. A short information video on the revised quality management standards is available on the IAASA YouTube channel.

Vouchers to help SMEs protect their IP

The European Union Intellectual Property Office has launched a new SME Fund, which offers vouchers to help EU-based SMEs protect their intellectual property (IP) rights. The fund will:

- reimburse 90% of the fees charged by Member States for IP scan services;
- reimburse 75% of the fees charged by IP offices for trademark and design registration;
- reimburse 50% of the fees charged by the World Intellectual Property Organisation; and
- reimburse 50% of the fees charged by national patent offices for the registration of patents in 2022.

Applications will be examined and evaluated on a "first in, first out" basis. SMEs with no experience in the area of IP are encouraged to apply first for an IP scan and only subsequently for the other services.

Pension accounting in a credit union

The accounting for a commitment to fund a past-service deficit in a multi-employer defined-benefit scheme in a credit union is relatively straight forward compared to the accounting for a defined-benefit scheme. FRS 102 para. 28.11A states:

"Where an entity participates in a defined benefit plan, which is a multi-employer plan that in accordance with para. 28.11 is accounted for as if the plan were a defined contribution plan, and the entity has entered into an agreement with the multi-employer plan that determines how the entity will fund a deficit, the entity shall recognise a liability for the contributions payable that arise from the agreement (to the extent that they relate to the deficit) and the resulting expense in profit or loss in accordance with paragraphs 28.13 and 28.13A."

If the scheme in question will be closed to future accrual, the full amount of the payments to be made, irrespective of when they will be made, are in respect of past-service deficit and must be provided for in the profit and loss account in the current year.

Other comprehensive income or profit and loss?

FRS 102 set out explicit requirements for how an entity shall transition from defined-contribution accounting to defined-benefit accounting when sufficient information becomes available to allow this to happen in a multi-employer scheme. The transition is accounted for through other comprehensive income. However, where there is a commitment simply to fund a deficit as opposed to full defined-benefit accounting, the commitment to fund the deficit is accounted for in the profit and loss.

Legal Monitor

Caroline Austin
Partner, Tax, Matheson

Selected Acts Signed into Law 1 November 2021–31 January 2022

No. 35	Land and Conveyancing Law Reform Act 2021	This Act (i) repeals a number of provisions of the Land and Conveyancing Law Reform Act 2009 relating to prescriptive easements and profits à prendre, which were due to take effect on 1 December 2021; (ii) introduces a number of new rules relating to the law on acquiring and validating prescriptive easements and profits à prendre; and (iii) amends the Registration of Title Act 1964 in relation to the process for registration of easements and profits à prendre in the Land Registry. The Act is effective from 30 November 2021.
No. 38	Finance (European Stability Mechanism and Single Resolution Fund) Act 2021	This Act ratifies amendments to the European Stability Mechanism Treaty.
No. 39	Residential Tenancies (Amendment) Act 2021	This Act amends the Residential Tenancies Act 2004 to enhance tenancy protections. In particular, it provides for the conversion of certain residential tenancies to residential tenancies of unlimited duration; the setting of rent in rent pressure zones; and the payment of fees in respect of the registration of certain tenancies.
No. 40	Planning and Development (Large Scale Residential Developments) Act 2021	This Act amends and extends the Planning and Development Acts 2000 to 2021 in order to replace the current Strategic Housing Development planning arrangements with new streamlined arrangements for large-scale residential developments.
No. 43	Appropriation Act 2021	This Act provides legal authorisation for (i) expenditure that occurred in 2021 on the basis of estimates voted by the Dáil and (ii) spending into 2022 before the Dáil votes on the estimates.
No. 44	Social Welfare Act 2021	This Act amends the Social Welfare Acts and the Credit Guarantee Act 2012 to give effect to the social welfare measures announced in the October 2021 Budget. It also extends the end date of the Covid-19 Credit Guarantee Scheme to 31 December 2022.

No. 45	Finance Act 2021	The Budget Statement for 2022 was announced on 12 October 2021. Finance Act 2021 includes legislation to implement the announced tax policy changes. The Act provides for the imposition, repeal, alteration and regulation of taxation, of stamp duties and of duties relating to excise and customs.
No. 48	Companies (Corporate Enforcement Authority) Act 2021	This Act establishes the Office of the Director of Corporate Enforcement as a standalone agency called the "Corporate Enforcement Authority", with enhanced powers and autonomy. It also gives effect to recommendations of the Company Law Review Group in relation to certain anomalies in the Companies Act 2014 concerning corporate governance, shares and share capital. It was enacted on 22 December 2021 and awaits commencement.

Selected Government Bills Initiated 1 November 2021–31 January 2022

No. 145	Residential Tenancies (Amendment) (No. 2) Bill 2021 Initiated 15 November	See Residential Tenancies (Amendment) Act 2021
No. 152	Social Welfare Bill 2021 Initiated 29 November	See Social Welfare Act 2021
No. 157	Appropriation Bill 2021 Initiated 8 December	See Appropriation Act 2021
No. 4	Redundancy Payments (Amendment) Bill 2022 (Bill 4 of 2022)	The purpose of the Bill is to amend the Redundancy Payments Act 1967 and to provide for an additional payment from the Social Insurance Fund on the redundancy of persons laid off for a period of time due to Covid-19 restrictions whose redundancy lump sum is reduced because of the lay-off period.
No. 5	Payment of Wages (Amendment) (Tips and Gratuities) Bill 2022 (Bill 5 of 2022)	The purpose of this Bill is to provide employees with enhanced protection in relation to payment of wages. The legislation will provide for employer obligations in relation to fair distribution of tips and gratuities, as well as imposing an obligation to inform the public by way of a "tips and gratuities notice" about how tips and gratuities are treated and distributed.

No. 6	Online Safety and Media Regulation Bill 2022 (Bill 6 of 2022)	The purpose of this Bill is to provide for the establishment of the Media Commission and to provide for the implementation of Directive 2010/13/EU, as amended by Directive 2018/1808. The proposed legislation will impose obligations on providers of broadcasting services and on-demand media services, as well as regulating content available on certain online services.
No. 12	Competition (Amendment) Bill 2022 (Bill 12 of 2022)	This Bill will transpose the ECN+ Directive (EU) 2019/1 and provides for the reform of competition enforcement in Ireland, with the introduction of administrative fining powers for the Irish competition regulator, the Competition and Consumer Protection Commission, as well as the establishment of a leniency, or "whistle-blower", programme.

Selected Statutory Instruments 1 November 2021–31 January 2022

No. 567	European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021	This SI transposes Directive 2019/790/EU and amends the Copyright and Related Rights Act 2000. It strengthens the rights and protections of various right holders (in particular, musicians, performers, script authors and news publishers) in light of technological advances and increased digitisation.
No. 577	Appointment of Special Adviser (Minister for Finance) (No. 2) Order 2021	This SI appointed Aidan Murphy as Special Adviser to the Minister for Finance on a temporary basis from 24 August 2021.
No. 623	Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 15) (Carers) Regulations 2021	This SI removes certain provisions in relation to assessing a carer's eligibility for Carer's Benefit and Carer's Support Grant and clarifies the total number of hours that a carer is permitted to engage in other activities. It also prescribes the types of leave from employment that are permitted and the relevant period in relation to Carer's Benefit.
No. 675	Companies Act 2014 (Prescribed Form and Notice) Regulations 2021	This SI provides the regulations for the form, notices and instruments of proxy to be used for the purposes of the Small Company Administrative Rescue Process (SCARP). Commencement was on 8 December 2021.
No. 673	Companies (Rescue Process for Small and Micro Companies) Act 2021 (Commencement) Order 2021	This SI provides for the commencement of the Act of the same name (no. 30 of 2021). Commencement was on 7 December 2021.
No. 686	Taxes Consolidation Act 1997 (Section 835d(3)) Order 2021	This SI gives effect to the OECD's "Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS Actions 4, 8–10" by designating it as being comprised in Part 35A of the Taxes Consolidation Act 1997. Commencement was on 8 December 2021.

No. 713	Value-Added Tax (Refund of Tax) (Charities Compensation Scheme) (Amendment) Order 2021	This SI amends the Value-Added Tax (Refund of Tax) (Charities Compensation Scheme) Order 2018 (SI 580 of 2018) to provide that from 1 January 2022 the maximum amount that may be claimed under the scheme is €1 million.
No. 725	Companies Act 2014 (Section 12A(1)) (Covid-19) (No. 2) Order 2021	The Companies Act 2014 (No. 38 of 2014) was amended in relation to the operation of certain provisions for a certain period as a result of Covid-19. This SI provides that the “interim period” as defined shall start on 1 January 2022 and end on 30 April 2022.
No. 723	Residential Tenancies Act 2004 (Prescribed Form) (No. 2) Regulations 2021	This SI prescribes the notice to be served by a landlord or by his or her authorised agent for the purposes of a rent review; and the notice to be served by a landlord on the Residential Tenancies Board where the landlord seeks to rely on an exemption from the Rent Pressure Zone rent increase restriction.
No. 726	Land Registration Rules 2021	This SI amends the provisions for the registration of easements and profits à prendre pursuant to s49A of the Registration of Title Act 1964, as amended by the Land and Conveyancing Law Reform Act 2021.
No. 727	Registration of Deeds Rules 2021	This SI amends the Registration of Deeds Rules 2008 to provide for the registration of notices and statements under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It also amends the Registration of Deeds Rules 2013 relating to the registration of judgment mortgages to include judgments of the Court of Appeal.
No. 730	Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 2) (Attribution of self-employment contributions) Regulations 2021	This SI provides that for a self-employed contributor who, in 2020, was entitled to and in receipt of the Covid-19 pandemic unemployment payment or a jobseeker’s payment but would otherwise be entitled to the Covid-19 pandemic unemployment payment, 52 self-employment contributions shall be deemed to have been made in the 2020 contribution year.
No. 731	Social Welfare (Consolidated Occupational Injuries) (Amendment) (No. 1) Regulations 2021	This SI provides for increases in the rate of Disablement Gratuity and the weekly rates of Disablement Pension. The SI also provides for an increase in the rate of Injury Benefit payable to persons under the age of sixteen.
No. 750	Social Welfare Act 2021 (Section 24) (Commencement) Order 2021	This SI prescribes 1 January 2022 as the appointed day on which s24 of the Social Welfare Act 2021 shall come into operation. See Social Welfare Act 2021.
No. 755	Affordable Housing Act 2021 (Cost Rental Letting and Eligibility) Regulations 2021	This SI prescribes how landlords of cost rental dwellings should advertise vacancies in such properties and how interested parties can express an interest in leasing these homes. The SI also sets out the main eligibility condition for leasing a cost rental dwelling.

No. 6	European Union (Markets in Financial Instruments) (Amendment) Regulations 2022	This SI gives effect to Directive (EU) 2021/338, the Capital Markets Recovery Package (CMRP). The CMRP is a package of measures that sets out targeted amendments to financial services frameworks to support economic recovery in the aftermath of the Covid-19 crisis.
No. 9	European Union (Official Controls in Relation to Food Legislation) (Imports of Food of Non-animal Origin) (Amendment) (No. 2) Regulations 2022	This SI gives further effect to the Commission Implementing Regulation (EU) 2021/2246 of 15 December 2021 amending Implementing Regulation (EU) 2019/1793 on the temporary increase of official controls and emergency measures governing the entry into the Union of certain goods from certain third countries.
No. 10	Vehicle Registration and Taxation (Amendment) Regulations 2022	This SI makes a technical amendment to the Vehicle Registration and Taxation Regulations, 1992 (SI 318 of 1992) to update the reference to the EU legislative framework for the type approval of motor vehicles.
No. 18	Personal Insolvency Act 2012 (Prescribed Debt Relief Notice Application Form) (Amendment) Regulations 2022	This SI amends the application form set out in the Schedule to the Personal Insolvency Act 2012 (Prescribed Debt Relief Notice Application Form) Regulations 2013 (SI 333 of 2013) by substituting “€1,500” for “€400”.
No. 24	Consumer Protection Act 2007 (Competition and Consumer Protection Commission) Levy Regulations 2022	This SI provides for a levy scheme to fund the provision of information in relation to financial services, including information in relation to the costs to consumers, the risks and benefits associated with the provision of those services and promoting the development of financial education and capability.

John Curry
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Andrew Egan
Director, Tax Transformation & Technology, KPMG

Tax Technology Update

> "Information technology and business are becoming inextricably interwoven. I don't think anybody can talk meaningfully about one without talking about the other" – Bill Gates

Introduction

Bill Gates may have shared the views above several years ago, but they are particularly relevant in the modern world of tax, especially for those with a compliance and reporting remit.

Information technology can be intimidating for tax professionals. The reality is that tax teams are often the recipients of data and information from several different systems and processes that they played no role in defining and have limited ownership or control over. To produce an accurate tax return or tax computation, these data challenges are typically addressed through "workarounds", i.e. undertaking data remediation work using the no. 1 tool at the tax team's disposal, the spreadsheet.

The challenges that tax professionals face from a data and information perspective apply across the spectrum, from the smaller accounting practice receiving information from multiple clients to the multinational group managing various tax obligations in multiple jurisdictions. In this article we assess why IT and tax are aligning, and how tax professionals can embrace this agenda to allow them to focus on their core competencies, add greater value to the business and spend less time in spreadsheets. To do this, we cover:

- why technology is relevant to tax,
- global trends disrupting the tax function,
- where technology can assist tax,
- implementation considerations and
- where tax should start.

Why Technology Is Relevant to Tax

There are several factors, both internal and external, driving the information technology agenda in tax, including the following.

Changing tax compliance environment

Historically, the tax return was the focal point of tax authority reviews and audits. However, in a substantial shift in recent years, the underlying data supporting the tax return is now more important. Put simply, tax authorities are now directly accessing, often in real time, the source data underpinning the tax return to identify unpaid taxes. In addition to currently deploying e-audit techniques to support interventions across a range of taxes, Revenue is considering significant changes to how businesses report VAT, and this will likely result in changes to VAT compliance requirements in Ireland in the coming years. With the introduction of enhanced digital reporting, the opportunity for workarounds in a spreadsheet are becoming more and more limited and challenging.

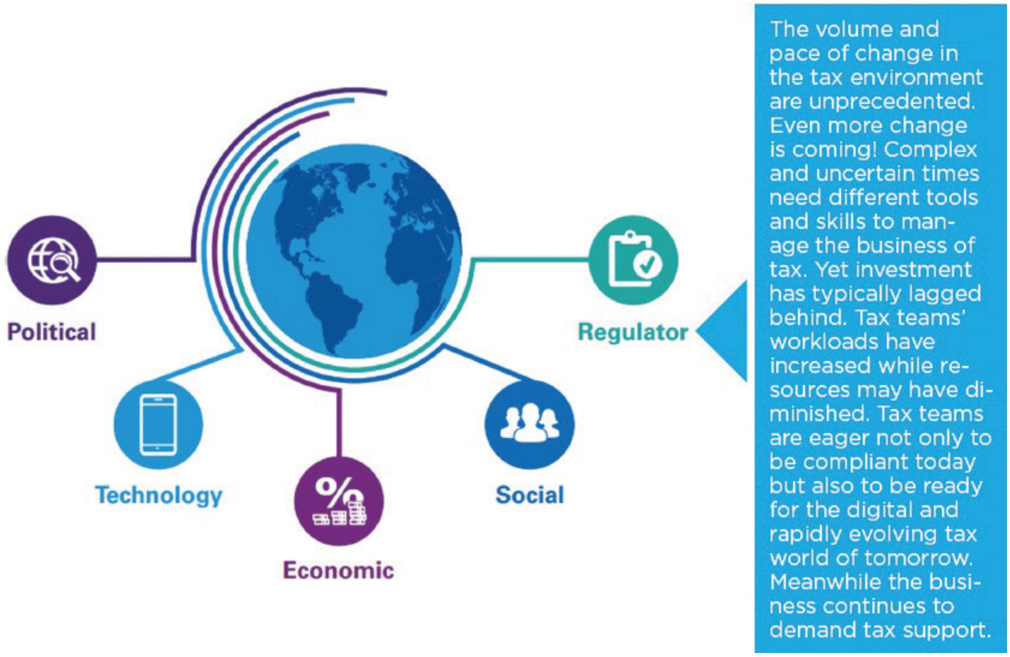
Increasing demands being placed on tax teams

With increased compliance obligations and tax featuring on the C-suite agenda, the tax team is becoming an integral partner to the wider business. A recent KPMG survey of C-suite CEOs and CFOs[1] revealed that 89% of respondents see tax functions as having "a seat at the table" when significant decisions are being made, demonstrating the importance of the tax function to the wider business.

The wider digital agenda

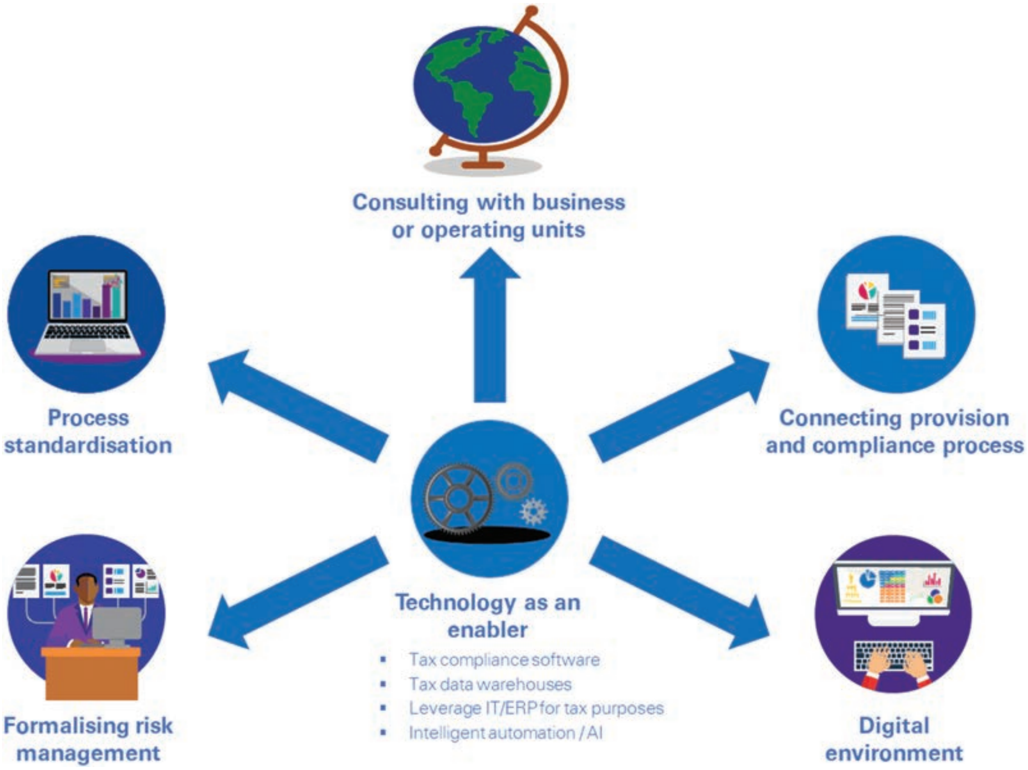
The Covid-19 pandemic transformed how businesses operate, and the digital agenda that many businesses are now embracing presents a unique opportunity for tax and wider finance functions to address historical data and information challenges, navigate the changes in the compliance environment, and achieve the ultimate objective of spending less time in spreadsheets and more time providing valuable insights to the business.

Global Trends Disrupting the Tax Function



1 KPMG LLP, "Tax Reimagined 2021: Perspectives from the C-suite" (October 2021).

Where Technology Can Assist the Tax Function



The chart above highlights some examples of where technology can assist tax functions and support the wider business. To progress any initiatives within an organisation, further consideration will be required of the factors below.

Value or benefits

What value or benefits will this technology deliver for the organisation, and how do we measure this? Consider short-term versus long-term and financial versus non-financial benefits. Financial benefits may relate to the efficiency agenda, ranging from working capital management to reducing an organisation's cost of managing compliance. Non-financial benefits may include improved risk management (spreadsheets are prone to errors) right through to reduced team turnover.

Available alternatives

What are the alternatives to deploying this technology investment, and how do they compare? This may include doing nothing – what will be the impact of continuing "as is"? Will the current process allow the tax function to support the wider business in the future? Is the process sufficient for new challenges such as BEPS 2.0 or real-time VAT reporting?

Roadmap

Having a roadmap that is aligned with the needs or demands of other stakeholders such as IT, tax authorities and the wider finance function is critical. All investments should seek to align with this roadmap.

Implementation Considerations

The roadmap will then need to consider a number of factors that may impact the implementation of tax technology and tools within the business, including the following.

Evaluating wider ongoing or planned IT initiatives in the organisation

In our experience one of the key reasons why tax teams struggle with data is that the original implementation of the enterprise resource planning (ERP) of finance systems was not optimised for tax. A major ERP or finance initiative can be a catalyst for tax, and this is particularly relevant for businesses considering upgrading SAP or similar ERP systems. However, the next system upgrade may be years away for many businesses. It is possible to take remediating actions in existing systems – specifically around data quality and tax set-up – which can deliver significant efficiencies and reduce the reliance on spreadsheets.

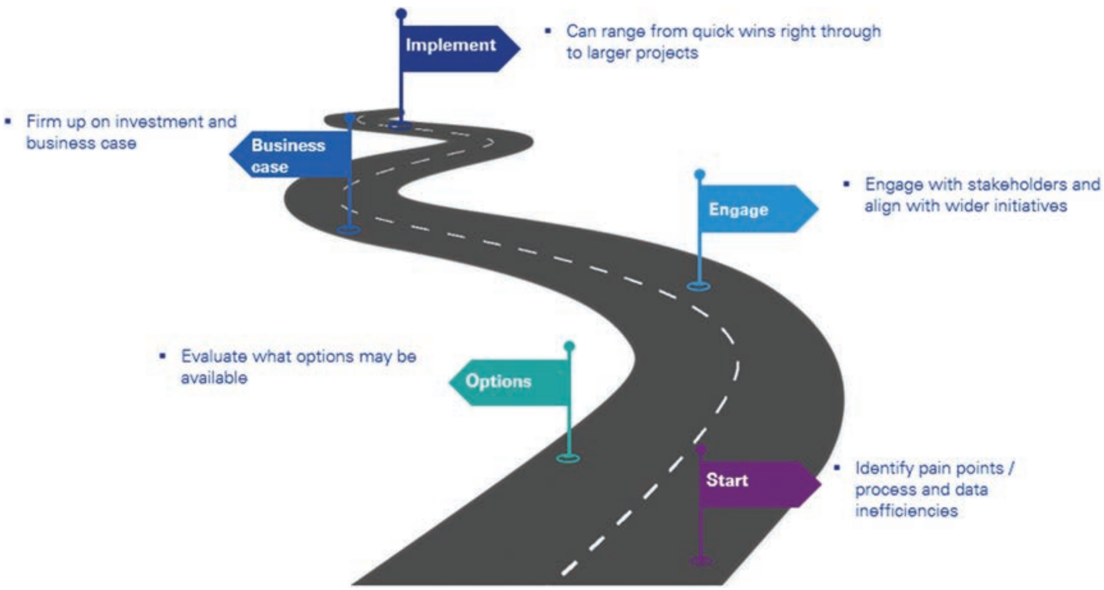
Identifying what other stakeholders need to be involved in developing this tax roadmap

The IT function is a key enabler of any information technology initiative in an organisation. When engaging with IT, it is important (a) to identify the business issue and (b) to focus on a specific request/proposal (with support from leadership) that is consistent with your roadmap. This helps to drive better engagement. It may involve the tax team's having to delve into understanding what technologies are available to the business. Another key stakeholder is the wider finance function, and in our experience, progressing technology initiatives must be mutually beneficial. The benefits for finance may include better data for wider finance KPIs, quicker decisions, reduced interaction on tax-related matters and supporting the wider efficiency agenda.

The wider compliance environment

This will be heavily dependent on the type and size of business and the jurisdictions where it operates. Revenue is following how other sophisticated tax authorities operate, which is to have increased focus on the data and information that support a tax return, which can present a challenge where there is a heavy reliance on remediating this data in spreadsheets. Although the compliance environment is indeed a challenge for tax teams, it is also a key justification for investing in the information technology agenda for tax.

Where Tax Should Start



Despite having support of the C-suite, when it comes to investing in technology, one of the biggest concerns among businesses is the vast array of innovations on the market and the difficulty in choosing the right tools, as well as leaders questioning the return on the investment. The key areas for tax teams to focus on initially are those that take up the greatest amount of time, such as reworking data in spreadsheets, undertaking manual reconciliations and reviewing data against original documents.

Starting with the problem, as opposed to the solution (i.e. the technology), assists with choosing the right tools and can also play a key role in defining the business case for further investment. In progressing the information technology agenda, there are a number of initial key action areas:

- Start now. Look for those incremental wins, some of which can be initiated within the tax team with limited involvement from the rest of the business. This may include increased use of data and analytics (D&A), compliance process automation or meeting new compliance obligations.
- People are key. Data is ultimately managed by people through processes and technologies, so strong relationships across the business will be a key driver of any initiatives. For tax teams, reducing the amount of time spent in spreadsheets managing standard/repeatable activities will deliver benefits and allow them to focus on the myriad of other demands placed on them.
- Business case. A robust business case based on both financial and non-financial benefits will be key to enabling any information technology initiative for tax.

Technology can be intimidating – the terminology used in IT is as unfamiliar to tax teams as the terminology used in tax is to IT teams. Bringing these two worlds together is what enhances the tax team and the organisation as a whole.

Mark Barrett
Chartered Tax Adviser, Ronan Daly Jermyn

Finance Act 2021 and the Code of Practice for Revenue Compliance Interventions

Introduction

All Government departments, including Revenue, are obliged to prepare Statements of Strategy at regular intervals. In January 2021 Revenue published its Statement of Strategy for the period 2021 to 2023, the twin pillars of which were "Service for Compliance" and "Confronting Non-Compliance". One of the primary areas of focus was maximising timely compliance, and reference was made to the proposed introduction of a revised framework of compliance interventions:

> "We will further enhance our real-time engagement and response to risk, building on the segmentation of our customer base. We will leverage our data holdings and capacity for advanced

analytics. We will continue to encourage self-review and correction by taxpayers. We will implement a revised framework of compliance interventions that supports early and effective engagement to address non-compliance, based on the level of risk and taxpayer behaviour."

New Code

On 11 February 2022 Revenue published its new Code of Practice for Revenue Compliance Interventions ("the new Code").[1] The new Code will come into effect on 1 May 2022 and replace the Code of Practice for Revenue Audits and Other Compliance Interventions issued in 2019 ("the existing Code"). It has been published almost three months before its "go-live" date to give both Revenue officials and practitioners an opportunity to familiarise themselves with its content and the changes in the approach to Revenue compliance interventions that it will introduce.

The new Code features Revenue's "Compliance Intervention Framework", which was signalled in its Statement of Strategy. This represents a significant departure from the approach to Revenue audits and interventions under the existing Code. This edition of *Irish Tax Review* features an article by Revenue setting out in detail how the new Compliance Intervention Framework is intended to operate, and I would encourage all readers to take the time to review it. (See also article by Irish Tax Institute, in this issue).

Risk Review

The Compliance Intervention Framework provides a graduated response to risk and continued non-compliance. This response ranges from self-correction opportunities through to tax audits and investigations, across three "levels" (Level 1, 2 and 3). Perhaps the most significant aspect of the new framework is the introduction of a new type of intervention, the "risk review", at Level 2.

A risk review is a Revenue inquiry for the purposes of s1077F TCA 1997 and is a focused intervention to examine a risk or a small number of risks on a tax return where a full audit is not warranted. Once notified of a risk review, a taxpayer will no longer be afforded the opportunity to make an **unprompted** qualifying disclosure, and any disclosure will be treated as a **prompted** qualifying disclosure. This results in a reduction in the mitigation of penalties that is currently available for unprompted qualifying disclosures which are made before receiving a Revenue audit notification.

It would appear that the risk review was introduced to address a view held in some quarters that taxpayers were not necessarily incentivised to regularise their tax affairs unless prompted to do so. Under the existing Code, a taxpayer has an opportunity to make an unprompted qualifying disclosure at any point before the notification of a Revenue audit. Therefore any intervention by Revenue via phone, email, letter, MyEnquiries etc. that raises queries but does not constitute a notification of a Revenue audit provides a taxpayer a chance to avail of the benefits of an unprompted qualifying disclosure and obtain greater mitigation of penalties.

As the number of non-audit interventions carried out by Revenue has increased in recent years, taxpayers who had concerns over tax-related issues may have considered postponing a potential tax issue until first contact was made by Revenue. The "risk review" is intended to address this perceived weakness in the existing Code. The lead-in time to the new Code's becoming operational on 1 May should therefore be used by taxpayers and their advisers to consider whether there are any matters that would best be dealt with by means of an unprompted qualifying disclosure, before risk review letters can be issued.

The other type of intervention at Level 2 is a Revenue audit. Section 3 of the new Code contains an overview of both risk reviews and

1 See https://www.revenue.ie/en/tax-professionals/documents/code-of-practice-revenue-compliance-interventions.pdf.

Revenue audits and includes details on location, conduct and escalation of these types of intervention.

Institute's Response

The Institute's TaxFax of 11 February 2022 sets out a response to the publication of the new Code. It contains:

- an outline of the main features of the Compliance Intervention Framework,
- a note of the Institute's representations to Revenue before the publication of the Code and
- a summary of the ways in which members will be kept informed by the Institute of the issues arising from the implementation of the new Code over the coming weeks and months.

It is recommended that all members familiarise themselves with these key changes and the timing of their implementation.

Finance Act 2021

The introduction of the new Code necessitated a number of changes to the legislation governing penalties for tax defaults and the publication regime. We will now consider these legislative changes and how they are reflected in the Code.

Sections 74, 75 and 76 Finance Act 2021: Penalties

Section 74 Finance Act 2021 provides that s1077E TCA 1997,[2] which sets out the penalty regime for deliberately or carelessly making incorrect returns etc., shall not apply in respect of any disclosure made, act done or omission made after 21 December 2021 (the date of the passing of Finance Act 2021). Similarly, s76 Finance Act 2021 provides that s116 VATCA 2010, which contains the penalty regime for deliberately or carelessly making incorrect VAT returns etc., shall not apply in respect of any disclosure made, act done or omission made after 21 December 2021.

Section 75 Finance Act 2021 inserts a new s1077F in TCA 1997. Section 1077F substantially reproduces the provisions previously contained in s1077E but contains the following notable changes:

- Penalties will not be charged for technical adjustments, innocent errors and cases where total tax defaults are less than €6,000 and are in the careless rather than deliberate behaviour category of default. This provides a legislative basis for the administrative practice that applies under the existing Code.
- The calculation of the tax-geared penalty where no return has been filed will be based on the tax paid before the **notification** of a Revenue inquiry or investigation rather than before the **commencement** of a Revenue inquiry or investigation.[3]
- The prohibition on mitigation of penalties in offshore cases has been removed.

Section 75 also inserts a new s116A VATCA 2010 and makes amendments to s134A SDCA 1999 and s58 CATCA 2003, which mirror the changes in s1077F.

Offshore Matters

Although it does not represent a shift in Revenue practice, the legislative change in the application of the penalty regime to technical adjustments and innocent errors is to be welcomed. Of more significance, however, is the removal of restrictions on mitigation of penalties in offshore matters.

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2 Section 1077E was introduced by Finance (No. 2) Act 2008 to bring into legislation the Revenue practice at the time for tax-geared penalties in audits and investigations. The effect was to codify into legislation parts of the 2002 Code of Practice for Revenue Auditors with some significant amendments to the conduct of Revenue audits. It put the definitions of "prompted qualifying disclosure" and "unprompted qualifying disclosure" on a statutory footing for the first time.

3 Section 4.5.1 of the new Code sets out the mechanism to be applied under s1077F(5) TCA 1997 to calculate the amount on which a penalty is due in situations where a person has failed to file a return.

Many readers will recall the strong reaction generated by the changes to s1077E that were introduced by s56 Finance Act 2016. These changes set out certain circumstances where a disclosure would not be a qualifying disclosure and would lead to unavoidable publication on the list of tax defaulters and unmitigated tax-geared penalties. In particular, a disclosure made on or after 1 May 2017 was not treated as a qualifying disclosure (1) where any matters contained in the disclosure related directly or indirectly to "offshore matters" (essentially meaning any income, gains, accounts or assets accruing, arising, situated or located outside of the State) and (2) in any other case where a disclosure was not made but the person had a tax liability resulting from offshore matters that were known or became known to Revenue at any time. There was a carve-out in relation to (2) in that the disclosure may still have been qualifying if (a) the penalty was less than 15% of the total correct tax due or (b) the behaviour was careless but not deliberate.

Revenue policy on interventions, as enshrined in Codes of Practice over the years, has been to encourage and facilitate taxpayers to come forward and regularise their tax affairs when they become aware of tax underpayments or defaults. When advising clients, tax practitioners can point to incentives such as protection from prosecution, mitigation of penalties, avoiding publication etc. and highlight the benefits associated with making a disclosure. This approach is generally seen to be a "win–win" for taxpayers and the Exchequer.

By introducing a blanket ban on the benefits of disclosures for offshore matters after 1 May 2017, the incentive for taxpayers to come forward and regularise their tax affairs was effectively removed. For practitioners, it was difficult to highlight to clients the benefits (apart from restricting a potential exposure to interest on non-payment of tax) of notifying Revenue of an offshore matter. As a policy, it did not appear to be in the interest of fostering a culture of compliance that an individual who identified an offshore matter was not going to materially benefit from voluntarily addressing it with Revenue.

The introduction of this legislation, as a precursor to the implementation of the new Code, is a very welcome change in policy.

Sections 77 and 78 Finance Act 2021: Publication of Tax Defaulters

Section 1086 TCA 1997 requires Revenue to compile lists of certain tax defaulters on a quarterly basis and publish such lists in *Iris Oifigiúil* within three months of the end of the particular quarter. Lists of defaulters may also be publicised or reproduced by Revenue in any manner that it considers appropriate. Section 77 Finance Act 2021 provides for the ending of the current publication regime in s1086 TCA 1997 with effect from 31 December 2021.

Section 78 Finance Act 2021 inserted a new s1086A in TCA 1997, replacing s1086. The new section makes a number of amendments to the criteria for publication and the details to be published, which include:

- A settlement will not be published when the tax underpayment made or refund incorrectly claimed is less than €50,000. Under s1086, any settlement where the combined tax, interest and penalty exceeded €35,000 was publishable. However, where a settlement is published, the full amount, including interest and penalties, will be published.
- Where any part of a settlement is not subject to a penalty, such part will not be published.

These amendments are to be welcomed and had been the subject of extensive representations by the ITI.

Other amendments are:

- Surcharges and any fixed penalties will be publishable, where applicable.
- Settlements will be published where refunds have been incorrectly claimed.

- The details in relation to a tax defaulter's name have been expanded to include any trading name or previous name. This is with a view to preventing a defaulter from avoiding recognition by using an alternative name.

The new provisions apply to "relevant periods", a relevant period being the period beginning on 1 January 2022 and ending on 31 March 2022, and each subsequent period of three months beginning with the period ending on 30 June 2022.

In a Committee Stage amendment, the definition of "qualifying disclosure" was updated to include settlements in relation to excise matters. This ensures that the same treatment will apply to such disclosures as apply in relation to other taxes, that is, a qualifying disclosure will not be published but a settlement may be published if the tax is not paid in accordance with the terms of the qualifying disclosure.

Chapter 5 of the new Code: Publication in List of Tax Defaulters

Chapter 5 of the new Code (pages 64 and 65) sets out the rules governing the obligation to publish, exclusions from publication and determining the publication figure.[4]
It includes the following table, which is a useful summary of the statutory exclusions from publication:

Statutory Exclusions from publicaiton	
Section 1086A(8)(c) TCA 1997	✓ Cases where a qualifying disclosure is accepted
Section 1086A(8)(b) TCA 1997	✓ Cases where the settlement does not exceed €50,000 (figure for tax only
Section 1086A(8)(a) TCA 1997	✓ Cases where the penalty does not exceed 15% of the amount of the additional tax due
Sectoin 811D TCA 1997	✓ Cases where a 'qualifying avoidance disclosure' is accepted and/or a tax avoidance surcharge(s)

Next Steps

A good working knowledge of the operation of the new Code will be an essential tool for tax practitioners. As set out in the Institute's TaxFax of 11 February 2022, the following actions will be taken to inform and assist members in the transition to the new Code:

- Stream 3 of the Annual Tax Summit on 1 April 2022 will include an update on the Compliance Intervention Framework and the revised Code from Aidan Lucey, PwC, who will be joined by a Revenue speaker for the Q&A session.
- Before 1 May, the Institute will advise on practical aspects of the notification procedures, such as the format of the notification letters, the channels for issue to taxpayers and their agents (i.e. paper-based/electronic) and the issue of reminder notifications on risk reviews.
- The Irish Tax Series 2022 will include publication of a third edition of *Revenue Audits and Investigations – The Professional's Handbook*, to be released later in 2022.
- The Institute will monitor members' experiences of the practical implementation of the new Framework and the revised Code during 2022, to draw any emerging issues causing difficulty or requiring clarity to the attention of Revenue's compliance policy personnel at an early stage.

4 At the time of writing, para. 5.3 contains a link to Revenue's "Compliance Manual – Criteria for Publication of Tax Defaulters Manual". This document was last reviewed in July 2021 and does not reflect the Finance Act 2021 amendments. Care should therefore be taken in referring to this document until it is updated by Revenue.

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The Institute's Representations on Revenue's New Compliance Intervention Framework and the New Code

Introduction

The articles by Sarah Waters and Mark Barrett in this edition of *Irish Tax Review* provide an overview of Revenue's new Compliance Intervention Framework ("the Framework"), key related developments regarding the Code of Practice for Revenue Compliance Interventions[1] ("the new Code") and intervention-related developments in Finance Act 2021.

As set out in the above-mentioned articles, the Framework introduces significant changes to compliance interventions and related disclosure opportunities, as reflected in the new Code. Since Revenue provided an overview of its planned changes to compliance interventions at the ITI/Revenue Joint Webinar on 1 June 2021, the Institute has engaged extensively with Revenue through the TALC Compliance

1 See https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-revenue-audit.pdf.

Interventions Sub-Committee (“TALC Audit”) as Revenue developed its new Code.

At every opportunity, the Institute provided comments and recommendations and raised issues and concerns in multiple meetings of TALC Audit, bilateral meetings with Revenue Compliance Policy personnel, and correspondence and detailed submissions, as draft chapters of the Code were made available to the Institute on a strictly confidential basis. Following representations by the Institute on key concerns and the timeframe for implementation, the planned implementation date of the Framework and the new Code was deferred from 1 February to 1 May 2022.

As highlighted in TaxFax on 11 February, we raised several concerns with Revenue about the new Framework. Some of our concerns were taken on board and reflected in the final Code as published while others were not. Now that the Code has been released, our immediate focus shifts to informing and educating members about the changes and their implications for tax advice. We will inform members through our suite of information resources, including TaxFax, *Irish Tax Review*, the Annual Tax Summit on 1 April and a new edition of *Revenue Audits and Investigations – The Professional’s Handbook.*

Before 1 May, we will provide further information on the format of the new compliance intervention notifications and their channel of issue (e.g. paper or electronic) to assist members consider any internal procedural changes required to manage notifications received. Once the new Code and Framework come into operation, the Institute will collate feedback from members to raise any emerging concerns with Revenue at an early stage.

In this article we provide a summary of key representations in our engagement with Revenue over the last eight months. The new Framework (detailed in the article by Sarah Waters) was a core area of focus in our representations. However, we also made many recommendations to improve aspects of the Code informed by feedback from members. These included on issues such as disclosures relating to offshore matters, barriers to reaching a settlement, delays in concluding audits, and Revenue’s approach to the “technical adjustment”, “innocent error” and “no loss of revenue” provisions. We cover a number of these issues below, in addition to representations on the Framework.

Level 2 Notifications: A New Type of Revenue Inquiry – A “Risk Review”

The Institute raised particular concerns about the new type of Revenue inquiry in the Framework – a Level 2 risk review notification.

The scope of the qualifying disclosure expected in response to a risk review notification

As reported in TaxFax on 11 February, the Institute strongly and repeatedly objected to the type and the scope of the qualifying disclosure expected in response to a Level 2 risk review notification and the resulting additional cost and risk for taxpayers and tax advisers in dealing with these interventions.

Risk reviews are at an equivalent level to Revenue audits as regards disclosure opportunities. Therefore, a diligent tax adviser cannot simply review the risk identified in Revenue’s risk review notification in isolation and respond. Instead, the tax adviser is expected to carry out a full review of the tax head for the period with their client, determine whether a prompted qualifying disclosure (PQD) for that tax head and period is required and, if so, submit within a short timeframe a notification of an intention to make such a disclosure to avail of the additional time to prepare the disclosure. Otherwise, the opportunity to make a valid and complete qualifying disclosure for the tax head and period and to benefit from the protections that it affords in relation to publication and possible prosecution is missed.

Although Revenue describes risk reviews in the Code as narrow, focused interventions to which an early reply is encouraged, we highlighted how the task that taxpayers and their advisers need to complete on receipt of such a notification is significantly broader. We objected to the costs and risks that responding to these notifications would introduce and questioned the rationale for this approach against a backdrop of strong voluntary compliance rates. A letter https://taxinstitute.ie/wp-content/uploads/2022/02/2021-09-20-ITI-letter-to-Revenue-on-the-draft-revised-Code-of-Practice-for-Revenue-Compliance-Interventions-for-website.pdf from the Institute's Chief Executive, Martin Lambe, to the Head of the Division responsible for compliance policy on this matter and other concerns and Revenue's response https://taxinstitute.ie/wp-content/uploads/2022/02/Letter-to-Martin-Lambe-in-response-to-letter-2109-1.pdf are available on our website.

Notwithstanding our strenuous objections, Revenue would not agree to narrowing the scope of the PQD to the particular issue outlined in the risk review notification. Revenue considers it important not to create a "culture of piecemeal disclosures" with regard to a tax head or period. Finance Act 2021 introduced amendments to underpin Revenue's new Framework.

Having considered our concerns about the time in which to respond to these interventions, Revenue agreed to extend the notification period for Level 2 interventions to 28 days and extend the period to notify Revenue of the intention to make a disclosure to 21 days (to avail of an additional maximum 60 days to prepare the disclosure). These changes are reflected in the new Code.

The notification period for risk reviews

It was initially proposed that risk reviews would have a 21-day notification period before the intervention is considered to have begun, as this was the long-standing approach to Revenue audits. We highlighted the shortness of a 21-day timeframe and the 14-day window to notify Revenue if additional time is needed to prepare a disclosure. A week may have elapsed by the time that a client and an adviser receive a notification and can meet to begin to consider the issue at hand. We considered an extension to at least 28 days to be more appropriate (for both risk reviews and audits), and as outlined above, this has been provided in the new Code, together with an increase from 14 to 21 days for the period to notify Revenue and seek additional time to prepare the disclosure.

The Code provides for some flexibility in the start date of a Revenue audit, if agreed with Revenue. We sought a similar approach to the commencement date for a risk review, which is considered to start 28 days after the notification issues. Revenue has noted in the new Code that in exceptional circumstances it may be possible to agree an alternative commencement date, provided that the reason for the request is legitimate and reasonable.[2]

Communications with Revenue during the different stages of the risk review process

We sought detailed information in the new Code on the conduct of risk reviews, including on communication between Revenue and the taxpayer/adviser during each stage of the intervention. Given that risk reviews are primarily desk-based interventions, we highlighted concerns about instances that could arise where a risk review notification issues but is overlooked by the taxpayer/tax agent due to, for example, annual leave by a key staff member or a heavy workload. In such circumstances, an intervention could potentially proceed without the taxpayer's knowledge and involvement, and the opportunity to make a PQD or to provide full cooperation to mitigate penalties could be missed.

Following our representations, the new Code reflects that Revenue will make every effort to contact taxpayers and their agents to remind them of the impending commencement of the intervention.[3] We sought, and Revenue has

2 Paragraph 1.3.4, Notification of a Level 2 Compliance Intervention, Code of Practice for Revenue Compliance Interventions (2022).

3 Paragraph 3.1.2, Conduct of a Risk Review, Code of Practice for Revenue Compliance Interventions (2022).

agreed to issue, a reminder to the taxpayer/adviser of the risk review notification within the 21-day period to notify Revenue of a taxpayer's intention to make a PQD.

We also sought the issue of hard-copy Level 2 risk review notifications (to the taxpayer and their tax agent on record) in addition to any electronic notifications. An electronic notification could be overlooked or be received by a junior staff member who may not appreciate the serious consequences of failing to respond appropriately in a short timeframe. We will update members in TaxFax on the reminder procedure and the communication channel to be used once the details are confirmed.

The Code outlines some options for Revenue officers if there is no response to a risk review notification that has issued.[4] In cases where it considers that the tax is quantifiable without the need for a site visit, Revenue notes the option to issue a Notice of Assessment. We sought that Revenue engage with the taxpayer before the issue of an assessment. Otherwise, a taxpayer will not have sufficient information to decide whether to appeal that assessment. The Code reflects that in all such cases Revenue will contact the taxpayer setting out the basis of assessment before the issue of the assessment.[5]

The migration of aspect queries: risk review or Level 1 interventions?

We raised Revenue's extensive use of the aspect query designation in recent years and queried whether this would translate to a similar number of risk review notifications. Aspect queries are defined as "a short, targeted intervention for the purpose of checking a particular risk".[6] Yet in recent years members have reported the use of aspect queries for matters ranging from requests for supporting information in relation to a tax return to very detailed and specific queries on a tax head, described by some members as akin to audits, given the level of examination involved. Against that backdrop, we expressed concern about the compliance burden that would arise for taxpayers and the tax profession if all aspect queries would migrate to Level 2 risk review notifications.

Revenue acknowledged that aspect queries were issued quite broadly and considered that Revenue audit notifications would have seemed more appropriate in some cases. Revenue has confirmed that the instigation of risk reviews will not replicate the broad use of aspect queries. Risk reviews have a clear purpose to examine a particular risk(s), and their use will be monitored by Revenue to ensure that the Framework operates as intended.

To help members better understand the distinction between Level 1 and Level 2 compliance interventions, we sought more examples in the Code of Level 1 interventions to reflect the variety of correspondence that Revenue issues. Although the examples in the Code have not been expanded, we are engaging with Revenue to obtain sample compliance intervention notifications to help us inform members of the type of interventions that could be expected. As we understand it, standard requests for supporting information in relation to returns filed, for example, would be classified as Level 1 interventions.

Level 3 Notifications: Proposal to Extend the Use of Revenue Investigations Beyond Tax Evasion

The draft text of the Code reflected a Revenue proposal to broaden the use of Level 3 notifications of investigation to cases that Revenue believes involve tax avoidance. We strongly opposed this proposal throughout our engagement on the Code and the conflation of tax evasion and tax avoidance that such an approach would imply. Revenue investigations are normally reserved for and synonymous with serious fraud and tax evasion, and we were gravely concerned about their use on a broader basis.

4 Paragraph 3.1.2, Conduct of a Risk Review, Code of Practice for Revenue Compliance Interventions (2022).

5 Paragraph 3.1.2, Conduct of a Risk Review, Code of Practice for Revenue Compliance Interventions (2022).

6 Paragraph 2.3.2, Definition of an Aspect Query, Code of Practice for Revenue Audit and Other Compliance Interventions (2019).

Furthermore, what constitutes tax avoidance is a highly subjective matter. For example, Revenue officers may have different views on what constitutes avoidance and on whether an investigation may be appropriate, even when faced with the same set of facts and circumstances. Yet, the taxpayer would have been denied the right to make a qualifying disclosure and avail of the protections that it provides from publication if an investigation notification was issued.

We also noted the wide-ranging provisions in legislation already available to Revenue to challenge behaviour that it perceives as problematic, through the general anti-avoidance rules, specific anti-avoidance provisions, a tax-avoidance surcharge and a mandatory disclosure regime for transactions with certain characteristics.

After lengthy discussions on this topic, Revenue did not ultimately proceed to broaden the use of investigations in the final Code, as published.

Level 1 Notifications: The Importance of Direct and Clear Communication with Taxpayers

The article by Sarah Waters provides an overview of the different methods that Revenue may use to advise taxpayers of Level 1 compliance interventions. In addition to contact through real-time requests for data and correspondence with taxpayers, Revenue notes that it may use the publication of notices in the media or similar public notifications advising of an area of concern that taxpayers should review.[7]

Revenue initiatives to improve taxpayers' awareness of their tax compliance obligations through the media are certainly useful. However, the Institute does not believe that such communications can substitute for direct communication with a taxpayer. A taxpayer may not see or read a press release or may fail to understand Revenue's message and its relevance to their own circumstances. We emphasised the importance of direct contact with taxpayers at an early stage if Revenue has identified potential errors in a taxpayer's return or has a concern about a potential tax risk. Should Revenue wish to support tax compliance in particular areas via the media, this should be through high-profile media campaigns across a number of communication channels so the communication has a broad reach.

We also sought that a Level 1 notification clearly informs the taxpayer of the consequences of not responding to Revenue's request. Taxpayers – in particular, unrepresented taxpayers – may not appreciate the importance of dealing with a Revenue request promptly or that receipt of a notification marks their entry into a compliance process with escalating consequences. For example, a notification of an outstanding return is classified as a Level 1 compliance intervention. Up to now, some taxpayers may have perceived these reminders as computer-generated standard reminders rather than an issue requiring immediate attention. We were concerned that taxpayers could inadvertently end up published on Revenue's list of tax defaulters due to a lack of understanding of Revenue's Framework and the relatively low publication threshold of €35,000 (total tax, interest, penalties). The publication threshold was subsequently increased to €50,000 (in tax underpaid or tax refund overclaimed) in Finance Act 2021, as outlined in the article by Mark Barrett.

The Increased Onus on Taxpayers to Identify and Rectify Errors Without Contact from Revenue

The Framework, as reflected in the new Code, places a greater emphasis on a taxpayer's responsibility for their own compliance and the need to manage compliance issues proactively (and address tax defaults through self-correction or an unprompted qualifying disclosure, where required). We raised the challenges that this can present for taxpayers.

7 Paragraph 1.2.1, Level 1 Compliance Interventions, Code of Practice for Revenue Compliance Interventions (2022).

Revenue has sophisticated IT and data analytics tools to spot errors and anomalies in returns quite quickly and easily. In contrast, taxpayers often rely on manual checking processes to identify and address errors and may only become aware of a potential tax default after contact from Revenue, notwithstanding a taxpayer's best efforts to be fully compliant. We encouraged the instigation of interventions at the lowest level in the Framework, wherever possible, to help taxpayers to address inadvertent errors at the lowest rate of penalty (if a penalty applies at all).

Revenue has emphasised throughout our engagement that the levels in the Framework are not sequential. A compliance intervention can be initiated at any level based on the perceived level of risk and taxpayer behaviour. To illustrate this, Sarah Waters' article in this edition provides an example of an intervention initiated as Level 2. In addition, although progression through the levels of intervention is not automatic, Revenue may escalate a matter to a higher level if it is not addressed. Therefore, it is vital that clients are aware of the renewed importance of proactively engaging with their tax affairs to minimise their exposure to penalties and avail of disclosure opportunities.

Conclusion of Checks on Covid-19 Support Schemes

We sought that outstanding compliance checks on the Covid-19 support schemes are concluded before the implementation of the new Code (excluding those checks that are occurring in real time for schemes that remain in operation). Otherwise, considerable additional work in analysing historical information for taxpayers and the costs associated with such an exercise would be very challenging for businesses emerging from the pandemic.

Revenue advised that the postponement of the implementation date from 1 February to 1 May 2022 should address these concerns. The Temporary Wage Subsidy Scheme compliance checks are essentially completed, and checks on the other Revenue-operated supports are carried out selectively and in real time.

Other Aspects of the New Code and Compliance Interventions

Engagement on the Framework and its implications took up a considerable part of the discussions at TALC. However, we also sought revisions to other aspects of the Code and interventions that have been long-running issues of focus in our engagement at TALC Audit.

Removal of the prohibition on qualifying disclosures relating to offshore matters

Finance Act 2021 removed the prohibition on making a qualifying disclosure in relation to "offshore matters". In our engagement with Revenue at TALC Audit, the Institute has continually raised that prohibiting qualifying disclosures was counterproductive in encouraging voluntary compliance and settlements, and we highlighted the types of issues that could arise where a qualifying disclosure would not be permitted – for example, errors arising due to the complexity of the offshore funds regime, transfer pricing adjustments and issues for individuals in receipt of foreign pensions.

Increase in the publication threshold

An Institute survey of members' experiences of compliance interventions in 2020 underlined that the relatively low publication threshold of €35,000 (of combined tax, interest and penalties) was acting as a barrier to reaching settlements and should be increased. As outlined by Mark Barrett in his article, the publication threshold was increased to €50,000 (in tax underpaid or refund incorrectly claimed) in Finance Act 2021.

Greater recognition that genuine errors and differences in interpretation can arise

Even the most compliant taxpayers can make errors in their tax returns or have an interpretation of the legislation different from Revenue's. Although this principle and the fact that penalties are inappropriate in some circumstances are acknowledged in print in the 2019 Code, feedback from members over recent years has indicated that this was not always the experience in practice during interventions. Some amendments were made to the language in the Code on "innocent error" and "technical adjustment" and other paragraphs in the draft text following our engagement to reinforce this important acknowledgement in the Code. We also sought to ensure that it is cases involving "egregious failure" that are excluded from the opportunity to claim "no loss of revenue" rather than a broader prohibition as was suggested in the draft text.

Timeframe for concluding interventions

Delays in concluding interventions and the absence of a timeframe for Revenue to conclude an open intervention have been an ongoing topic of discussion with Revenue. Paragraph 4.8 of the new Code outlines that the three-month waiting period to request a status update from Revenue on an intervention has been reduced to one month.

The Institute will continue to engage with Revenue at TALC on members' practical experiences of the application of the Code and the Framework over the year ahead.

Sarah Waters *(not pictured)*
Accountant General's and Strategic Planning Division, Revenue

Revenue's New Compliance Intervention Framework

Introduction

Revenue's mission is to serve the community by fairly and efficiently collecting taxes and duties and implementing customs controls. We achieve this by providing excellent service to support voluntary compliance and by delivering a risk-focused, effective, and proportionate response to non-compliance that reflects taxpayer behaviour[1].

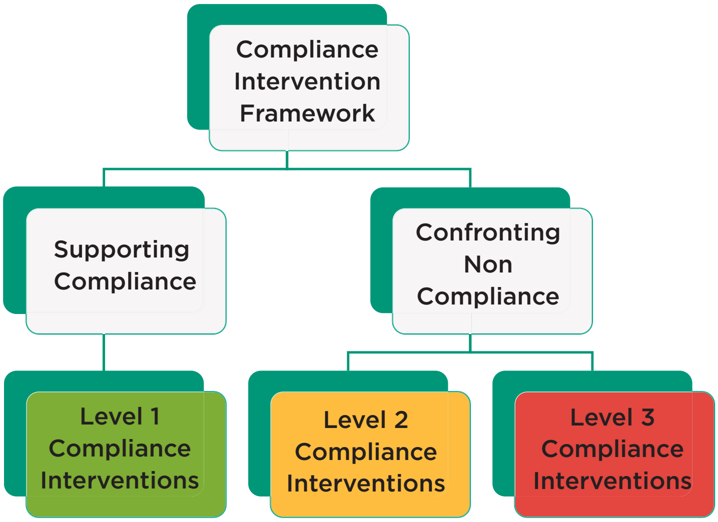
From 1 May 2022, we will better support our objective by further enhancing our real-time engagement with taxpayers, using the insights from PAYE Modernisation to expand real-time compliance management of Revenue's segmented case-base. This will see us incorporate our traditional tax audit approach within a Compliance Intervention Framework that provides a graduated response

1 Revenue Statement of Strategy 2021 – 2023 https://www.revenue.ie/en/corporate/documents/governance/sos-2021-2023.pdf

to risk and continued non-compliance. The graduated response ranges from self-correction opportunities up to tax audit and investigation with a view to prosecution for the most egregious cases.

The Compliance Intervention Framework provides taxpayers with opportunities to review their tax compliance position and to voluntarily address any issues identified. Taxpayers who avail of these opportunities will experience the minimum level of penalty and generally not risk either publication or prosecution. Revenue will progressively respond with appropriate vigour to taxpayers who do not comply voluntarily or change the behaviour, leading to tax non-compliance. This article sets out a summary overview of Revenue's new Compliance Intervention Framework. Further details will be available in the Code of Practice for Revenue Compliance Interventions which was published on 11 February 2022, on the Revenue website, www.revenue.ie.

Compliance Intervention Framework – Overview



As outlined in the introduction, part of Revenue's mission is to collect taxes and duties fairly and efficiently. We do this through our twin strategic pillars of *Supporting Compliance* and *Confronting Non-Compliance*. The Compliance Intervention Framework is comprised of three distinct levels which are based on our twin strategic pillars.

The intervention levels (Level 1, Level 2, Level 3) in the Compliance Intervention Framework reflect our graduated response to risk and taxpayer behaviour. The intervention levels also provide taxpayers with a mechanism and incentive to address any tax non-compliance issues voluntarily. To this end, taxpayers and tax agents are strongly advised to review their tax affairs and address issues prior to contact from Revenue.

Within the Compliance Intervention Framework, each intervention is intended to be in the form which is most efficient in terms of time and resources, and which imposes the least cost on the taxpayer and on Revenue, whilst properly addressing the perceived risk. An overview of the intervention types contained in Levels 1, 2 and 3 of the Compliance Intervention Framework is included in this article.

Overview of Compliance Intervention Framework Levels

	Level 1	Level 2	Level 3
Objective	Support Compliance	Challenge Non-Compliance	Tackle High-Risk Cases/Practices
Corrective Options	Payment of liability/self-correction	Payment of liability	Payment of liability
Disclosure Position	Unprompted Disclosure Available	Prompted Disclosure Available	No Qualifying Disclosure
Activity	Self-Reviews Profile Interviews Bulk issue non-filer reminders CCF Engagements	Risk Review Audit	Investigation

Supporting Compliance

Revenue recognises that most taxpayers want to comply with their tax obligations and pay the right amount of tax at the right time. Supporting taxpayers in getting it right first time facilitates voluntary compliance. Revenue invests significantly in making it as easy as possible to comply by providing excellent service for those who want to do it correctly.

However, even the most compliant taxpayers can make errors in filing tax returns and paying the correct amount due. For this reason, Revenue provides a range of opportunities for taxpayers to self-review, self-correct or to make unprompted qualifying disclosures of any matters. These opportunities ensure that interest and/or penalties are kept to a minimum, if they apply at all.

Actions which are designed to assist taxpayers in being voluntarily compliant fall within Level 1 of the Compliance Intervention Framework and do not constitute an inquiry for the purposes of s1077F[2] TCA 1997 (introduced by Finance Act 2021 which will be addressed in this issue by Mark Barrett). This means that where a Level 1 Compliance Intervention has been initiated, taxpayers can address any compliance matters through self-correction or by making an unprompted qualifying disclosure, as appropriate.

Level 1 Compliance Interventions

Level 1 Compliance Interventions are aimed at supporting taxpayers by reminding them of their obligations and providing them with the opportunity to correct errors without the need for a more in-depth inquiry. A Level 1 Compliance Intervention is broad based and only occurs where Revenue has not already engaged in any detailed examination or review of an individual taxpayer's case.

Some examples of Level 1 Compliance Interventions include:

1. Request to self-review
2. Profile Interview
3. Bulk issue reminder notification to file outstanding tax returns
4. Engagement with businesses under the Cooperative Compliance Framework (CCF)

There are many ways in which a Level 1 Compliance Intervention may be advised to a taxpayer. The method chosen may depend on the profile of the taxpayer or the particular segment of Revenue's case base. For example:

2 All references in this article to s 1077F TCA 1997 should be read to include references to s 1077E TCA 1997 where the act, omission or disclosure was made prior to 21 December 2021.

- a Level 1 Compliance Intervention may be advised through a real-time request to a taxpayer to review data during the submission of a return.
- a Level 1 Compliance Intervention could include a letter to a group of taxpayers requesting self-review of a particular issue, for example, rental income.

Level 1 Compliance Interventions are designed to support compliance. Therefore, Revenue may publish notices regarding various compliance issues which should be reviewed, through the media, press releases or other similar public notification channels.

These notifications or reminders aim to support taxpayers in achieving voluntary compliance, and do not represent an inquiry, meaning that taxpayers may correct any issues in a cost-effective way.

The Compliance Intervention Framework is not sequential. This means that the notification of a Level 1 Compliance Intervention is not necessarily a precursor to receiving notification of either a Level 2 or Level 3 Compliance Intervention.

Confronting Non-Compliance

Revenue pursues those who do not avail of the opportunities to self-correct and/or avail of the opportunity to make an unprompted qualifying disclosure. Revenue also challenges aggressive tax avoidance schemes and unintended uses of legislation which threaten tax yields and the fairness of the tax system. Revenue's priority is to recover any unpaid tax or duty, along with interest and penalties, as efficiently as possible and to ensure any non-compliant behaviour is rectified.

To maintain the integrity of the tax system and to ensure fairness for compliant taxpayers, Revenue provides a robust response to suspected cases of abuse of the tax code. We apply an expanding range of advanced analytics and data interrogation processes to all data available, including data returned by third parties. Where we identify risks, we tackle them using our range of compliance interventions. All data obtained by Revenue, in the course of compliance interventions, are subject to Revenue's data protection policy and data protection legislation. Details of Revenue's data protection policy can be found on our website, *www.revenue.ie*.

In the Compliance Intervention Framework, Level 2 and Level 3 compliance interventions are used to confront compliance risks based on the circumstances and behaviour of the taxpayers concerned.

Level 2 Compliance Interventions

There are two intervention types within Level 2 of the Compliance Intervention Framework:

1. Risk Review, or
2. Audit

In recognition of the fact that an audit is not the appropriate intervention type in every case, with effect from 1 May 2022 Revenue is introducing another type of inquiry which is called a Risk Review.

Every case which is selected for a Level 2 Compliance Intervention will be notified in writing and the notification will clearly state that it is a Level 2 Compliance Intervention and will specify risk review or audit. Where the taxpayer has an agent on our records, the notification of a Level 2 Compliance Intervention will issue simultaneously to the taxpayer's agent, as with any other type of Revenue correspondence.

Level 2 Compliance Interventions generally focus on a year or period where a specific risk has been identified by Revenue. However, multi-year (or multi-period) compliance interventions may be carried out where material risks, informed by the wide range of data sources available to Revenue, are identified across multiple years (or periods). Once a Level 2 Compliance Intervention is notified, the taxpayer is no longer entitled to make an unprompted qualifying disclosure in respect of the risk identified but is entitled to make a prompted qualifying disclosure.

Any Level 2 Compliance Intervention may be desk or field based. A desk intervention is conducted without a visit to the taxpayer's place of business. A field intervention involves a visit to the taxpayer's place of business.

Level 2 Compliance Intervention - Risk Review

A Risk Review is a focused intervention to examine a risk or a small number of risks on a return.

For example, the risk review may focus on a particular aspect or issue on a return or from a risk identified from Revenue's Risk Evaluation, Analysis and Profiling (REAP) system.

Level 2 Compliance Intervention - Revenue Audit

A 'Revenue Audit' is an examination of the compliance of a person with tax and duty legislation, having particular regard to the accuracy of specific returns, statements, claims or declarations. Under the Compliance Intervention Framework, an audit will be initiated (as opposed to a Level 2 Risk Review) where there is a greater level of perceived risk.

A Revenue audit can involve an examination of all risk indicators in a case (across multiple taxes and periods) or may focus on a single issue/ single tax within the case. An audit may also be subsequently extended to include additional issues, taxes or years/periods depending on the issues uncovered during the initial examination and will include collecting any arrears of tax that are outstanding at that time.

A Revenue audit may be carried out by an individual Revenue auditor or by a team of Revenue auditors depending on the size and complexity of the case. There are no changes to the process of a Revenue audit as a result of the introduction of the Compliance Intervention Framework. Further details will be found in the Code of Practice for Revenue Compliance Interventions.

Notification of a Level 2 Compliance Intervention

A taxpayer will receive 28 days' notice of a Level 2 Compliance Intervention. Prior to the introduction of the Compliance Intervention Framework, taxpayers would only have received 21 days' notice of a Revenue audit. In order to apply consistency to Level 2 compliance interventions, 28 days' notice will be given for either a risk review or an audit.

Where Revenue has a record of an agent representing the taxpayer in respect of the tax/ duty in question, a copy of the notification will also be sent to that agent.

The notification letter will clearly indicate the type of compliance intervention to be undertaken, that is, Level 2 Compliance Intervention - Risk Review or Audit. The scope of the intervention will be set out and will range from a single issue or single tax for a specific period or year to a comprehensive audit for multiple years/periods.

The notification letter issued in respect of a Risk Review, will confirm that the intervention is considered to have started 28 days after the date of the letter.

The notification letter in respect of an Audit, will confirm that the intervention is considered to have started 28 days after the date of the letter, unless otherwise agreed.

As and from the date of issue of a letter of notification of a Level 2 Compliance Intervention to the taxpayer and agent, the opportunity to make an unprompted qualifying disclosure is no longer available. The taxpayer can however make a prompted qualifying disclosure before the risk review or audit starts.

Once the intervention begins or is deemed to have commenced, the entitlement to avail of a prompted qualifying disclosure is no longer available. Even where a qualifying disclosure has not been made, the taxpayer still has the opportunity to fully cooperate with the inquiry thereby ensuring a reduction in the amount of penalty due.

Level 2 Compliance Intervention – disclosure opportunity

Once a taxpayer is notified of an impending Level 2 Compliance Intervention, the opportunity to make an unprompted qualifying disclosure is no longer available. This is because Revenue has actively identified the risk in question and has invited the taxpayer to quantify any liability arising. Prior to the commencement of the inquiry (that is, the risk review or audit), the taxpayer has the opportunity to make a prompted qualifying disclosure.

The definition of a qualifying disclosure remains unchanged and is set out in ss1077F TCA 1997. As outlined above, notification of a Level 2 Compliance Intervention means that the taxpayer may only avail of a prompted qualifying disclosure. The matters to be included in a prompted qualifying disclosure depend on the category of behaviour giving rise to the tax default. For example, in the case of a prompted qualifying disclosure in the careless behaviour category of tax default, the qualifying disclosure must state the amounts to tax, duty and interest in respect of the relevant tax and periods within the scope of the proposed compliance intervention. Likewise, in the case of a prompted qualifying disclosure in the deliberate category of tax default, the qualifying disclosure must state the amounts of all liabilities to tax, duty, and interest, in respect of all taxes and periods, where liabilities arise that were previously undisclosed.

As both risk reviews and audits are within Level 2 of the Compliance Intervention Framework, the scope of the disclosure is the same and depends on the category of behaviour giving rise to the tax default.

The following example illustrates the scope of a prompted qualifying disclosure following notification of a Level 2 Compliance Intervention - Risk Review.

Example

Revenue receives third party data in relation to rents paid to a certain category of landlords. This data is cross-referenced with self-assessed taxpayers who have failed to file an Income Tax Return and Self-Assessment for the year (Form 11). A notification of a Level 2 Compliance Intervention – Risk Review is issued to those taxpayers who are in receipt of rental income per the third-party data and who failed to file their Form 11. The notification specifies that the scope of the risk review is Income Tax for 2019 and the focus of the risk review is Case V rental income.

From the date of the notification, the opportunity to make an unprompted qualifying disclosure is no longer available in respect of income tax for 2019. However, the taxpayer may make a prompted qualifying disclosure before the inquiry is deemed to have commenced i.e. 28 days following the date of notification. Assuming that the default is in the careless behaviour category, the qualifying disclosure must include all liabilities to tax, duty and interest in respect of the relevant tax and periods within the scope of the risk review.

The focus of the risk review is Case V rental income for 2019 therefore the disclosure must include all liabilities to income tax for 2019 in order to be considered qualifying. Further information will be set out in Chapter 2 of the Code of Practice for Revenue Compliance Interventions.

Additional period to prepare a prompted qualifying disclosure

A taxpayer may wish to secure an agreed period of time in which to prepare and make a prompted qualifying disclosure. The notice of the intention to make a prompted qualifying disclosure must be given to Revenue in writing within 21 days of the issue of the notification of a Level 2 Compliance Intervention. This is an increase of 7 days over the existing 14-day deadline.

A maximum period of 60 calendar days may be requested where a prompted disclosure will be made. The period of 60 days begins from the day on which the notice of intention to make a prompted qualifying disclosure was given. Revenue will confirm the expiry of the 60-day period in writing.

Level 3 Compliance Intervention

Revenue Investigation is the Level 3 Compliance Intervention within the Compliance Intervention Framework. An investigation focuses on tackling high risk practices and cases displaying risks of suspected fraud and tax evasion.

Revenue Investigation

A 'Revenue Investigation' is an examination of a taxpayer's affairs where Revenue believes, from a review of available information, that serious tax or duty evasion may have occurred, or a Revenue offence may have been committed and may lead to a criminal prosecution.

A Revenue Investigation is generally initiated by formally advising the taxpayer in writing that his or her tax/duty affairs are under Revenue Investigation. However, there are also situations where a Revenue Investigation is regarded as on-going without formal notification to the taxpayer. Such situations are outlined in tax and duty legislation and include:

- a Revenue Investigation into matters that have become known, or are about to become known, to the Revenue Commissioners through their own investigations or through an investigation conducted by a statutory body or agency,
- a Revenue Investigation into matters within the scope of an inquiry being carried out wholly or partly in public, or
- a Revenue Investigation into matters to which a person is linked, or about to be linked, publicly.

A taxpayer who receives notification of a Level 3 Compliance Intervention is no longer entitled to make a qualifying disclosure regarding the matter under investigation. This means that the final settlement may be subject to publication in Iris Oifigiúil and on the Revenue website, provided the conditions as set out in s s1086A TCA 1997 (introduced by Finance Act 2021 which will be addressed in this issue by Mark Barrett) are met.

Where, in the course of a Level 3 Compliance Intervention a Revenue officer uncovers information, not previously disclosed by the taxpayer, suggesting serious tax or duty evasion or that a Revenue offence may have occurred, the officer will inform the taxpayer by letter that a civil or criminal prosecution will be considered. The final decision in relation to any criminal prosecution rests with the Director of Public Prosecutions.

Important information for taxpayers

- On 11 February 2022, Revenue published the Code of Practice for Revenue Compliance Interventions which sets out details of the Compliance Intervention Framework which will be effective from 1 May 2022.
- Until this time, Revenue will continue to conduct interventions based on the current framework of classifications i.e. Profile Interview, Aspect Query, Audit and Investigation.

Revenue encourages taxpayers (through their agents where relevant) to take every opportunity to self-review their tax affairs and avail of the extensive opportunities to voluntarily address compliance issues and minimise their exposure liability to penalties. Further information about Revenue's Compliance Intervention Framework is available in the Code of Practice for Revenue Compliance Interventions which is available on the Revenue website, www.revenue.ie

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Finance Act 2021: Reverse Hybrid Legislation and Other Related Technical Amendments

Introduction

Anti-hybrid provisions were introduced in Finance Act 2019 and entered into effect on 1 January 2020, as required by the EU Anti-Tax-Avoidance Directives (ATAD). These rules are applicable to all deductible payments made or arising on or after 1 January 2020. The primary effect of the anti-hybrid provisions is that, where they apply, a tax deduction can be denied in respect of payments made by Irish-resident companies, or Irish branches, that give rise to a hybrid mismatch.

ATAD also required the implementation of anti-hybrid rules targeting "reverse hybrid mismatches" in EU Member States' domestic law by no later than 1 January 2022. This legislation has now been introduced as part of Finance Act 2021 and is effective for tax periods starting on or after 1 January 2022.

The primary effect of the reverse hybrid provisions is that, where they apply, income or gains of a "reverse hybrid entity" that would not have previously been taxable in Ireland –

e.g. on the basis that the entity was viewed as a tax-transparent vehicle, such as an Irish partnership – may become taxable in Ireland in the same manner as those of a company resident in the State.

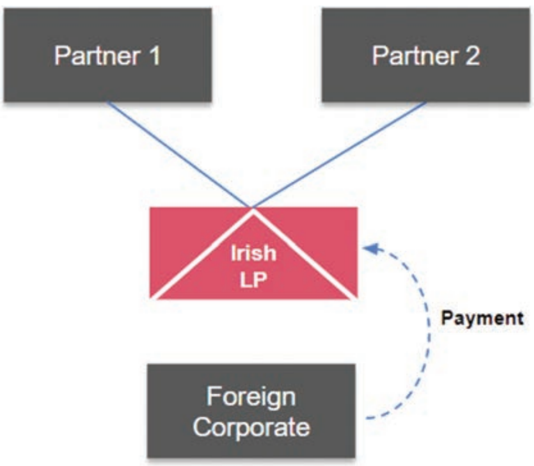
The introduction of the Irish reverse hybrid provisions followed a consultation process and adds another layer of complexity to the already extremely technical anti-hybrid rules. The reverse hybrid rules will require consideration in the context of both existing and future operations. Additionally, the application of the reverse hybrid provisions will require a detailed understanding of the foreign tax treatment of certain entities and payments.

What Is a Reverse Hybrid Mismatch?

Before analysing the relevant legislation, it is helpful to understand what is meant by a reverse hybrid mismatch. At a high level, reverse hybrid mismatches can arise where an entity is treated as tax transparent in the territory in which it is established but is treated as a separate taxable person by some, or all, of its owners, with the result being that some, or all, of the income or gains of the entity goes untaxed in any jurisdiction.

The concept can best be understood by way of a simple example.

Fig. 1: Example of reverse hybrid mismatch.



In this example an Irish limited partnership (LP) receives income from a foreign corporation. This payment is tax-deductible from the foreign corporation's perspective.

The Irish partnership is held by two shareholders (Partners 1 and 2) who are corporate entities. The corporate entities are tax resident in a jurisdiction that views the Irish partnership as an opaque entity for tax purposes, i.e. it regards the income of the Irish partnership to arise to the partnership and not to them.

From an Irish tax perspective, this income would not historically have been taxable at the level of the Irish partnership, as the partnership would be viewed as a transparent vehicle from an Irish tax perspective and the income would not be subject to Irish tax. In addition, owing to the tax characterisation of the Irish partnership as opaque, or as a corporate entity, the income would not be subject to tax in the jurisdiction where the partners are located. Accordingly, the payment would not be subject to tax in either jurisdiction, owing to the hybridity in the treatment of the partnership between Ireland and the jurisdiction where the partners are tax resident.

Irish Reverse Hybrid Legislation

The new provisions apply where there is a "reverse hybrid entity" and a "reverse hybrid mismatch outcome" arises in respect of such an entity. Where the provisions apply, the reverse hybrid entity becomes subject to Irish tax as if it were a company tax resident in Ireland.

Reverse hybrid mismatch

A reverse hybrid mismatch outcome is defined in s835AVD Taxes Consolidation Act 1997 (TCA 1997). This section provides that a mismatch outcome shall arise where some or all of the profits or gains of a reverse hybrid entity that are attributable to a relevant participator are subject to neither domestic nor foreign tax. The reference to gains in the legislation makes it clear that capital transactions are also within the scope of the reverse hybrid provisions.

Foreign tax is defined in s835Z(1) TCA 1997 as being a tax chargeable on profits or gains, under the laws of a territory other than Ireland, that is similar to "domestic tax". The definition of "domestic tax" in s835Z(1) makes it clear that income tax, capital gains tax, corporation tax and the Irish CFC (controlled foreign companies) charge all come within the concept of "domestic tax". This means that all taxes in foreign territories that are similar to these Irish taxes fall under the concept of "foreign tax".

Reverse hybrid entity

A "reverse hybrid entity" is defined, in s835AVA(1) TCA 1997, as a "hybrid entity" established in Ireland that is not chargeable to tax in Ireland on its profits or gains, as those profits or gains are seen as arising to its "participators", while the tax law of the territory in which the "participators" are established sees the income or gains as arising or accruing to the Irish hybrid entity on its own account. Accordingly, it is only the portion of the income or gains that is attributable to the "participators" in the hybrid entity that should be subject to the reverse hybrid rules.

A "relevant participator", in relation to a reverse hybrid entity, is defined as "a participator with a relevant ownership interest in the reverse hybrid entity". The concept of "relevant ownership interest" is defined in detail in s835AVA TCA 1997, which provides that it exists where the participator, or the participator and its associated entities:

- possesses or is beneficially entitled to 50% or more of the ownership rights in the reverse hybrid entity;
- is entitled to exercise, directly or indirectly, 50% or more of the voting power in the reverse hybrid entity; or
- holds, directly or indirectly, rights giving rise to an entitlement to 50% or more of the profits of the reverse hybrid entity.

The concept of "associated entities" for the purpose of the reverse hybrid legislation has the same meaning as given to "associated enterprises" by s835AA TCA 1997 with the following modifications:

- a reference to "enterprise" in s835AA shall be construed as a reference to "entity";
- a reference to "25%" in s835AA shall be construed as a reference to "50%"; and
- two entities shall not be treated as acting together with respect to voting rights, share ownership rights or similar ownership rights solely because they are partners in a partnership.

Application of provisions

Section 835AVD(3) TCA 1997 provides that a reverse hybrid mismatch outcome shall be neutralised through the profits and gains of the reverse hybrid entity that are subject to neither domestic nor foreign tax being charged to Irish corporation tax as if the business carried on by the reverse hybrid entity in Ireland were carried on by an Irish-tax-resident company.

An important point that differentiates the application of the reverse hybrid rules from the existing anti-hybrid rules is that the former are not tied to the "deduction without inclusion" principles that form part of the existing anti-hybrid legislation. The practical impact of this is that non-tax-deductible payments made by an entity to the Irish hybrid entity (e.g. a dividend payment) can still fall within the scope of the reverse hybrid rules.

As the legislation specifies that the Irish reverse hybrid entity should be taxable in Ireland on its income/gains as if its business were carried on by an Irish-resident company, the reverse hybrid entity should be entitled to the same reliefs in the Tax Acts as an equivalent Irish company would be if it were in receipt of the same income flow/gains, subject to relevant conditions etc. being satisfied.

Section 835AVD(8) TCA 1997 further provides that where the reverse hybrid entity is a partnership, all obligations falling on the partnership pursuant to the reverse hybrid rules shall be fulfilled by the precedent partner. Where the reverse hybrid entity is a common contractual fund, any obligations arising should be fulfilled by the management company that is authorised to act on behalf, or for the purposes, of the common contractual fund, and habitually does so, without being liable in a personal capacity to any tax imposed on the reverse hybrid entity.

For example, where the payment was a dividend, the Irish reverse hybrid should be entitled to double taxation relief on any withholding tax operated on the payment. Similarly, where the Irish partnership disposed of shares in a subsidiary, the reverse hybrid can rely on any Irish exemptions that would otherwise be available to an Irish corporate, e.g. s626B TCA 1997.

The legislation also includes provisions, in s835AVD(7) TCA 1997, to ensure that the Irish tax charged takes account of any relevant double taxation treaty – for example, where one of the "relevant participators" in the reverse hybrid entity is resident in a tax treaty jurisdiction.

Exemptions/Carve-outs

A number of exemptions/carve outs from the reverse hybrid rules are included in the legislation. The first is that, as noted above, the reverse hybrid legislation applies only in respect of, and to the extent that there are, partners/investors that are considered to be "relevant participators" in the reverse hybrid entity. At a high level, "relevant participators" are those holding, directly or indirectly, at least a 50% interest in the reverse hybrid entity. However, it is important to note that any holdings of investors or partners that are "associated enterprises" must be aggregated for the purposes of this 50% test.

From a financial services perspective, the legislation also includes an exemption for certain "collective investment schemes", as defined in s835AVB TCA 1997. A "collective investment scheme" is defined in that section as being a "relevant investment undertaking" that is widely held and that holds a diversified portfolio of assets. A "relevant investment undertaking" includes common contractual funds (CCFs), investment limited partnerships, and limited partnerships that are managed by a regulated fund manager. Both of these conditions must be carefully considered on a case-by-case basis and will not always be met.

The relevant investment undertakings will be considered to be "widely held" where there is no beneficial owner of the undertaking, with a "beneficial owner" being any individual who is a beneficial owner within the meaning of the Investment Limited Partnerships Act 1994 or the Investment Funds, Companies and Miscellaneous Provisions Act 2005. For the purpose of the reverse hybrid rules, the beneficial owner of a relevant partnership shall be identified in the same manner as the beneficial owner of an investment limited partnership is identified.

For the purposes of determining whether a relevant investment undertaking holds a diversified portfolio of assets, regard shall be had to:

- the nature of the assets held;
- the level of exposure to the risks and rewards of different classes of assets;
- the number of investments made;
- the means through which the investment objective is to be achieved, as set out in its prospectus; and
- where the assets held are derivatives, the assets to which the derivatives give exposure.

A relevant investment undertaking shall not be determined to hold a diversified portfolio of assets (1) in a case in which the undertaking holds securities, where more than 10% of those securities are issued by a single issuer, or (2) in a case in which the undertaking holds land, unless the undertaking holds three or more properties and the market value of each of those properties is less than 40% of the total market value of the properties held.

Where the conditions for the "collective investment vehicles" exemption are not met, the "relevant participators" definition discussed above should then be considered to determine whether the reverse hybrid provisions apply. Where neither is applicable and the reverse hybrid rules apply, s835AVD(5) TCA 1997 allows for the appropriation or cancellation of units to meet the amount of tax arising as a consequence of the reverse hybrid rules.

Finally, s835AVD(2) TCA 1997 provides that the rules will not apply to the extent that the "relevant participator(s)" in the hybrid entity is an entity that:

- is exempt from tax under the laws of the territory in which it is established;
- is established in a territory that does not impose a foreign tax; or
- is established in a territory that does not impose a tax on profits or gains receivable in that territory from sources outside that territory.

Technical Amendments to Existing Anti-hybrid Legislation

Finance Act 2021 also includes a number of technical amendments to the anti-hybrid rules introduced in 2020. These amendments are in relation to the "worldwide system of taxation" provisions in s835AB and the definitions of "entity" and "associated enterprises".

Section 835AB: Worldwide system of taxation

Section 835AB is a helpful provision in the existing legislation that can operate to treat payments that may be disregarded in a parent or investor country as giving rise to "dual inclusion income" for the purposes of these rules. Revenue states in its commentary that the purpose of this provision is to ensure that a technical mismatch does not give rise to a denial of a tax deduction in a situation that should not fall within the anti-hybrid provisions.

The provision operates only where the overall economic profits are taxed in the investor or parent territory as a result of the operation of a worldwide system of taxation and the fact pattern falls into one of the specific circumstances described in the provision.

A small update has been made to expand the list of these specific circumstances where the deeming provision applies, with the section now available to payments made between "an individual and a permanent establishment of that individual" and "two or more permanent establishments of an individual".

It is worth noting that this update is retroactive and is effective from 1 January 2020, which will help to provide certainty to some taxpayers.

Entity and associated enterprises

The technical tweaks to the definition of an "entity" and "associated enterprises" are particularly relevant for certain investment structures.

The definition of an "entity" under s835Z has been broadened and can now include partnerships that do not have legal personality. From a financial services perspective, the broadening of this definition will need to be considered in the context of investment structures containing partnerships without separate legal personality (which did not previously fall within the definition of an "entity"). The ability to trace through these partnerships for anti-hybrid rules has been removed, which may necessitate a review of the application of the rules for investment structures with such partnerships in their structures.

The definition of "associated enterprises" in s835AA has also been updated, to include a definition of a "consolidated group for financial accounting purposes".

Conclusion

The introduction of the reverse hybrid provisions adds to the already complex anti-hybrid legislation, with the new provisions requiring careful analysis by taxpayers in the context of transparent Irish vehicles in existing group structures and any changes to the same going forward.

The technical amendments to the existing anti-hybrid legislation – in respect of the definitions of “entity” and “associated enterprises”, in particular – can also result in quite a significant change in the Irish anti-hybrid analysis for certain investment structures, and it may now be necessary for taxpayers to re-examine the analysis undertaken previously. These tweaks could have a significant impact, particularly if a position had been taken that those certain payments were not made to an “associated enterprise” under the old definition.

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Finance Act 2021: Changes to VAT Treatment of Non-refundable Deposits

Introduction

One of the features of the lead-up to Christmas 2021 was the large scale of customer cancellations and "no shows" in the hospitality and travel sector here in Ireland, as plans were changed by many customers to accommodate and respond to the widespread impact of and concerns around the Omicron Covid-19 variant. In some cases the customer may have paid a non-refundable deposit for the reservation, which was retained by the business as compensation when the reservation was subsequently cancelled.

Although it is hoped that such large-scale cancellations are not repeated from 2022 onwards, for businesses that retain non-refundable deposits there will be an additional VAT cost compared to the position heretofore. This is due to changes to Irish VAT law in

Finance Act 2021[1] regarding the treatment of a non-refundable deposit after a customer cancellation. The purpose of this article is to outline and trace the rationale for these developments. The Finance Act 2021 change, which came into force on 1 January 2022, has abolished the previous entitlement of suppliers to reclaim VAT that was previously accounted for in respect of the non-refundable deposit. This represents an important development for businesses that operate such deposits.

The change in the Finance Act does not affect the VAT treatment of deposits that are refunded to customers as, broadly, VAT relief should still be available on those deposits.

The VAT position in Ireland before 1 January 2022

Our starting point in respect of this issue is a decision in 2007 of the Court of Justice of the European Union (CJEU) in *Société thermale d'Eugénie-Les-Bains* C-277/05 ("*Société Thermale*"). In this case a French hotel collected deposits from customers when reserving rooms. The deposits either were deducted from the amount to be paid by the customers for the accommodation later (if the customers completed their stay) or were retained by the company if the customers cancelled their bookings. After a dispute with the French tax authorities, a question ultimately was put to the CJEU regarding the VAT treatment where such deposits were retained due to customer cancellations, and in particular whether the retained deposit should be regarded for VAT purposes as consideration for the supply of a reservation service (which would be subject to VAT) or as fixed compensation for the cancellation (which would not be subject to VAT).

Although the CJEU recognised that the definition of a "deposit" can vary from one EU Member State to another and that the exercise of a cancellation option that is linked to the deposit may entail different consequences under different national laws, in the case at hand it had been accepted that the factual effect of the customer cancellation was to release the resiling party (the customer) from the consequences of not performing the contract. The CJEU drew on well-established VAT principles set out by previous case law (e.g. *Apple and Pear Development Council* C-16/93, *Tolsma* C-174/00) that in order for a supply of services to be regarded as taking place for VAT purposes, there must be a direct link between the service rendered and the consideration received. In other words, there must be reciprocity of performance, as the sums paid must constitute genuine consideration for an identifiable service that is supplied in the context of a legal relationship.

In the case at hand, the CJEU found that these VAT "ingredients" for a supply of services were missing and that this analysis was not affected by the fact that if the customer went ahead and took occupancy, the deposit was then applied towards the price of the reserved room. Instead, the CJEU noted that the retention of the deposit was triggered by the customer's exercise of the cancellation option made available to him or her and served to compensate the hotelier following the cancellation. Therefore the CJEU concluded in favour of the taxpayer.

As a result of the *Société Thermale* judgment (and given the supremacy of EU law), provisions were introduced by Finance Act 2008 into s19(2B) of the Value-Added Tax Act 1972 (VATA 1972) that were aimed at implementing the *Société Thermale* principles. When VATA 1972 was replaced by the Value-Added Tax Consolidation Act 2010 (VATCA 2010), the relieving provision was carried over into s74(4), and therefore for ease of reference we refer to this.

The relief provided that where a supplier had accounted for VAT on an amount received by way of a "deposit" (this term is not expressly defined under the legislation) from a customer before the supply of the goods or services to which it related, the supplier could make a VAT reclaim in respect of the retained deposit in the

1 Section 53 of Finance Act 2021 deleted ss67(4), 67(6a) and 74(4) of the Value-Added Tax Consolidation Act 2010.

VAT period during which the cancellation was recorded. The entitlement to make this reclaim required that a number of conditions were met:

- the supply did not take place owing to a customer cancellation;
- the cancellation was recorded as such in the supplier's books and records;
- the deposit was not refunded to the customer; and
- no other consideration, benefit or supply was provided to the customer by any person in lieu of the refund of the deposit.

Where the relevant criteria were met, the supplier was also obliged to issue a document to the customer that was treated as if it were a credit note for VAT purposes (and if the customer was VAT registered, there was a matching reduction in the amount of VAT, if any, that was deductible by the customer).

Further developments at the CJEU

Although the above-mentioned relieving provision remained in force in Ireland before the Finance Act 2021 change, in the intervening period further case law was decided by the CJEU that, although addressing a different sector and fact pattern than the *Société Thermale* case, cast doubt on whether forfeited non-refundable deposits and payments should be VAT-free in all circumstances.

At the end of 2015 the CJEU released its judgment in the joined cases of *Air France–KLM* C-250/14 and *Hop!–Brit Air SAS* C-289/14 (collectively "*Air France–KLM*"). Air France–KLM provided domestic passenger flights in certain countries where VAT was chargeable on the fare (unlike in Ireland, where the supply of domestic passenger transport services is VAT exempt). However, Air France–KLM did not account for VAT on the sale of tickets that were issued to but not used by passengers on the domestic flights. These comprised non-refundable tickets that were no longer valid due to "no shows" at boarding and invalid exchangeable tickets that were not used during their period of validity. A dispute with the French tax authorities arose that ultimately made its way to the CJEU.

The CJEU referred to its previous decision in *Société Thermale* and affirmed the principle that there is a supply of services for consideration where there is a direct link between the service supplied and the consideration received, with the sums paid being the actual consideration for an identifiable service supplied in the context of such a legal relationship. In *Air France–KLM* the CJEU found that where the passenger had paid the price of the flight ticket, the sale was final and definitive. Therefore, the consideration for the price paid when a ticket was purchased consisted of the passenger's right to benefit from the performance of the airline's obligations under the transport contract (regardless of whether the passenger actually exercises the right), since the airline fulfilled the service by **enabling** the passenger to benefit from those services. The CJEU therefore concluded that the sums retained by the airline were not compensation for possible harm suffered by it (e.g. as result of a passenger's "no show") but, rather, constituted consideration for a supply of services. In other words, the CJEU found in *Air France–KLM* that the customer had received the right to access the service, which was a taxable service for VAT purposes.

In light of the above, many businesses operating non-refundable deposits and "no show" charges were grappling with applying and reconciling *Société Thermale* and *Air France–KLM* principles in practice, in particular where suppliers were of the view that the commercial aim of retaining a payment was compensatory in nature, akin to damages.

It is worth noting that during this period the UK (which was still an EU Member State) changed its VAT practice in respect of non-refundable deposits, as HMRC confirmed that, with effect from March 2019, VAT would remain due on retained payments for unused services and uncollected goods.

The area was put into further focus with the release in November 2018 and June 2020, respectively, of further CJEU case law (*MEO* C-295/17 and *Vodafone Portugal* C-43/19) in respect of the VAT treatment of termination payments for mobile phone services. The CJEU concluded that amounts received by a mobile phone operator for the early termination of a mobile phone contract, which had a tie-in period in exchange for advantageous commercial conditions for the customer, constituted remuneration for a supply of services (rather than being purely compensatory payments that are outside the scope of VAT).

Given the trajectory of CJEU case law, matters came to a head in Ireland with the above-mentioned change in Finance Act 2021. In this regard, the Explanatory Memorandum for the Finance Bill recognised that CJEU case law had been a key driver for the change, noting that the amendment was to "give 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". Similarly, Revenue's VAT Notes for Guidance on Finance Act 2021 (eBrief No. 235/2021) note that the legislative change provides that "cancellation deposits are taxable" and "will ensure that Irish legislation correctly reflects recent judgments made by the CJEU".

What now for Irish businesses?

As outlined above, the VAT reclaim provisions in s74(4) VATCA 2010 have been abolished with effect from 1 January 2022. This is intended to have the effect of bringing to an end VAT reclaims on non-refundable deposits retained by businesses in the event of customer cancellations.

Revenue has confirmed in guidance that where a deposit was retained by a business after cancellation of the whole transaction by the customer before 1 January 2022, the business may reduce its VAT liability for the VAT period in which the deposit was forfeited, in line with the s74(4) criteria (Revenue notes that the allowable reduction is an amount equal to the VAT accounted for on the deposit and that the reduction is available only for deposits received and cancelled before 1 January 2022).

In practical terms, the abolition of the previous VAT reclaim provisions represents a significant change in VAT practice and procedure for businesses across many sectors from 1 January 2022. Although the CJEU cases mentioned in this article dealt with hospitality, passenger flights and telecoms, the principles (and the consequential change in Irish VAT legislation brought about by Finance Act 2021) are not limited to these sectors and may be relevant for a wide range of businesses supplying goods and services.

Therefore, any businesses that have not already done so should review any of their receipts that are in the nature of non-refundable deposits, cancellation and "no show" charges to ensure that the appropriate VAT treatment (and pricing) is being applied. Each income stream should be assessed on its own fact pattern, and the fact that a business may view a particular payment as being "compensatory" in nature from a commercial perspective may not result in the payment's being free from a VAT charge. In addition, as with any tax change, it is important that affected businesses have made appropriate changes to their systems to operate the new position correctly.

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Finance Act 2021: Corporate Tax Changes

Introduction

Once again, the new year brings further changes to the Irish corporate tax regime. This article covers Finance Act 2021 changes that affect corporate taxpayers from both a compliance and strategic/planning perspective. It is incumbent on companies and, more specifically, their advisers/in-house tax teams to be cognisant of the changes which will affect future tax filings and positions.

Section 18: Corporate Non-resident Landlords

The rationale behind this amendment is to align how resident and non-resident companies are taxed on Irish-source rental income streams. A further objective of the changes is to ensure that such landlords will be within the ambit of the new interest limitation regime. Before Finance Act 2021, non-resident companies (where there was no Irish branch) were liable to income tax at 20% on rental income, whereas

Irish-tax-resident companies were subject to corporation tax at 25% on such income.

Additionally, where non-resident companies dispose of assets giving rise to Irish rental income, any resultant chargeable gains are now within the charge to corporate tax (as opposed to capital gains tax) at an effective rate of 33%. This amendment takes effect for profits and gains accruing from 1 January 2022. This change does not, however, give rise to an additional tax exposure as the effective rate of tax would be 33% in either scenario, whether under capital gains tax or corporation tax rules.

There are provisions to facilitate the carry-forward of rental losses and capital allowances in the move from the income tax to the corporate tax regime, without any restriction on same. Where capital allowances were claimed on an asset before the introduction of the new rules and that asset is disposed of from 2022, any balancing allowance or charge will be, respectively, tax-deductible or taxable at 20% rather than the new, higher rate.

In a further measure to ease the transition from the income tax to the corporate tax regime, the preliminary corporation tax due date has been adjusted for periods ending between 1 January 2022 and 30 June 2022. In these instances, preliminary tax will be payable on or before 23 June 2022.

Non-resident corporate landlords will now also be subject to the new interest limitation rules, which take effect from 1 January 2022. Thus, it will be important to map the implications of any leverage/financing costs vis-à-vis their tax-deductibility against rental income streams.

Section 21: Accelerated Capital Allowances – Energy-Efficient Equipment

In line with the State’s green agenda to address climate change, s285A TCA 1997 provides for 100% capital allowances in year 1 on expenditure incurred on qualifying energy-saving equipment to the extent that it is used in a trade or profession. Such equipment is defined by the Sustainable Energy Authority of Ireland. This equipment must be acquired and cannot be leased, let or hired to another party. There is a minimum spend on each piece of equipment, ranging from €1,000 to €5,000 depending on the class of technology.

From 1 January 2022, capital expenditure on equipment that operates on fossil fuel will no longer qualify for these expedited capital allowances. Fossil fuel is defined as “coal, oil, natural gas, peat or any derivative thereof intended for use in the production of energy by combustion”. Meanwhile, the legislation explicitly confirms that where the equipment operates on electricity generated from such fossil fuel, it will continue to qualify for the accelerated allowances (subject to all other conditions being satisfied).

Given the broad definition of fossil fuel and the requirement now to consider how energy-efficient equipment is being operated, further analysis will be required before allowances under s285A TCA 1997 are claimed.

Section 22: Gas-Powered Vehicles and Refuelling Equipment

Under s285C TCA 1997, accelerated capital allowances (at 100%) are available for capital expenditure incurred on the acquisition of natural gas vehicles and refuelling equipment that are used for the purposes of a trade. This would include aviation refuellers and other equipment that is used in industries such as aerospace and defence.

Section 22 Finance Act 2021 incorporates hydrogen-fuelled vehicles and associated refuelling equipment in the definition of vehicles and equipment for these capital allowances.

In line with the green agenda, the qualifying period for this relief has been extended to 31 December 2024. It had been due to expire at the end of 2021.

Section 29: Dividends Paid out of Foreign Profits

Section 129A TCA 1997 is an anti-avoidance provision that was introduced to prevent foreign companies migrating residence to Ireland and then repatriating funds to an Irish parent by way of franked investment income, notwithstanding that the profits arose when the company was not Irish tax resident. Section 129A(3) TCA 1997 regards certain distributions in excess of distributable profits for a certain period as arising during a period when the subsidiary/entity paying the dividend was non-Irish tax resident.

The amendment introduced in Finance Act 2021 ensures that any interim distributions paid out of profits arising when the company was actually Irish tax resident will not be within the anti-avoidance provisions. Before this amendment, there was a scenario whereby profits made after the migration of tax residence to Ireland but before the end of an accounting period may have been regarded as "foreign profits" if the company paid an interim dividend before the end of its first accounting period in which it became Irish tax resident.

Section 32: Relief for Investment in Films

Section 481 TCA 1997 provides for tax relief for investment in films by film producer companies. This relief is in the form of a corporate tax credit, which is based on 32% of the lowest of:

- the eligible expenditure incurred on the production of the film,
- 80% of the total cost of production of the film and
- €70m.

The objective of the scheme is to act as a stimulus to the creation of an indigenous film industry in Ireland, creating high-quality employment opportunities and supporting the expression of Irish culture.

Section 32 Finance Act 2021 amends the definition of "eligible expenditure" to include payments related to the provision of labour-only services by an individual who is not employed by the qualifying company for the purposes of the production of the qualifying film. The amendment arose as a result of the move of the film tax credit to a self-assessment basis under Finance Act 2018. This involved a significant amount of rewriting of s481 TCA 1997, and it was subsequently identified that the amended definition of "eligible expenditure" excluded expenditure on individuals providing a labour-only service. Payments in respect of such individuals – which could include actors, directors and crew – had previously qualified as eligible expenditure, and this was confirmed in Revenue guidance. This amendment therefore provides confirmation that expenditure on individuals providing a labour-only service in the production of a qualifying film may be regarded as qualifying expenditure.

It was confirmed that there is no expected Exchequer cost of the amendment. It is anticipated to be cost-neutral on the basis that there is no change to existing policy or practice.

Section 34: Start-up Relief from Corporation Tax

This amendment enhances the attractiveness of the start-up relief available to qualifying new companies. By way of recap, s486C TCA 1997 provides relief from corporation tax for new companies in the first three years of trading. This relief operates by reducing the corporation tax liability and is linked to the number of employees and related employer's PRSI. The relief is capped at €40,000, and there is a maximum PRSI benefit (via the corporation tax saving) of €5,000 per employee. However, marginal relief is available where the corporate tax liability is between €40,000 and €60,000. It is worth noting that any unused relief arising in the first three years of trading (now five years – see below) may be carried forward for use in subsequent years.

Under the Finance Act 2021 changes, the three-year relief period has been extended to five years for qualifying companies that start to trade on or after 1 January 2018. This is a very welcome enhancement, and it recognises the fact that certain companies that availed of Covid-19 reliefs may have had reduced employer's PRSI, which would have had an adverse knock-on effect on the quantum of start-up relief that would have been claimed in respect of that period.

Owing to the extension of the relief to five years, the maximum tax saving available is now increased to €200,000. In addition, the relief has been extended to 31 December 2026.

Section 35: Controlled Foreign Companies

The CFC legislation was introduced in Finance Act 2018 to prevent the artificial diversion of profits from controlling companies to CFCs – broadly, being offshore entities in low- or no-tax jurisdictions. A CFC's undistributed income may be attributed to a controlling or connected Irish company where relevant Irish activities are carried out (based on the concepts of "significant people functions" and "key entrepreneurial risk-taking functions").

There are a number of exclusions in the CFC legislation. As a result of Finance Act 2021, three such exemptions will now be denied where the CFC is resident in a non-cooperative jurisdiction. These exemptions are:

- low profit margin – where the accounting profits are less than 10% of the relevant operating costs for the relevant period;
- low accounting profit – where a CFC has accounting profits of less than €750,000 with any non-trading income stream being less than €75,000, or where a CFC has accounting profits of less than €75,000; and
- effective tax rate – this is quite complex but, broadly, where the effective tax of the CFC exceeds half of the Irish tax that would have been paid had the income been taxed on the basis that the CFC was Irish tax resident.

The list of non-cooperative jurisdictions is set out by the EU and is updated twice a year. Finance Act 2021 states that the relevant lists are:

For accounting periods beginning between 1 January 2021 and 31 December 2021	List published in October 2020
For accounting periods beginning on or after 1 January 2022	List published in October 2021

The lists are based on recognised international tax standards, and the focus is on transparency, fair taxation and the implementation of the OECD BEPS minimum standards.

The list adopted by the European Council on 5 October 2021 comprises:

- American Samoa,
- Fiji,
- Guam,
- Palau,
- Panama,
- Samoa,
- Trinidad and Tobago,
- US Virgin Islands and
- Vanuatu.

Section 36: Interest on Loans to Defray Money Applied for Certain Purposes

Section 840A TCA 1997 is a piece of anti-avoidance legislation that denies a trading deduction for interest payable on intra-group borrowings used to purchase assets from a connected company. There is a carve-out to the extent that the borrowings are used to acquire certain intangible assets or trading stock. Furthermore, back-to-back loans or circular arrangements with unconnected persons may result in the application of this anti-avoidance provision.

Section 36 Finance Act 2021 extends the applicability of s840A TCA 1997 to interest payable on the refinancing of loans that were originally within the ambit of s840A. There is also an amendment to expand the definition of a loan to include promissory notes and any other agreement or arrangement having similar effect.

Section 68: Preliminary Corporation Tax

Under s959AM TCA 1997, companies may base their preliminary tax on the preceding year's tax liabilities, as follows.

Type of company	Basis (it is optional to use preceding year, and current-year basis may alternatively be used)
Small company	100% of prior year's corporation tax liability
Large company (first preliminary tax payment)	50% of prior year's corporation tax liability

The formula that must be used is:

Corporation tax for preceding accounting period x (Number of days in accounting period [C] / Number of days in preceding accounting period [P])

Where either the current or the preceding accounting period fell during a leap year, 366 days would be used for C or P, as appropriate. This resulted in scenarios whereby preliminary tax would need to be grossed up or vice versa.

The Finance Act 2021 amendment introduces a new sub-section (3A), which provides that in leap years 365 days should be used for C or P, as appropriate. This change is very welcome and offers administrative ease and clarity for leap years.

Conclusion

The Irish corporate tax regime continues to become ever more complex, particularly due to international, OECD and EU efforts to reduce opportunities for aggressive tax planning by multinational corporates, and there does not appear to be indication that this trend will cease, with further developments already on the horizon.

Some key changes were introduced in Finance Act 2021 that are important for companies within the charge to Irish tax, and the amendments referred to above are now live. Readers should note that this article does not cover all of the corporate tax amendments, and further articles in this issue of *Irish Tax Review* cover areas such as the introduction of the interest limitation rules.

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Finance Act 2021: Overview of EII and Covid-19-Related Measures

Introduction

This article provides an overview of changes introduced by Finance Act 2021 (FA 2021) to Part 16 TCA 1997 (relief for investment in corporate trades) and certain Covid-19-related measures, i.e. the Employment Wage Subsidy Scheme (EWSS) and debt warehousing of income tax. Albeit that the Finance Act 2021 was signed into law on 21 December 2021, owing to the changing nature of the pandemic, amendments have been made to the EWSS, and those changes, as at the time of writing, are highlighted.

Relief for Investment in Corporate Trade: EII/SCI/SURE

Part 16 TCA 1997 provides income tax relief for investments by individuals in a qualifying company. Three types of relief are provided:

- Employment Investment Incentive (EII) – provides for relief claimed by external investors in a qualifying company. The EII does not permit the investor or his/her associate (including a relative) to hold any shares in the company before making the EII investment. An individual is connected with a company if that individual or an associate is a partner, director or employee of the company or of any company in the "RICT group". A RICT group comprises all of the company's linked and partner businesses.[1]
- Start-up Capital Incentive (SCI) – This is a form of EII relief for individuals who are connected to the founder of the company and who are early-stage investors and

1 Annex 3 of the General Block Exemption Regulations (Commission Regulation No. 651/2014) defines linked and partner businesses.

subscribe for shares on or after 1 January 2019 in a micro enterprise.[2] A company can raise a maximum of €500,000 that will qualify for the relief.

- Start-Up Relief for Entrepreneurs (SURE) – relief available to people who have recently left employment and incorporate a company to carry on a new qualifying trade. An individual can invest up to €700,000 and claim relief of up to €100,000 p.a. in the year of investment and in each of the previous six years.

In relation to the EII, for eligible shares issued after 8 October 2019, full relief is available for the investment made in the qualifying company. For shares issued on or before 8 October 2019, 30/40ths of the investment is available for relief in the year of investment, with the balance of 10/40ths being claimed as second-stage relief. For the tax year 2020 and subsequent years:

- Relief of up to €250,000 can be claimed where the relevant holding period is four years. Full relief (subject to the €250,000 cap) can be claimed in the year of investment.
- A limit of €500,000 applies to investments in qualifying companies where the shares will be held for at least seven years. Again, relief is allowable on the full investment (subject to the limit) in the year of investment.

The key amendments introduced by Finance Act 2021 are outlined below.

Clawback of 10/40ths of relief

FA 2021 reinstates the rule that part of the relief (10/40ths) will be withdrawn, **by way of an assessment on the company**, for shares issued on or after 1 January 2022, if the following conditions are not met:

- the employment relevant number exceeds the employment threshold number by at least one qualifying employee (see Table 1 below for meaning of terms), and
- the relevant amount exceeds the threshold amount by at least the total emoluments of one qualifying employee in the year of assessment in which the subsequent period ends (see Table 1 below for meaning of terms), or
- the amount of expenditure on research, development and innovation (R&D+I) incurred in the year of assessment in which the subsequent period ends exceeds the amount of expenditure on R&D+I incurred in the year of assessment before the year of assessment in which the subscription for eligible shares was made.

Table 1: EII definitions.

Employment threshold number	=	no. of qualifying employees in the tax year before the tax year of the EII investment
Employment relevant number	=	no. of qualifying employees in the tax year in which the period of three years from the date the EII investment was made ends
Threshold amount	=	total emoluments paid to qualifying employees in the tax year before the tax year of the EII investment
Relevant amount	=	total emoluments paid to qualifying employees in the tax year in which the period of three years from the date the EII investment was made ends
Qualifying employee	=	an employee (other than a director) who works on average 30 hours per week and whose employment is capable of lasting at least 12 months

2 A micro enterprise has fewer than 10 employees and has an annual turnover and/or annual balance sheet total not exceeding €2m.

The effect of the FA 2021 amendment is that the investor claims full relief upfront on the investment, but if the conditions in relation to employment or investment in R&D+I are not satisfied, then 10/40ths of the relief that the investor claimed will be clawed back but will be payable by the company.

Capital redemption window

Before Finance Act 2021, a relaxation of the clawback rule was provided for a return of capital to persons (**other than the qualifying investor**) by the company that arose on the redemption/buy-back of shares in a qualifying company. FA 2021 extends the capital redemption window for a redemption/buy-back of shares from the qualifying investor.

FA 2021 relaxes the rules around the "capital redemption window" so that investors with a number of investments in a company over multiple years may redeem an investment for a year where that year is outside the compliance period even though other investments may still be within their compliance periods. In general, the compliance period is two years before the eligible shares issued and four years after (i.e. six years in total).

A clawback of relief will not arise for the redemption/acquisition of eligible shares by the company from an investor where the compliance period for those shares has ended, albeit that the compliance period for other eligible shares has not ended, where:

- the most recent investment in eligible shares in the RICT group was 18 months before the date of redemption/buy-back;
- no qualifying investment has been made in the company or RICT group (by any person) within 12 months after the redemption/buy-back; and
- no qualifying investment is made by that investor in the company within a period of five years after the date of the redemption/buy-back.

Removal of 30% rule

FA 2021 amends s508A (EII) and s508C (SURE) as follows:

- it removes the requirement that 30% of the amount raised has been expended on a qualifying purpose before a qualifying company can issue a statement of qualification (SOQ) to the investor to allow relief to be claimed; and
- it provides that a company cannot issue an SOQ in respect of a qualifying investment more than four months (previously, two years) after the end of the year in which the shares were issued.

In effect, an SOQ can now be issued once an investment is made in a qualifying company. It is important to note that as the timeline for issuing an SOQ by qualifying company has been significantly reduced, qualifying companies will need to ensure that procedures are in place to satisfy the revised timelines.

Qualifying investment funds

Currently, investors can invest directly in a qualifying company or indirectly via a designated investment fund. A designated investment fund must be established under an irrevocable trust for the **sole purpose** of investing in qualifying companies.

FA 2021 extends the EII to a wider range of funds, referred to as qualifying investment funds. Qualifying investment funds means investment limited partnerships (authorised in accordance with the Investment Limited Partnerships Act 1994) and limited partnerships (registered in accordance with the Limited Partnerships Act 1907).

It is expected that this will facilitate greater investment by private equity that would typically structure investments via investment limited partnerships and limited partnerships. Consequential amendments have been made to s508A(3)(a)(iv), s508Y(2)(c) and s508J TCA

1997 to refer to qualifying investment funds and their obligations and the timeframes for reporting of certain events to Revenue (which are the same as for designated investment funds).

Extension of relief

The EII, SCI and SURE have been extended by three years to 31 December 2024. There were also a number of technical amendments to ensure that the relief under Part 16 operated as intended, such as the calculation of the amount of unused relief to be carried forward.

Although certain FA 2021 measures are clearly welcome (e.g. the removal of the 30% expenditure requirement before a statement of qualification can issue and the expansion of the capital redemption window to qualifying investors), it is disappointing that the 10/40ths clawback has been reinstated. The purpose of Part 16 is not just to create additional employment but also to maintain it.

Although the Government must be cognisant of the EU State Aid rules, in the author's opinion, not relaxing the rules in relation to connected persons investing in a qualifying company and being entitled to the EII is a missed opportunity. The introduction of SCI for investments by connected persons in micro enterprises in 2019 is narrow in its application. There is potential to allow connected persons make investments that can qualify for EII relief. It is hoped that this area will be revisited in the future.

Employment Wage Subsidy Scheme

The EWSS supports eligible businesses that have been significantly disrupted by the Covid-19 pandemic. For pay dates in the six months to 31 December 2021, an employer had to demonstrate to the satisfaction of Revenue, based on guidelines issued by it, that there was at least a 30% reduction in turnover or customer orders due to Covid-19 in the twelve months to 31 December 2021 compared to the twelve months to 31 December 2019. Where an employer qualifies for the EWSS, a flat-rate subsidy is paid to the employer for qualifying employees.

FA 2021 introduced the measures outlined below.

Extension of scheme

When initiated, Finance Bill 2021 provided that the first phase of the EWSS was to end on 30 November 2021. A Government announcement on 9 December 2021 extended the enhanced subsidy rates to 31 January 2022. On 21 January 2022 the Government announced that for those businesses impacted by the restrictions in place between 20 December 2021 and 22 January 2022:

- the enhanced rates will continue to apply up to 28 February 2022 and
- the scheme will be extended by one month to 31 May 2022.

Revenue's EWSS guidelines[3] list the businesses that are likely to benefit from this additional support, being:

- restaurants, bars and cafes, excluding take-away and delivery services, that were required to close at 8pm where this was before their normal closing time;
- operators of indoor events, including entertainment, cultural, community and sporting events, that could not take place after 8pm, with attendance limited to 50% of venue capacity or 1,000 attendees, whichever was the lower, for events held before 8pm;
- operators of outdoor events, including entertainment, cultural, community and sporting events, where attendance was limited to 50% of venue capacity or 5,000 attendees, whichever was the lower; and
- wedding reception venues where capacity was limited to a maximum of 100 guests and that had to close by midnight.

Phased reduction of rates of subsidy

The following table summarises the subsidy rates to be paid in 2022 to those businesses detailed above.

3 At the time of writing, the latest version of the EWSS guidelines had been issued on 26 January 2022.

Table 2: EWSS rates for 2022.

	Phase 1	Phase 2	Phase 3
	Up to 28 February 2022[4]	March 2022	April–May 2022
Gross pay per week (€)	**Subsidy rate (€)**	**Subsidy rate (€)**	**Subsidy rate (€)**
Less than 151.50	Nil	Nil	Nil
151.50–202.99	203	151.50	100
203–299.99	250	203	100
300–399.99	300	203	100
400–1,462	350	203	100
More than 1,462	Nil	Nil	Nil

For all businesses not directly impacted by the public health regulations imposed from 20 December 2021 to 22 January 2022, the additional month of enhanced rates for February 2022 and the extension of one month to May 2022 do not apply. The EWSS guidelines give an example of a retail shop as not likely to have been impacted by the restrictions imposed by the health regulations.

Closing of the scheme to certain employers from 1 January 2022

FA 2021 provides that if an employer qualified for the EWSS as at December 2021, it can continue to avail of the EWSS up to 30 April 2022. Furthermore, there is no requirement for those businesses to satisfy a reduction-in-turnover test as applied for pay periods up to 31 December 2021.

On 21 December 2021 the Government announced that those employers who did not qualify as at 31 December 2021 (as they did not satisfy the 30% reduction test for the twelve months to 31 December 2021) could qualify for the subsidy from 1 January 2022 to 30 April 2022. A revised percentage reduction test has been introduced, and its application depends on when the business started to trade. For a business established on or before 30 April 2019, the business must anticipate that its combined turnover for December 2021 and January 2022 will be down by at least 30% compared with its combined turnover for December 2019 and January 2020. For a business established between 1 May 2019 and 31 December 2021, the business must anticipate that its average monthly turnover for December 2021 and January 2022 will be down by at least 30% compared with its average monthly turnover over the period August 2021 to November 2021 (or pro rata basis if established during this four-month period).

The 30% reduction test for turnover/customer orders is not required to be satisfied by childcare businesses registered in accordance with s58C of the Child Care Act 1991. All businesses making a claim under the scheme must also have a valid tax clearance certificate throughout the duration of their claiming the subsidy.

Finally, the reduced rate of employer's PRSI (of 0.05%) applied to wages and salaries of qualifying employees under the EWSS will cease at the end of February 2022, with the normal rates of employer's PRSI reinstated from 1 March 2022.

4 When initiated, Finance Bill 2021 provided that the first phase was to end on 30 November 2021. A Government announcement on 9 December 2021 extended the enhanced subsidy rates to 31 January 2022; and on 21 January 2022 a Government announcement confirmed that the enhanced rates will continue to apply up to 28 February 2022.

Warehousing of Proprietary Directors' Income Tax

Section 997A TCA 1997 provides that persons who hold more than 15% of the ordinary share capital of a company (known as a material interest) are not entitled to claim a credit for payroll taxes deducted from the emoluments paid to them by the company when filing their income tax return if the company has not paid over the payroll taxes to Revenue. Persons connected to the person who has a material interest are also caught by this provision. In the main, s997A affects proprietary directors, but it is broad in its application and can apply to other persons (e.g. family members employed by the company who are not shareholders/ directors of the company).

Finance Act 2020 introduced measures to allow a person to "warehouse" income tax liabilities (i.e. the 2020 balancing payment and 2021 preliminary income tax) if that person's total income for 2020 was less than 75% of the total income for 2019 as a result of the effect of the Covid-19 pandemic and the person had also formed the view that the 2021 income will be less than 75% of the 2019 income. However, persons impacted by s997A may not have met the requirements to avail of this income tax debt warehousing provision.

FA 2021 provided that:

- if a person with a material interest cannot warehouse the balancing payment for 2020 and preliminary income tax for 2021 (i.e. as the person does not satisfy the 75% test for reduction of income) and
- the company has warehoused the payroll liabilities,[5]

then the person can warehouse that part of the income tax liability that relates to the tax due on the emoluments for which a credit for payroll taxes cannot be claimed by virtue of s997A.[6] If there is tax due on non-Schedule E income (e.g. rents), that tax must be paid as normal. The Statement of Net Liabilities on ROS was updated to allow the taxpayer to make the appropriate declaration to warehouse the tax liability of the Schedule E income.

Given that the tax on the emoluments is effectively being warehoused twice, FA 2021 inserted a new s1080C into TCA 1997 providing that:

- if a director/employee with a material interest has warehoused the tax due on the Schedule E income (as a credit for payroll taxes cannot be claimed by virtue of s997A) and
- the company has also warehoused the payroll taxes in accordance with s991B,

then interest will be collected only from the employer (i.e. the company). However, if the company fails to honour the terms of the Period 3 payment arrangement, the director/employee will be liable to pay the simple interest.[7]

Guidance is to issue on how the warehoused debt of an individual will be updated to reflect payments made by a company. At the TALC Collections Group meeting in November 2021, it was confirmed that 922 individuals availed of the new measure when filing their 2020 income tax returns.

Conclusion

On balance, the changes introduced by FA 2021 to the EII are positive. However, the reinstatement of the clawback of 10/40ths is disappointing and may unnecessarily penalise a business that maintains employment. The changes to the EWSS should ensure that most businesses, especially those in the hospitality industry, do not reach a "cliff-edge" in relation to supports. Finally, here's hoping that the Finance Act 2022 article will not include content on Covid-19-related measures!

5 In accordance with s991B TCA 1997.

6 Section 1080B TCA 1997 amended by inserting a new ss(19).

7 Please refer to my article "Finance Act 2020: Overview of Covid-19-Related Measures" (*Irish Tax Review*, 2/33 (2020)) for an overview of debt warehousing and the debt warehousing periods.

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Finance Act 2021: Key Changes to Capital Taxes

Introduction

There were very few notable changes to the capital acquisitions tax (CAT) legislation, although there was considerable discussion about a change proposed to the way in which free use of money is calculated.

Most of the changes made to stamp duty in the Finance Act 2021 followed from other legislative measures brought in during the year, namely, the Financial Resolution and the Finance (Covid-19 and Miscellaneous Provisions) Act 2021, which introduced the higher, 10% rate of stamp duty targeted at bulk purchases of residential property. This article examines the changes to stamp duty and CAT introduced by the Finance Act 2021.

Capital Acquisitions Tax

Minor changes were enacted to confirm that Revenue may require a disponer to file a return in respect of a gift on which either business property relief or agricultural relief was claimed irrespective of whether the gift breaches the relevant 80% group threshold for the recipient (s46 Capital Acquisitions Tax Consolidation Act 2003).

The original Finance Bill 2021 included an amendment to s40 Capital Acquisitions Tax Consolidation Act 2003 that would have changed the way the free use of money is calculated. It specifically provided that the amount of the benefit would be calculated by reference to the best price obtainable for borrowing an equivalent amount of money in the open market rather than the existing rules, which use the demand deposit rate as the benchmark for calculating the deemed gift, being the interest forgone. After significant discussion among practitioners, Revenue and the public, the Government opted to exclude this from Finance Act 2021. This will be welcomed by many families who assist children in purchasing homes or starting careers/businesses and providing interest-free loans. Had the amendment been introduced, it could have eroded available thresholds on a yearly basis. Although Finance Act 2021 did not bring the changes to s40 as anticipated, many are wondering whether this a taste of what is to come.

Stamp Duty

10% rate of stamp duty and refunds for social housing

By way of recap, the Financial Resolution introduced a new s31E to the Stamp Duties Consolidation Act 1999 (SDCA 1999), the effect of which is to apply a 10% rate of stamp duty where a person acquires a residential unit on or after 20 May 2021 and the total number of residential units acquired by that person or a connected person in the 12 months immediately preceding that date, including the current acquisition, is greater than or equal to 10. It specifically excludes apartments that are in an apartment block of three or more with grouped or common access. Revenue confirmed in its Stamp Duty Manual that shares deriving their value from apartments are also not within the charge, and this was confirmed in the Finance Act 2021.

Where a person has acquired 10 or more residential units in a 12-month period, each unit is referred to as a "relevant residential unit". The 10% charge applies when a tenth unit is acquired by the person or a person connected with them in a 12-month period. Units purchased before the Financial Resolution can count towards the threshold, but they do not need to be "stamped up" if purchases after that date are within the remit of s31E; however, if all 10 transactions occur after 20 May 2021, the prior transactions are treated as occurring on the date of the tenth acquisition, and additional stamp duty must be paid. Of most concern is that stamp duty chargeable but not paid in respect of a relevant residential unit can remain a charge on the property indefinitely, until the duty, interest and penalties are paid.

One of the notable changes in the Finance (Covid-19 and Miscellaneous Provisions) Act 2021 was that a new s83E provided for a potential partial refund of the 10% stamp duty paid where the relevant residential units are leased to a local authority within 24 months for at least 10 years and is executed in favour of a housing authority/approved housing body. If applicable, the effective rate is reduced to 1–2%. Should the lease be terminated within 10 years, a clawback can arise. The Finance Act 2021 amended s83E to clarify that the qualifying lease must be entered into **after** the qualifying residential unit is acquired in order to avail of a refund of stamp duty where the unit is leased by approved persons for social housing within 24 months of purchase.

The charge in s31E also applies to stocks, marketable securities, units in an Irish Real Estate Fund ("IREF") and partnership interests that derive value directly or indirectly from a residential unit, and a transfer of same would result in a change in the person/persons having direct or indirect control over the residential unit. A technical change was included in the Finance Act 2021 to confirm that an acquisition by way of a change in the persons having direct or indirect control by virtue of a transfer of stocks, marketable securities, units in an IREF or partnership interests would also be considered an "acquisition" for the purposes of the section.

There were also amendments to clarify that existing stamp duty exemptions in s82, s82C(2) and s88(1)(b) will be disapplied only to the extent that the value relates to a relevant residential unit.

Revenue has confirmed that the changes to s31E contained in the Finance Act 2021 apply to all acquisitions made on or after 20 May 2021 on the basis that this section was clarifying the intention of the legislation.

Despite the changes to this section, it is still quite complex for practitioners and is likely to result in increased queries or due diligence on transactions to ensure that a charge to higher stamp duty is not inadvertently missed.

Transfers to young trained farmers

The relief for transfers to young trained farmers provided for in s81AA SDCA 1999 was extended until 31 December 2022. This relief applies to transfers of agricultural land where the transferee intends to spend 50% of normal working time farming the land and retain such ownership for five years after the transfer. The "young trained farmer" must be under the age of 35 at the date of transfer, must hold the requisite qualification and must have received the Teagasc Certificate, having submitted a business plan.

Levies: Financial Cards, Cheques and Insurance Policies

A number of changes are provided for to modernise the system for the collection of stamp duties on financial cards, cheques and certain insurance policies. The changes facilitate the introduction of a new system to collect the stamp duty and pave the way for electronic filings of relevant returns, but they are still subject to Ministerial Commencement Order.

A new s123D SDCA 1999 charge for bills of exchange is introduced, starting in 2024, which requires promoters to deliver, within one month of the year-end, an electronic statement indicating the number of relevant bills of exchange either issued or exchanged (subject to whether an election is made) during that year; stamp duty at the rate of €0.50 will be payable in respect of each bill shown on the statement.

For credit cards and charge cards (s124 SDCA 1999), the chargeable period will change from a 1 April start to align with the calendar year, with a short chargeable period provided for in 2023 (April to December). For the short chargeable period, a reduced charge of €22.50 per credit card account or charge card issued to an account during that period applies, instead of the usual €30 rate. The changes also require the use of electronic means to deliver statements to Revenue and pay the related stamp duty.

Sections 123C and 124A are repealed by Finance Act 2021, thereby abolishing the requirement to pay preliminary duty on cash, combined and debit cards, and credit and charge cards.

Similar changes are provided for in the context of insurance levies, namely, the modernisation of the filing system and a new charge. These changes are also subject to commencement by Ministerial Order. Section 62 of the Finance Act 2021 includes a new annual levy in s125C SDCA 1999 on policies of insurance (other than life insurance). The section sets out that an insurer must deliver, within 25 days of the end of each quarter, a statement showing the number of relevant polices issued in that quarter, and stamp duty at a rate of €1 is payable in respect of each policy. The current head of charge in Schedule 1 is to be deleted, along with s59 and s62.

There are some changes to this area that took effect on 1 January 2022. A welcome change is the abolition of the daily penalty of €380 for failure to pay and to deliver the relevant statement, which applied in addition to the duty and interest. Instead, s126C SDCA 1999 provides for a new surcharge for late filing of a return under ss123B, 123C, 123D, 124, 124A, 124B, 125 or 125C and applies the usual penalties and categories of behaviour in line with the general compliance provisions.

The "further levy on certain financial institutions" (s126AA) was amended specifically to exclude KBC Bank and Ulster Bank from the scope of the charge and to extend the charge to 31 December 2022 while maintaining the 2019 "base year".

Conclusion

The increased stamp duty rate will be front of mind for taxpayers and practitioners in this area, and it will be important to keep abreast of the considerable changes that have been introduced throughout the year and how they will be monitored in practice. When there is a transfer of shares, all three rates will need to be considered (1%, 7.5% and 10%), and you could have a situation where more than one rate applies to a single transaction. Care is needed to ensure that each relevant part is stamped on the appropriate amount, as the legislation states that "regard shall be had to the gross value of the immovable property from which the value is derived" (31C(8)(b) SDCA 1999) and "regard shall be had to the market value of the residential unit from which the value is derived" (31E(11)(b)).

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DAC 7: Another Step on the Tax Transparency Journey, with a Focus on Digital Platforms

Tax Transparency Journey: Information Reporting Obligations

The tax transparency agenda of the EU has been in full flight for a number of years. Over the last 24 months, the term DAC 6 has become familiar to all companies, advisers and other service providers. DAC 6 reporting, as it is broadly known, reflects an amendment to the original EU Directive on Administrative Cooperation. The broad aim of DAC 6 was to enhance tax transparency through automatic exchange of information between EU Member States on what was regarded as, or deemed to be, "aggressive tax planning". The tax transparency agenda of the EU has not ended there, with DAC 7 (another amendment to the Directive) swiftly following on its heels and a potential further amendment (DAC 8) coming down the path, focussed on transparency in the e-money and crypto-assets sector. So the key questions at this stage are: what is DAC 7, who does it impact and what are the associated compliance obligations?

What Is DAC 7?

As mentioned above, DAC 7 is a further amendment to the Directive on Administrative Cooperation, but this amendment on transparency has a particular focus on the digital economy. Both the OECD and the EU have outlined on numerous occasions that the growth of the digital economy has brought challenges from both a tax compliance and a tax collection perspective, and as stated in the amendment to the Directive itself, "the cross-border dimension of services offered through the use of platform operators has created a complex environment where it can be challenging to enforce tax rules and ensure tax compliance".[1] The rationale behind the introduction of DAC 7 is to introduce new reporting obligations for companies that are known as "digital intermediaries" or "platforms" and subsequently exchange this information among EU tax authorities in a similar manner to the EU Common Reporting Standard ("DAC 2–CRS") and the mandatory disclosure regime (DAC 6).

It is envisaged that the information collected will allow tax authorities across the EU to ensure better compliance with local income tax and value-added tax (VAT) obligations. The European Commission also believes that the new rules will promote the standardisation of reporting obligations for companies. Unilateral information reporting obligations in various jurisdictions currently give rise to differing requirements and obligations, which are currently seen as burdensome for businesses.

Along the lines of DAC 2–CRS, DAC 7 was originally linked to OECD work, specifically its "Model Rules for Reporting by Platform Operators with Respect to Sellers in the Sharing and Gig Economy" ("the Model Rules"), which were issued in June 2020. DAC 7, however, had a wider scope than the original Model Rules.

In July 2021 the OECD issued a further report,[2] which extended the scope of the reporting rules to include sale of goods and rental of transportation, meaning that they now more closely align with DAC 7.

The provisions as outlined in DAC 7 place due diligence and reporting obligations on digital platform operators in respect of certain cross-border and domestic activities carried on via the digital platform. All EU Member States are required to transpose DAC 7 rules into domestic legislation by 31 December 2022. Ireland has transposed the DAC 7 rules into Irish legislation through Finance Act 2021 with the insertion of s891I TCA 1997. As detailed below, the legislation as implemented provides for regulations to be issued relating to certain aspects of these information reporting obligations, and in conjunction with those regulations Revenue will likely be updating its Tax and Duty Manual to incorporate guidance on the legislation and regulations. In this context, as we await the regulations and the Tax and Duty Manual update, we have detailed below the position in relation to DAC 7 as per the transposed legislation in the Finance Act.

DAC 7 adopts a "one-stop-shop" approach, meaning that reporting platform operators need to register and report the relevant information in one EU Member State only. This information will then be shared among the other EU Member States. The provisions of DAC 7, with a single EU reporting standard, should in theory provide uniform implementation of the rules across the EU, thereby reducing undue administrative burdens for digital platform operators. Whether the implementation of DAC 7 across the various EU territories manages to achieve this will have to be seen once it is operational.

Scope of DAC 7

The DAC 7 provisions apply to "relevant activities'' that occur on or after 1 January 2023, with the first reporting obligation arising on

1 Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

2 OECD, "Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sales of Goods" (July 2021).

31 January 2024 (in respect of the calendar year 2023). To come within the scope of reporting, there must be a "platform" and the platform must facilitate "relevant activities". If businesses come within the scope of DAC 7, "reporting platform operators" (defined below) will be required to report the relevant information to the relevant tax authority.

Platform

Platform for the purpose of DAC 7 is very broadly defined and means any software that allows users and sellers to be connected to other users for the provision of a relevant activity. Platforms include websites and mobile applications, as well as any arrangement for the collection and payment of consideration in respect of a relevant activity (see below for detail on what constitutes a relevant activity).

The Directive, and therefore the Irish legislation, excludes from the definition of a platform any software that exclusively, without any further intervention in carrying out a relevant activity, allows any of the following: (1) processing of payments, (2) users to list or advertise a relevant activity, or (3) redirecting or transferring users to a platform. The key question here is: what would be regarded as an intervention in this case?

Relevant activities

Only platforms that facilitate relevant activities are included in the scope of DAC 7. Relevant activities include the following activities carried out for consideration:

(1) rental of immoveable property (including parking spaces),

(2) personal services,

(3) sale of goods and

(4) rental of any mode of transport.

Points (3) and (4) above are the ones that were added to the optional scope of the OECD Model Rules in July 2021, which align it with DAC 7. Whereas points (1), (3) and (4) are clearer in terms of scope, point (2) is a particularly broad concept. The Directive defines it as: "a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an Entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a platform". This definition is not very specific, and we look to the OECD rules for further guidance in this context.

OECD guidance notes that a personal service means work performed by one or more individuals, acting independently or on behalf of an entity. In its examples, it notes that transportation and delivery services, manual labour, tutoring, copywriting, data manipulation, as well as clerical, legal and accounting tasks, are all examples of personal service. However, publicly accessible transportation services operated in accordance with a predetermined timetable (such as coach, train, airplane services) would not constitute a personal service. In addition, it is noted that a personal service does not include a service provided by a seller pursuant to an employment relationship with the platform operator (or a related entity).

The OECD also recognises that there may be transactions involving both goods and services, and in such cases, it may not be clear whether a transaction comes within the scope of a personal service. If a transaction contains both elements (supply of goods and provision of services) and they can be split, then reporting could arise on the services element. In cases where the transaction cannot be split, the full transaction could be reportable if the service element is not purely ancillary to the transaction. An example is provided of where a seller provides tiling services and also supplies the tiles (provision of goods). The OECD notes that the installation service would be regarded as a personal service, as it is task-based work, so to the extent that the installation element can be carved out, that should be reported. Where the elements cannot be split, the whole transaction would come within the scope of reporting. Expanding on this, the OECD notes that the provision of a delivery service with sale of goods is likely to be seen as ancillary and therefore not within the scope of reporting, but it highlights that a delivery service relating to goods supplied by someone else would come within scope.

The above shows the complexity and nuances that arise when considering what comes within the scope of personal services.

Reporting platform operator

If a business comes within the scope of DAC 7 due to its being regarded as a platform that facilitates relevant activities in a relevant jurisdiction, then it will be regarded as a relevant platform operator and, as such, will be required to report the required information to the relevant tax authority.

The definition of what constitutes a reporting platform operator is also very broad and has the potential to include both EU and non-EU platforms. A platform operator is considered a reporting platform operator if:

- it has a presence in the EU by virtue of tax residence, incorporation, place of management or permanent establishment; or
- it facilitates the carrying out of a relevant activity by reportable sellers or the rental of premises located in an EU Member State.

Section 891I(3)(a) TCA 1997 confirms that a platform operator that meets the above conditions should register with Revenue as a platform operator. However, s891I(3)(b) TCA 1997 states that where a platform operator satisfies the conditions of being a platform operator in the State and in another Member State, the platform operator does not have register with Revenue provided that it elects to register as a platform operator for the purposes of the Directive in that other Member State and notifies that election in writing to Revenue.

Furthermore, platform operators that can demonstrate to the satisfaction of the tax authorities that the platform's entire business model is such that it does not have reportable sellers (see below for more detail) are regarded as excluded platform operators and are therefore exempt from DAC 7.

Who Is a Reportable Seller?

DAC 7 imposes an obligation on reporting platform operators to report certain information about reportable sellers. A reportable seller is an individual or an entity who is registered on a platform and carries out a relevant activity in the reportable period (i.e. calendar year) and who is not an excluded seller. A reportable seller must be an active seller that is resident in the EU or rents out immoveable property located in the EU.

The following are considered excluded sellers and, thus, are not within the scope of DAC 7:

(1) governmental entities.
(2) listed entities the stock of which is regularly traded (including related entities);
(3) entities for which the platform operator facilitated more than 2,000 relevant activities by means of the rental of immoveable property in respect of a property listing during the reporting period; and
(4) entities for which the platform operator facilitated fewer than 30 relevant activities by means of the sale of goods **and** for which the total amount of consideration paid or credited did not exceed €2,000 during the reporting period.

The exclusion under point (3) above is broadly aimed at excluding large providers of things such as hospitality accommodation, with frequent bookings. The exclusion under point (4) is aimed at excluding casual or once-off sellers of goods from the reporting obligations; however, the fact that the carve-out in this context is two-pronged means that practically it will have limited value. Two transactions for €2,100 in total in a calendar year would still come within the scope of reporting, which is a very low threshold.

Information To Be Reported

Section 891I(5) TCA 1997 outlines the information that will need to be reported in the DAC 7 report when filed with Revenue, which is summarised below.

Information to be disclosed in respect of a reporting platform operator (s891I(5)(a) TCA 1997)	Information to be disclosed in respect in respect of reportable sellers who are individuals (s891I(5)(b) TCA 1997)	Information to be disclosed in respect of reportable sellers who are not individuals (s891I(5)(c) TCA 1997)	Information to be disclosed in respect of all reportable sellers (s891I(5)(d) TCA 1997)	Information to be disclosed where the relevant activity of a reportable seller involves the rental of immoveable property, in addition to the information specified in paras (b) to (d) (s891I)(5)(e) TCA 1997
• The name of the reporting platform operator • The registered office address of the reporting platform operator • The tax identification number (TIN) of the reporting platform operator • The platform operator ID, where one has been assigned by Revenue • The business name of each platform in respect of which the reporting platform operator is reporting	• The first name and last name of each reportable seller • The primary address of each reportable seller • The TIN issued to each reportable seller and, where a reportable seller has a TIN issued by more than one Member State, the Member State of issuance of each TIN, or in the absence of a TIN, the place of birth of such reportable seller • The VAT identification number of each reportable seller, where available • The date of birth of each reportable seller	• The legal name of each reportable seller • The primary address of each reportable seller • Where relevant activities are carried on through a permanent establishment in any Member State, details for each reportable seller of each Member State where such a permanent establishment is located, where available • Any TIN issued to each reportable seller and, where a reportable seller has a TIN issued by more	• The total consideration paid or credited to each reportable seller during each quarter of the reportable period and the number of relevant activities in respect of which the consideration was paid or credited • Any fees, commissions or taxes withheld or charged by the reporting platform operator with respect to each reportable seller during each quarter of the reportable period • The financial account identifier of each reportable seller, if available	• The address of each property listing • The unique identifier, or identifiers, allocated under the Registration of Title Act 1964 to the land of each property listing, if available, or its equivalent under the law of the Member State where it is located, where available • The total consideration paid or credited during each quarter of the reportable period and the number of relevant activities provided with respect to each property listing

Information to be disclosed in respect of a reporting platform operator (s891I(5)(a) TCA 1997)	Information to be disclosed in respect in respect of reportable sellers who are individuals (s891I(5)(b) TCA 1997)	Information to be disclosed in respect of reportable sellers who are not individuals (s891I(5)(c) TCA 1997)	Information to be disclosed in respect of all reportable sellers (s891I(5)(d) TCA 1997)	Information to be disclosed where the relevant activity of a reportable seller involves the rental of immoveable property, in addition to the information specified in paras (b) to (d) (s891I)(5)(e) TCA 1997
		than one Member State, the Member State of issuance of each TIN • The VAT identification number of each reportable seller, where available • The business registration number of each reportable seller	• Where different from the name of a reportable seller, the name of the holder of the financial account to which the consideration is paid or credited, to the extent available to the reporting platform operator, as well as any other financial identification information available to the reporting platform operator with respect to that account holder • Each Member State in which each reportable seller is resident, as determined pursuant to para. D of Section II of Annex V to the Directive	• Where available, the number of days each property listing was rented during the reportable period and the type of each property listing

The relevant information to be reported for DAC 7 will be reported through an XML schema, and we understand that further details on this will form part of the regulations and the Revenue Tax and Duty Manual update.

Timing of reporting obligations

The first reporting obligation date that will arise for businesses that fall within the scope of DAC 7 will be 31 January 2024. After the first reporting period, reportable platform operators will be required to file a DAC 7 report with the relevant tax authorities on an annual basis. In this context a reportable platform operator will be required to file a report with the relevant tax authorities by 31 January of the year that immediately follows the end of the reportable period, i.e. for the period ending 31 December 2024, a DAC 7 report will be due by 31 January 2025.

Regulations

As noted, above, the legislation as enacted provides for the ability for regulations to be introduced in relation to the registration of platform operators and the return of information. Specifically, the legislation outlines the following areas that may be dealt with through regulations (it is important to note that these are indicative but not exhaustive areas where regulations can be issued in the context of this legislation):

- the period within which requirements to register as a platform operator must be satisfied;
- the manner in which returns are to be made, the currency in which they are required to be reported and the rules for conversion of amounts;
- the procedures to be put in place by a reporting platform operator for the purposes of identifying when a seller becomes a reportable seller;
- the procedures to be followed by a platform operator in respect of closing an account of a reportable seller, and the requirements to be satisfied before the platform operator can reopen an account, or open a new account, for a reportable seller whose account has previously been closed by the platform operator;
- the records and documents that are required to be provided by the reportable seller to the reporting platform operator to enable the reporting platform operator to comply with the obligations;
- the records and documents provided by the reportable seller to the reporting platform operator to enable the reporting platform operator to comply with the obligations and that are required to be retained by the reporting platform operator;
- the appointment of a third party by a reporting platform operator to carry out the duties and obligations imposed on it;
- the manner in which records shall be kept and the period for the retention of records; and
- such supplemental and incidental matters as appear to Revenue to be necessary to enable persons to fulfil their obligations under the regulations or for the general administration and implementation of the regulations.

From the above it can be seen that there are a broad number of areas that we would expect the regulations to cover, and it will be important to consider the impact of these regulations once they are available.

Penalties

No specific penalties were outlined in the Directive, which states that penalties should be “effective, proportionate and dissuasive”. This means that the penalty regime can differ between EU Member States, similar to DAC 6.

Finance Act 2021 provides for penalties for the platform operator where DAC 7 reporting requirements are not met. In addition, there can be consequences for reportable sellers. Finance Act 2021 provides that s898O TCA 1997 should apply where:

- there is a failure by a reporting platform operator to make a return as required by s891I(4) TCA 1997, or any other regulations made under s891I, or
- there is an incorrect or incomplete return made under s891I(4) TCA 1997, or any other regulation made under s891I.

The provisions of s898O note that where any person who is required to make a return under that section:

(a) fails, without reasonable excuse, to comply with any of the requirements of s898F or 898G,
(b) makes an incorrect or incomplete return under this Chapter or
(c) fails, without reasonable excuse, to make such a return,

that person shall be liable to a penalty of €19,045; and, in the case of paragraphs (a) and (c), if the failure continues, that person shall be liable to a further penalty of €2,535 for each day on which the failure continues.

Reporting platform operators can potentially be liable to the above penalties, which accrue on a daily basis, where an incomplete or incorrect DAC 7 return is filed with Revenue.

In addition to the monetary penalties outlined above, the Directive includes a section on "effective implementation", which outlines that Member States should have "rules and administrative procedures in place to ensure effective implementation of, and compliance with, the due diligence procedures and reporting requirements". In this context and from a commercial perspective, it is important to note that where a reportable seller does not provide the required information to the platform operator within a certain period, s891I(7)(b) TCA 1997 confirms, in line with the Directive, that the platform operator should close the online account of the reportable seller and it should not be reopened until such time as the relevant information has been provided.

This is a specific area where regulations are expected, as the procedures to be followed by a platform operator in respect of closing an account of a reportable seller, and the requirements to be satisfied before the platform operator can reopen an account, are highlighted in the Finance Act as being within the scope of regulation.

What Next for Those Within the Scope of DAC 7?

Given the "go live" date of 1 January 2023, the timeline to act and to ensure that businesses are compliant is very short. As noted previously, we expect that Revenue will update the Tax and Duty Manual for DAC 7 in 2022, and the Irish legislation also specifies that regulations will issue in relation to certain aspects of the reporting. The relevant XML schema will also need to be released to enable the reporting to be completed.

A number of things will need to be considered in the context of DAC 7 at this stage:

1. Practically, the introduction of regulations in relation to some of the detailed aspects of the information reporting obligations will need to be monitored.
2. To determine who is and is not in scope, it will be important to examine and understand the activities of platforms along with their customer base, together with any guidance that is available from the EU or the OECD in relation to the interpretation of the definitions of relevant activities, platforms and excluded platforms.
3. On the determination that a business falls within the scope of DAC 7, the business will need to assess what data will need to be collected and from whom it should be collected.
4. Practical issues of how the data is being collected, stored and protected from an operational, legal and privacy perspective will need to be factored into any action taken.
5. Wide internal stakeholder engagement will be needed, as internal expertise in areas as diverse as legal, data privacy, commercial and engineering will need to be involved to navigate the collection and reporting process.

Conclusion

The transposition of DAC 7 (Article 1(8) of EU Council Directive 2021/514) into s891I TCA 1997 represents a complex piece of informational reporting legislation that businesses will need to consider in the short term due to the timelines involved. As outlined above, some specific areas of the implementation of the obligations in Ireland will be dealt with through the issue of regulations, so keeping up to date with this and with the wider implementation of DAC 7 in other EU countries will be important. Additionally, we would be hopeful that the OECD territories and the EU territories stay aligned in terms of DAC 7 obligations and the "Model Reporting Rules for Digital Platforms", as it will be critical for businesses that the rules are consistently applied (i.e. items such as definition of personal services etc.).

The DAC 7 provisions are not the end of the tax transparency agenda for the EU, with information reporting measures expected in the area of crypto-assets and e-money (so-called DAC 8). These proposals are currently at the stage of awaiting feedback from the public consultation process, which ran during early 2021. The most recent Department of Finance Tax Strategy Group paper on international tax[3] acknowledges Ireland's support for the exchange of information by tax authorities and its ongoing participation at European Council level as the Directive on Administrative Cooperation is extended to keep pace with technological developments and to extend the scope of exchange of information to include areas such as crypto-assets and e-money.

What is very clear from all of this is that informational reporting obligations for companies over recent of years have increased, with the introduction of FATCA, DAC 2–CRS, DAC 6 and now DAC 7. The trend would suggest that such informational reporting obligations will continue to be a popular way for tax authorities to gather information to target an increase in tax compliance. In relation to DAC 7, the issuance of regulations and any Revenue updates to the Tax and Duty Manual on the operation of the legislation and the regulations will be keenly awaited by all.

3 Department of Finance, International and EU Tax Developments Tax Strategy Group, TSG 21/06 (September 2021).

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Interest Limitation Rules: Key Provisions and Areas To Watch

Background

Tax relief on borrowing costs for Irish tax purposes is a complex area of law, available in a variety of circumstances and subject to a myriad of conditions. Whether it is allowable as a trading expense, a rental expense or a charge on income, the complexity of and conditions attaching to tax relief on borrowings have been the subject of discussion and development in prior Finance Acts. This complexity is unlikely to be resolved any time soon, as with the introduction of the interest limitation rules (ILR) in Finance Act 2021, a new player has entered the game.

The Anti-Tax-Avoidance Directive 2016/1164 of 12 July 2016 ("ATAD1") requires Member States to implement an interest limitation ratio, designed to limit the ability of entities to deduct net borrowing costs in a given year to a maximum of 30% of earnings before interest, tax, depreciation and amortisation (EBITDA). ATAD1 provides that Member States shall transpose provisions into domestic law with respect to the interest limitation rules contained in the Directive, and for those provisions to apply from 1 January 2020. Under ATAD1, a transposition deadline of up to the end of 2023 can apply where a Member State has pre-existing national rules that are equally effective at preventing BEPS risks. Previous policy views expressed by Irish legislators indicated the view that existing rules on tax relief on borrowings remained "equally effective", and therefore ATAD1 was not transposed into Irish law to apply from 1 January 2020. Notwithstanding this, the updated January 2021 Corporation Tax Roadmap issued by the Tax Division of the Department of Finance noted a commitment to introduce ATAD1-compliant interest limitation rules in Finance Act 2021. In particular, the roadmap stated that "[w]hile we remain of the view that the extended deadline of 1 January 2024 should apply, it has been agreed to accelerate the transposition process".

The newly enacted rules on interest relief are contained in Part 35D of the Taxes Consolidation Act 1997 (TCA 1997), and this article addresses some of the core elements of the ILR, including scope, steps in applying a potential restriction, and key exemptions and exclusions. The ILR applies to an accounting period of a relevant entity starting on or after 1 January 2022.

Scope of the New Rules

The ILR transposed into TCA 1997 shall apply to a "relevant entity" as defined, meaning a company or an interest group. The definition of a relevant entity in s835AY TCA 1997 does not require a company to be specifically Irish tax resident, but as the operation of the ILR acts to reduce the interest equivalent that would otherwise be deducted in the calculation of the tax payable by the relevant entity, the conclusion may be reached that a relevant entity includes a non-resident company trading in Ireland through a branch or agency and, accordingly, chargeable to corporation tax on the chargeable profits arising from the activities of the branch.

An "interest group", while being treated as a "relevant entity", has a specific definition that will be addressed later in this article.

Part 35D recognises the existence of a special type of group, referred to as a "single company worldwide group" and defined in s835AY(1) TCA 1997. A single company worldwide group means a company that is not:

- a member of a worldwide group,
- a member of an interest group or
- a standalone entity.

The concept and definition of a standalone entity and an interest group will be addressed in due course.

The above definition of a single company worldwide group could refer, in practice, to companies that for a variety of reasons are not treated as members of a worldwide group from a consolidated accounts perspective but, equally, are not treated as a standalone entity due to the existence of associated enterprises. A detailed analysis of the single company worldwide group rules and their nuances is outside the scope of this article, but the status of a company as a "single company worldwide group" is of importance in the context of the equity and group ratio rules, as such rules must be applied subject to certain modifications.

Steps in Applying the Interest Limitation Rules

Taking the approach outlined in the Department of Finance Feedback Statement of July 2021, the application of the ILR can be split into a series of steps for ease of understanding:

Step 1	Identify the relevant entity (either a company or an interest group) – addressed above as part of the scope of the new rules.
Step 2	Calculate the relevant entity's relevant profit or loss.
Step 3	Identify the relevant entity's taxable interest equivalent.
Step 4	Identify the relevant entity's deductible interest equivalent.
Step 5	Calculate the net interest equivalent and EBITDA.
Step 6	Apply the equity ratio rule (where applicable).
Step 7	Calculate the allowable amount and disallowable amount (apply the group ratio rule, where applicable).
Step 8	Apply the interest limitation to restrict deductible interest (where applicable).
Step 9	Carry forward any disallowable amount or total spare capacity to future accounting periods.

Identifying the relevant profit or loss

A key step in assessing the applicability of the ILR is the calculation of the relevant entity's profit or loss. The identification of this amount is important in the overall calculation and application of the interest limitation rules as it forms part of the "EBITDA" for the relevant entity, which ultimately determines the maximum quantum of tax relief available on borrowing costs. Relevant profit for the purpose of the ILR is defined in s835AZ and refers to the amount of profits on which corporation tax falls finally to be borne. The reference to "profits" should be read alongside the definition in s4(1) TCA 1997 as meaning both income and chargeable gains. "Profits on which corporation tax falls finally to be borne" should also be read in conjunction with s4(4)(c) TCA 1997. Accordingly, the amount in question refers to profits after all deductions and reliefs against profits are given (but before any reliefs that reduce the tax payable); however, this is to be read subject to the comments below with respect to value-based relief for charges and losses under s243B and s396B, respectively. Relevant profit also includes any amounts in respect of "relevant disposals", referring to a disposal of development land, the gains of which are subject to capital gains tax (CGT).

Relevant profit must be further reduced by the amount of any excess trade charges or relevant trading losses on which value-based relief would be available but for the application of the ILR. In calculating the amount of relevant profit or loss, the relevant entity is required to engage in a value-basing exercise to take into account the differing rates of corporation tax applicable to different sources of income. For example, although a company may have €100 of Case I income and €200 of Case III income in its accounts, for the purpose of the ILR the Case III income must be "value-based" to €400 in calculating the total relevant profit of €500.

No account is taken in the calculation of relevant profit or loss for any amounts carried forward from prior years, amounts carried back from later years or amounts claimed as group relief (other than interest treated as a charge). We will look at certain infrastructure exclusions later in this article. Lastly, the calculation of a relevant loss is carried out in the same manner as that of a relevant profit.

Deductible and taxable interest equivalents

The correct identification and quantification of deductible and taxable interest equivalents is important in the assessment and application of the interest limitation rules. The starting point in this assessment is in the definition of "interest equivalent", meaning:

> *"(a) interest,*
>
> *(b) amounts economically equivalent to interest including –*
>
> *(i) a discount, where securities are issued at a discount,*
>
> *(ii) the finance element of finance lease payments,*
>
> *(iii) the finance income element and finance cost element of nonfinance lease payments of a company that carries on a trade of leasing that is treated for the purposes of the Tax Acts as a separate trade distinct from all other activities carried on by such company under section 403(2),*
>
> *(iv) amounts under derivative instruments or hedging arrangements directly connected with the raising of finance, and*
>
> *(v) such portion of the profit or loss on –*
>
> *(I) a financial asset (within the meaning of section 76B), or*
>
> *(II) a financial liability (within the meaning of section 76B), the coupon or return on which principally comprises interest or one or more of the amounts referred to*

in this paragraph, to the extent that it would be reasonable to consider that such amount is economically equivalent to interest,

(c) any amounts referred to in paragraph (a) or (b) claimed by a claimant company under section 420(6),

(d) amounts arising directly in connection with raising finance, including –

(i) guarantee fees,

(ii) arrangement fees, and

(iii) commitment fees,

(e) foreign exchange gains and losses on interest or amounts economically equivalent to interest, and

(f) any amount arising from an arrangement, or part of an arrangement, which could reasonably be considered, when the arrangement is considered in the whole, to be economically equivalent to interest."

The deductible interest equivalent (DIE) is defined as the amount in respect of interest that is "deducted in calculating the relevant profit or loss of a relevant entity". The taxable interest equivalent (TIE) is defined as an amount in respect of the interest equivalent that is income, profits or gains included in the calculation of the relevant profit or loss of a relevant entity, including a reversal of the deductible interest equivalent. Per previous commentary on the calculation of relevant profit or loss, DIE and TIE that either give relief at or are taxable at either the 25% rate (referred to in the legislation as the "P rate") or the CGT rate must be "value-based" to put them on the same footing as income and expenses at the 12.5% rate.

Net interest equivalent

On identifying amounts in respect of DIE and TIE, the relevant entity can calculate the "net interest equivalent", being the difference between DIE and TIE. Where the net interest equivalent is greater than or equal to zero, the amount shall be referred to as "exceeding borrowing costs". Exceeding borrowing costs, and the tax relief available on same, are therefore to be limited to an allowable amount determined by reference to the tax EBTIDA of the relevant entity. In contrast, where the net interest equivalent is less than zero, it shall be referred to as "interest spare capacity". Where a relevant entity has interest spare capacity as opposed to exceeding borrowing costs, there is in fact no amount on which the interest limitation rules may act to limit tax relief.

EBITDA

The calculation of EBITDA in the context of the ILR is an important step for the relevant entity; as tax relief on exceeding borrowings is to be limited to a set percentage of EBITDA, a correct assessment of this amount is required. A specific formula for EBITDA is outlined in s835AAB(5) TCA 1997, but for the sake of simplicity it can be outlined as follows:

> [Relevant profit or loss] + [Net interest equivalent] + [Foreign tax deducted] + [Capital allowances +/– Balancing allowances/Balancing charges +/– DIE referable to such allowances or charges] + [DIE in respect of legacy debt]

Lastly, the calculation of EBITDA must produce an amount equal to or greater than zero. Therefore, although it is possible for a relevant entity to have a relevant loss, it is not possible for EBITDA under s835AAB TCA 1997 to be a negative number; in such cases, the amount of EBITDA defaults to zero.

Equity ratio rule

The equity ratio rule above is one of two "group" rules provided for in ATAD1, which act either to allow for a full deduction for exceeding borrowing costs or (in the case of the group ratio rule, discussed below) to increase the allowable ratio of EBITDA beyond the set 30%. The equity ratio rule applies to a relevant entity where the entity's ratio of equity over total assets is greater than, equal to or not less than

2 percentage points lower than the worldwide group's ratio of equity over total assets. The equity ratio rule is available only to a relevant entity that is a member of a worldwide group, meaning (in general) a consolidated group for financial accounting purposes.

Where the conditions of the equity ratio rule are met by a relevant entity, it is open to the entity to make an election such that any restrictions on deductibility under the ILR are disapplied and full relief for exceeding borrowing costs is available.

Allowable and disallowable amounts

The allowable amount, in the context of the ILR, is calculated as EBITDA x EBITDA limit. The EBITDA limit is 30%, unless modified by the application of the group ratio rule, discussed below. A disallowable amount, accordingly, refers to the amount by which exceeding borrowing costs exceed the allowable amount (if such an excess in fact arises). In cases where the exceeding borrowing costs are less than the allowable amount, the difference is treated as "limitation spare capacity".

Group ratio rule

The group ratio rule, the second of the two "group" rules provided for in ATAD1, acts to increase the allowable percentage of EBITDA beyond the set 30% where certain conditions are met and where the relevant entity is a member of a worldwide group (defined generally as a consolidated group for financial accounting purposes).

Where the "group ratio" exceeds 30% for an accounting period for a relevant entity, the entity may make an election such that the allowable amount previously discussed shall be computed based on the revised, increased EBITDA limit. The group ratio refers to the ratio of group exceeding borrowing costs over group EBITDA.

A relevant entity may not make an election for both the equity ratio rule and the group ratio rule at the same time.

Application of the interest limitation rule

The ILR applies where for an accounting period:

- the relevant entity is not a standalone entity (discussed in greater detail below);
- the relevant entity has a disallowable amount greater than zero in respect of the accounting period; and
- the exceeding borrowing costs[1] of the relevant entity exceed the *de minimus* amount (see below).

Where the ILR applies, the amount of tax payable by the relevant entity must be adjusted. The adjustment takes effect by reducing the amount of interest equivalent that but for the application of the ILR would have been deducted. The interest equivalent is to be reduced by the disallowable amount.

Carry-forward provisions

Where a relevant entity has a disallowable amount, this may be carried forward to later accounting periods indefinitely. Carried forward disallowable amounts, for the purposes of the carry-forward provisions, are referred to as a "deemed borrowing cost". The aggregate of deemed borrowing cost used in a later accounting period shall be limited to the total spare capacity for the period in question (meaning the aggregate of "interest spare capacity" and "limitation spare capacity", referred to previously).

The manner in which deemed borrowing costs are treated for the purpose of the carry-forward provisions varies depending on whether the relevant entity is a company that is in a tax-payable position, is in a

1 This refers to the difference between deductible and taxable interest equivalent where the sum in question is equal to or greater than zero.

loss-making position or is an investment company with expenses of management. Such differing treatment acts to ensure that the carry-forward amounts are not given greater flexibility under the ILR than would be given to other tax attributes carried forward elsewhere in TCA 1997, such as trading losses forward. It is therefore necessary to identify the correct scenario for the relevant company to analyse properly the manner in which deemed borrowing costs are to be treated in later accounting periods.

Where a relevant entity has an amount of total spare capacity (rather than a disallowable amount), it may carry forward this capacity for a period not exceeding five years from the end of the accounting period in which the capacity arose. Disallowable amounts arising in a particular accounting period may, on the making of a claim by the relevant entity, be reduced by an amount of total spare capacity carried from previous accounting periods.

Interest Groups

Article 4(1) of ATAD1 allows for Member States to treat as a taxpayer:

> *"(a) An entity which is permitted or required to apply the rules on behalf of a group, as defined according to national tax law;*
>
> *(b) An entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes."*

ATAD1, accordingly, recognises that some Member States may permit companies to prepare and file tax returns on a consolidation or group basis and thus may treat the group as a single taxpayer.

An interest group from an Irish perspective comprises the companies within the charge to corporation tax that:

- are either:
  - members of the same worldwide group (as defined) or
  - where not members of the same worldwide group, are deemed to be members of the same group of companies for the purpose of s411 TCA 1997;[2] and
- have elected to be members of the interest group.

In calculating an amount in respect of an interest group, that amount comprises all of the results of the members of that interest group. The application of the ILR to an interest group is the same as for a single company (i.e. not a member of an interest group) subject to specific modifications with respect to disallowable amounts and spare capacity allocated to members of the interest group. Specifically, in identifying a disallowable amount allocable to a member of an interest group, the total disallowable amount for the interest group to be apportioned to each member based on the DIE for each member as a proportion of the total group DIE. A similar apportionment takes place with respect to total spare capacity, based on the amount of TIE for each group member as a proportion of total TIE for the group.

Key Exemptions and Exclusions

De minimus threshold

The ILR shall apply to a relevant entity where the exceeding borrowing costs exceed the *de minimus* amount. The *de minimus* amount is defined as €3m in respect of an accounting period of 12 months and is reduced pro rata in respect of shorter accounting periods. Therefore, where the exceeding borrowing

2 For the purposes of s411 TCA 1997, two companies are members of the same group if one is a subsidiary of the other or both are subsidiaries of a third company, the parent–subsidiary relationship being determined according to the test of not less than 75% ownership of the ordinary share capital.

costs of a relevant entity are below €3m, the interest limitation rules will not apply for that accounting period.

Standalone entities

The ILR shall not apply where the relevant entity is, at any time in the accounting period, a standalone entity. The definition of a standalone entity is a company resident in the State that:

- is not a member of a worldwide group;
- has no associated enterprises; and
- does not have a permanent establishment in a territory other than the State.

Where the above conditions are met, the relevant entity may fully deduct its exceeding borrowing costs.

Legacy debt exclusion

In calculating the amount of any exceeding borrowing cost or interest spare capacity (the former being subject to the interest limitation rules, where applicable), amounts in respect of legacy debt are to be excluded. Legacy debt is defined as a debt the terms of which were agreed before 17 June 2016. The definition includes any contract agreed before or after that date for the purpose of eliminating or reducing interest rate risk on the debt. Accordingly, the legacy debt definition is wide enough to cover not only the underlying debt but also interest rate swaps and derivatives for hedging purposes entered into at a later date to address any interest rate fluctuations that may arise.

Long-term public infrastructure project exclusion

The long-term public infrastructure project exclusion operates by:

- excluding any income and expenses directly connected with such a project from the calculation of "relevant profits" and thus from the calculation of tax EBITDA for the purposes of the ILR; and
- excluding from the exceeding borrowing costs any borrowing costs incurred on a qualifying long-term infrastructure project.

The definition of a "qualifying long-term infrastructure project" can be found in s853AY TCA 1997 and refers to a long-term infrastructure project:

- in respect of which the operator is established in and tax resident in a Member State;
- in respect of which the large-scale asset concerned is in a Member State; and
- the income arising from which and the deductible interest equivalent relating to which arise in a Member State.

A long-term infrastructure project is also defined in s835AY TCA 1997, referring to a project to provide, upgrade, operate or maintain a large-scale asset. A large-scale asset is in turn defined in the same section, by reference to a number of pieces of legislation, including (but not limited to) the Planning and Development Act 2000, where the asset in question has an expected life span of 10 years.

Reporting

Reporting obligations arise for a relevant entity whether as a single company (i.e. not a member of an interest group) and as a member of an interest group. An interest group shall appoint a member of the group as the "reporting company". The reporting company will make a return on behalf of the interest group on or before the specified return date for the accounting period. Table 1 summarises the information that may be required to be included in the return.

Table 1: Summary of reporting requirements by company type.

	Single company, not a member of an interest group	Single company, member of an interest group	Reporting company
Name and tax reference of each member of interest group	X	X	✓
EBITDA	✓	X	✓
Allowable amount	✓	X	✓
Exceeding borrowing costs	✓	X	✓
Disallowable amount	✓	✓	✓ (and allocation to group members)
Total spare capacity	X	X	✓ (and allocation to group members)
Interest spare capacity	✓	✓	X
Limitation spare capacity	✓	✓	X
Deemed borrowing costs and total spare capacity carried from prior periods and amounts used in the current period	✓	✓	✓ (and allocation to group members)
Where the group ratio election is made: • group exceeding borrowing costs and • group EBITDA	✓	X	✓
Where the equity ratio election is made, the amounts in respect of equity and assets	✓	X	✓
Whether the company is a single company worldwide group	✓	X	X
Where payment for tax relief is made, the name and tax reference of payee and payor and the amount of the payment	X	X	✓

Worked Example

TraderCo is an Irish-tax-resident company. It has incurred interest that is treated as trading in nature and therefore deductible. For the purposes of this example, TraderCo is not part of a worldwide group, is not a standalone entity and is not a single company worldwide group. No foreign tax is deducted, and the company has no allowances in respect of capital expenditure in the period in question. Lastly, the company has no amounts in respect of legacy debt.

The results for TraderCo (before application of the ILR) for the year ending 31 December 2022 (FY22) are as follows:

	€
Operating profits	10,000,000
Trade interest payable	(4,000,000)
Accounting profit before tax	6,000,000

Tax computation (before ILR)	**€**
Profit before tax	6,000,000
Case I taxable profit	6,000,000
Tax at 12.5%	750,000

Step 1: Identify the relevant entity

TraderCo, in this instance, is the "relevant entity"

Step 2: Calculation of relevant profit

	Actual	**Value-based at 12.5%**
	€	**€**
Case I taxable profit	6,000,000	6,000,000
Relevant profit	6,000,000	

Steps 3 and 4: Identify deductible interest equivalent (DIE) and taxable interest equivalent (TIE)

	Actual	**Value based at 12.5%**
	€	**€**
Deductible interest equivalent	4,000,000	4,000,000
Taxable interest equivalent	Nil	Nil

In this instance, TraderCo has no interest income and therefore has no "taxable interest equivalent".

Step 5: Calculate net interest equivalent and EBITDA

Calculation of net interest equivalent	**€**
Net interest equivalent	4,000,000
Exceeding borrowing costs	4,000,000

Net interest equivalent is the difference between DIE and TIE. Net interest equivalent greater than or equal to zero is referred to as "exceeding borrowing costs".

Calculation of EBITDA	**€**
Relevant profit	6,000,000
Net interest equivalent	4,000,000
Foreign tax	0
Allowances in respect of capital expenditure	0
Interest on legacy debt	0
EBITDA	**10,000,000**

Step 6: Apply equity ratio rule

As TraderCo is not a member of a worldwide group, it cannot avail of the equity ratio rule.

Step 7: Calculate allowable and disallowable amount (apply group ratio rule where applicable)

EBITDA	€10,000,000
EBITDA limit	30%
Allowable amount	€3,000,000
Disallowable amount	€1,000,000

The allowable amount is equal to 30% of the EBITDA. The disallowable amount is equal to the difference between the allowable amount and exceeding borrowing cost. The group ratio rule is not applicable as the relevant entity is not a member of a worldwide group.

Step 8: Apply the interest limitation rules

	Actual	**Value-based at 12.5%**
	€	**€**
Interest equivalent	4,000,000	4,000,000
Less disallowable amount	(1,000,000)	(1,000,000)
Revised interest equivalent	3,000,000	3,000,000

Revised tax computation	
Operating profits	10,000,000
Less revised interest equivalent	(3,000,000)
Revised taxable Case I profit	7,000,000
Revised tax at 12.5%	**875,000**

The revised tax is increased from €750,000 to €875,000.

Step 9: Carry-forward provisions

The disallowable amount of €1,000,000 for which no tax relief may be obtained in FY22 may be carried forward to later years as a deemed borrowing cost of the company.

Next Steps and Conclusion

The ILR is applicable to all accounting periods starting on or after 1 January 2022. Given the complexity of the rules, it is expected that taxpayers and advisers alike will need to take considerable time to get to grips with the legislation well before preparing and filing any tax return for an impacted company. To date, we have seen continued Revenue engagement through the Department of Finance to identify stakeholder concerns around the new rules through not one but two feedback statements. Although Revenue guidance notes on the provisions were issued in early January 2022, it is understood that Tax and Duty Manuals on the rules should issue soon.


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Transfer Pricing: Domestic Exclusion

Introduction: How We Got Here

Finance Act 2019 updated Ireland's transfer pricing rules significantly and extended their application to transactions that are of a non-trading nature for the purposes of Irish corporate tax, among a number of other extensions to the reach of the transfer pricing rules. When one considers the extension of the application of the Irish transfer pricing rules to non-trading transactions in a domestic context it is clear that, absent some form of domestic exclusion, some unusual and largely undesirable consequences would arise. As it was understood that the intention was that the rules should not create deemed income taxable at the 25% rate of corporate tax for which deductions were available only at the 12.5% rate of corporate tax – a risk for wholly domestic transactions – text was included in s835E Taxes Consolidation Act 1997 (TCA 1997), as inserted by s27 of Finance Act 2019, that would disapply the basic rules on transfer pricing outlined in s835C TCA 1997 where certain conditions were satisfied.

The version of the s835E TCA 1997 text inserted by Finance Act 2019 was open to a broad range of interpretations of its scope and application, with some interpretations being described as narrow. This version of the text was a topic of regular discussion for taxpayers and practitioners, with the divergence in opinion and interpretation generating confusion from time to time and clarity often difficult to achieve. The text was rewritten in Finance Act 2020 to include some very prescriptive conditions for a transaction between two Irish parties to be exempt. However, given the identification of potential practical difficulties, the legislation was made subject to a commencement order, which was not issued.

Finance Act 2021 repeals s835E TCA 1997 as inserted by Finance Act 2019[1] for chargeable periods starting on or after 1 January 2022 and rewrites the section to address unintended consequences of applying transfer pricing rules to certain Irish-to-Irish transactions. It disapplies the basic rules on transfer pricing in certain non-trading contexts, subject to the requirements discussed below, between associated persons that either are chargeable to Irish tax on profits, gains or losses arising from the transaction or that would be chargeable if there were any such profits etc.

What Is Exempt?

The version of the text in Finance Act 2021 provides for an exclusion from the application of s835C TCA 1997 for the party to an arrangement who meets the conditions of being an eligible person within the meaning of the legislation and where the eligible person is one party to a transaction involving two qualifying persons. There are also enhanced and expanded anti-avoidance provisions in this version of s835E TCA 1997, which must be considered. Some of the language in the Finance Act 2021 version is reminiscent of that in the original, Finance Act 2019 version, with additional clarifying provisions, which assist in appropriately interpreting the intent of s835E.

In determining whether the exemptions available under s835E apply to a specific arrangement involving two Irish related parties, one must first determine whether the parties to the transaction are qualifying persons. The requirements for both the supplier and the acquirer in a transaction are similar but are set out separately to ensure that the slight differences are clear.

For a supplier to be considered a qualifying person, it must:

- for the chargeable period, be chargeable to income tax or corporation tax under Schedule D (other than under Case I or II) in respect of the profits, gains or losses arising from the arrangement under consideration.
- be resident in the State for the purposes of income tax for the relevant chargeable period where the supplier is chargeable to income tax in respect of the profits, gains or losses arising from the arrangement; and
- **not** be a qualifying company within the meaning of s110 TCA 1997.

For an acquirer to be considered a qualifying person, it must satisfy the same conditions above with the notable difference that it does not matter under which Case of Schedule D the acquirer is subject to tax.

For the purposes of satisfying the first condition of being a qualifying person, a supplier shall be regarded as chargeable to income tax or corporate tax under Schedule D, other than under Case I or II, where consideration receivable is directly taken into account in the computation of the profits, gains or losses, or would be so taken into account if there were any consideration. Similarly, an acquirer will be regarded as chargeable to income tax or corporate tax under Schedule D where the consideration payable is directly taken into account in the computation of the profits, gains or losses, or would be so taken into account if there were any consideration. Additionally, for an acquirer, further clarification is provided such that where consideration is not, or would not be, directly taken into account, the acquirer will be regarded as chargeable to income tax or corporate tax under Schedule D:

- in respect of profits, gains or losses arising **directly or indirectly** from the relevant activities of the acquirer.

1 Although s15(2) Finance Act 2020 included the repeal of s835E TCA 1997 as inserted by Finance Act 2019, because s15 Finance Act 2020 was never commenced, that repeal of s835E was never affected, and so the version of s835E repealed by Finance Act 2021 was the version inserted by Finance Act 2019.

Specifically with reference to corporate tax, the acquirer will also be regarded as chargeable to corporate tax under Schedule D:

- in respect of profits, gains or losses arising **directly or indirectly** from the relevant activities of the acquirer that would be chargeable to corporation tax but for s129 TCA 1997.

Once it is determined that both the supplier and the acquirer are qualifying persons, one must determine which party is the eligible person. The eligible person is the supplier or acquirer engaged in the arrangement that is chargeable to tax for the chargeable period, other than under Case I or II of Schedule D, in respect of the profits, gains or losses arising from that arrangement.

For the purposes of determining whether one of the parties is, or shall be regarded as, chargeable to income or corporate tax other than under Case I or II of Schedule D and satisfies the conditions of an eligible person, the following clarification is made. A supplier, or acquirer, shall be regarded as chargeable to income tax or corporate tax under Schedule D, other than under Case I or II, where consideration is directly taken into account in the computation of the profits, gains or losses, or would be directly taken into account if there were any consideration.

Once it can be determined that both parties are qualifying persons for the chargeable period of the eligible person, and one of the parties is an eligible person (only one of the parties may be the eligible person), it may be concluded that the basic rules on transfer pricing outlined in s835C TCA 1997 will not apply in computing the profits, gains or losses of the eligible person. This assumes, however, that the enhanced anti-avoidance provisions in the Finance Act 2021 version of s835E do not apply to the arrangement.

It is important to recall that even where you conclude that the exemption under s835E indeed applies, that exemption applies only to the eligible person. A case-by-case assessment should be made of whether the application of s835C to the party that is not the eligible person in respect of the arrangement could result in the reaching of a conclusion that that party's income is understated or its expense overstated by reference to an arm's-length arrangement. Finally, taxpayers must also ensure that they maintain suitable documentation to evidence the appropriateness of placing reliance on the exemption in s835E; such documentation should be available to be shared on foot of a request from Revenue.

What Now, and What To Do About Positions Already Taken?

The Finance Act 2021 version of s835E TCA 1997 clarifies for taxpayers and practitioners that, at least when considering arrangements during chargeable periods beginning on or after 1 January 2022, an eligible person who is party to a transaction in which two Irish related parties are engaged and which does not involve actual consideration may still avail of this exemption (if the aforementioned requirements are satisfied). It is also useful to recall that for the acquirer, at least, the relevant activities may be taken to be its broader activities and not the narrow activities relevant only to the arrangement being considered.

If we consider a transaction that may have been considered to be unsuitable for the exemption under s835E per the Finance Act 2019 version when a narrow interpretation of the application of that text is employed vis-à-vis the version introduced by Finance Act 2021, we may begin to appreciate the impact of the revised text in Finance Act 2021. Take the following example:

- A loan transaction involves an Irish supplier (lender) and an Irish acquirer (borrower); assume that no interest is currently charged on the transaction.
- The supplier is not engaged in a Case I lending trade, such that any interest income, if it were to exist, would be chargeable to tax under Case III in the hands of the supplier.
- The Irish acquirer uses the funds secured to fund a dividend payment to its parent

company, and would not be entitled to a deduction for interest expense, if it were to exist, on the loan.

- Neither entity is a qualifying company within the meaning of s110 TCA 1997, and none of the anti-avoidance provisions in the Finance Act 2019 or Finance Act 2021 versions of s835E apply.

Based on the fact pattern above and under a narrow interpretation of s835E as presented by Finance Act 2019, one may conclude that the exemption would not be available to the supplier in the transaction. Given that there is no consideration, neither party would have profits, gains or losses arising as a result of the relevant activities. This could have been narrowly interpreted to be only those activities associated with the arrangement. Even if there had been consideration, given that the acquirer's profits, gains or losses would not have directly taken into account the results of the arrangement, a narrow interpretation of the Finance Act 2019 version of s835E would have precluded the acquirer from satisfying the conditions of what was, in that context, a qualifying **relevant** person. As a consequence, for transactions of this nature, s835C would likely have applied to the supplier in the transaction and resulted in taxable interest income in the hands of the supplier, while no deduction would have been available to the acquirer.

When the same fact pattern is considered in the context of the version of s835E introduced by Finance Act 2021, there is likely a different outcome. Both the supplier and the acquirer would likely satisfy the conditions of being a qualifying person, on the basis that no consideration is actually required to satisfy the condition, and for the acquirer specifically one may consider profits, gains or losses arising (or that could so arise) directly or indirectly as a result of its relevant activities. Similarly, the supplier would likely satisfy the conditions of being an eligible person. As a consequence, for transactions of this nature, s835C would likely not apply to the supplier in the transaction, thereby avoiding the undesirable outcome of taxable income arising at a 25% rate with no corresponding deduction available on a solely domestic transaction.

Although the previously enacted version of the exemption, as introduced in Finance Act 2019, is still applicable for taxpayers who have yet to start a chargeable period on or after 1 January 2022 and may be relevant to taxpayers considering their position for prior years, the Finance Act 2021 version of s835E TCA 1997 could be a useful interpretive guide where there are ambiguities around the Finance Act 2019 version. However, with that being said, it is not yet known if, or when, Revenue will update the existing Tax and Duty Manual for transfer pricing specifically to deal with the significant revisions to s835E introduced by Finance Act 2021. Absent any update to such guidance, or clear indication from Revenue, the position for chargeable periods for which the Finance Act 2019 version of s835E was in effect remains somewhat ambiguous.

Conclusion

Finance Act 2021 introduces a version of s835E TCA 1997 for chargeable periods starting on or after 1 January 2022 that appears to deal with some of the unintended consequences of applying transfer pricing rules to certain Irish-to-Irish transactions. Although ambiguities persist with respect to periods during which the Finance Act 2019 version was in force, taxpayers should have a greater degree of confidence in the appropriateness of relying on the exemption in s835E for domestic transactions in chargeable periods beginning on or after 1 January 2022. Taxpayers should take time to review their existing positions in this regard; assess whether some of those positions may change as a result of these revisions; revise and update, where necessary, their documentation of such positions; and enact (if they have not already done so) a regular cadence of monitoring the continued appropriateness of positions adopted with respect of their domestic transactions.

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Central Register of Beneficial Ownership of Trusts: The Irish UBO Register

Introduction

The Central Register of Beneficial Ownership of Trusts (CRBOT) is the third in a package of registers introduced by the EU through Anti-Money-Laundering Directives (AMLD) over the last few years, starting with the RBO (the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies) and the CBI – Beneficial Ownership Register of CFVs (i.e. of certain financial vehicles).

All of these registers focus on identifying the beneficial owner(s) of the relevant entity. Unlike the RBO or the CFV register, CRBOT is not a public register, albeit there is the potential for the public to access information in very limited circumstances.

CRBOT is managed by the Revenue Commissioners.[1] The Revenue website provides a stand-alone information page[2] with detailed

1 The RBO is managed by the Companies Registration Office, and the Register of CFVs is managed by the Central Bank of Ireland.

2 See https://www.revenue.ie/en/crbot/central-register-of-beneficial-ownership-of-trusts/index.aspx.

FAQs and troubleshooting guides on CRBOT, which is very useful and should be reviewed by practitioners before dealing with CRBOT.[3]

The Fourth AMLD had introduced a precursor to CRBOT, an internal trust register, where trustees were required to set up and maintain an internal register, the information for which now forms the basis for CRBOT.[4] The Fifth AMLD, however, is the basis for CRBOT, and this was brought into effect in Ireland by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2021 and, more particularly, by SI 110 of 2019, which amended the "base" legislation, which is the Act of 2010.[5] The legislation has been amended significantly since 2010, making it quite unwieldy and certainly worthy of consolidation.

Requirement to Register

All relevant trusts existing in the EU or seeking to hold assets or carry out business in the EU must be registered on an EU register.

CRBOT is the Irish register, but similar central registers have been created throughout the EU, some with different access permissions than others. The mechanism of how information in each central register in Member States will be accessed has yet to be agreed.[6] Obligations are placed on those businesses transacting with trustees[7] to check that they have been properly registered.

Failure to register results in trusts being unable to administer the trust assets effectively and, most importantly, significant fines imposed on those obliged to register the trust and keep it up to date.

Timing

The effective date for registration of trusts in Ireland was 24 April 2021, introducing the requirement to register trusts within six months of that date, i.e. by 23 October 2021.

The Registrar for CRBOT is encouraging registration of existing trusts even if, strictly, such registration is late. Trustees should register within a reasonable period on the basis that there may be genuine difficulties for some trustees in registering their details on time.

All new trusts, i.e. those created on or after 24 April 2021, should be registered within six months of their creation.

What Trusts Need To Be Registered

Trusts that have been created expressly and whose trustees are resident in Ireland or otherwise administer the trust in Ireland must be registered on CRBOT unless specifically excluded.

An express trust is a trust established by deed or other declaration in writing. It requires certainty of subject matter, objects and words imperative to creating the trust. Typically, trusts would include a trust created under a will (once the estate is administered and handed over to trustees), an inter vivos (lifetime) trust, a nomineeship, a charitable trust, a trust owning a company registered on the RBO, certain pension trusts and s189/189A TCA 1997 trusts. Discretionary, fixed interest/period trusts, life interest trusts and bare trusts are all registrable. There is not *de minimis* – even a pilot trust set up with a nominal €100 must be registered.

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3 The FAQs and troubleshooting guide has been developed in conjunction with a working group of practitioner representative bodies. Some of the original FAQs are to be incorporated in the main CRBOT website page going forward.

4 SI 16 of 2019, since 29 January 2019. Although this statutory instrument is now revoked, the requirement for the internal register continues under SI 188 of 2021.

5 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

6 This access system is known as BORIS. It is not clear if the information is accessed by the registrar in each Member State or by the State authorities only. If it is to be accessed by the registrar and then made available for access under local rules, there would be a concern that the confidentiality of the Irish register would be breached by access through other Member States' having registers that are more public than the Irish register.

7 I.e. a designated person who is defined under s25 of the 2010 Act as amended. Examples include a bank, auditor, external accountant, tax adviser and independent legal professional.

The following trusts are specifically excluded:

- approved occupational pension schemes,
- approved retirement funds,
- approved profit-sharing schemes or employee share ownership schemes,
- trusts for restricted shares,
- Haemophilia HIV Trusts, and
- unit trusts.

A statutory trust, such as one created for a minor on an intestacy, is not an express trust. Powers of attorney are not express trusts. Resulting or constructive trusts are also not considered express trusts (such as when dealing with joint bank accounts). Care should be taken to determine whether a trust exists or only a power arises, such as in the case of objects or powers in a company's constitution, which may not of itself create a trust. Likewise, if the relationship is one of agency, not trusteeship, this is not registrable.

The residency of each trustee is looked at in terms of residency in its ordinary sense, as opposed to residency of trustees or a trust as defined for income tax or capital gains tax purposes. If any trustee is resident in Ireland, the trust should be registered here unless it is already registered in another EU Member State. It is therefore sensible for trustees of a trust who reside in multiple EU Member States to decide between them the most appropriate register on which to register the trust.

A trust is considered to be administered in Ireland if it manages its assets here, gets advice from Irish professionals or other services are provided to the trust in Ireland.

If a trust is already registered in another EU country, it does not need to be registered in Ireland.

Separately, where a trust has not got any connection with Ireland or any other EU Member State but enters into an occasional transaction[8] with a designated person or forms a business relationship[9] with such a person, that trust will also need to be registered with CRBOT. In effect, a trustee's carrying out any transaction in Ireland brings the trust into the reckoning of being administered in Ireland and requiring registration here if not already registered elsewhere in the EU.

It should be noted that there is no Brexit or other derogation for trusts registered on the equivalent UK register. Therefore, a trust registered in the UK under its system of trust registrations may also need to be registered in Ireland.

Information Required

The information to be provided to CRBOT on registration focuses on the names, addresses, dates of birth and PPSNs[10] of each beneficial owner as defined. It is important to realise that under the Fifth AMLD the beneficial owner of a trust is not defined in the usual sense of beneficial interest of a trust for trust purposes. A beneficial owner for CRBOT is the settlor, trustee, protector, other controlling individual and all beneficiaries (vested or the class of beneficiaries). Each beneficial owner should register for each category in the case where he or she holds multiple roles in the trust, e.g. is both a settlor and a beneficiary or is both a settlor and a trustee.

On registration the information on the status of each beneficial owner is also required, i.e. how the person has become a beneficial owner, such as by being a settlor, a trustee or a beneficiary. In the case of discretionary trusts, a description of the class of beneficiaries is required, and although each identifiable discretionary beneficiary is not required to be detailed on

8 Section 24 of the 2010 Act.

9 Regulation 6, SI 194 of 2021.

10 Or, if no PPSN, foreign tax registration number, passport number or national identity number and evidence of that.

CRBOT, that information should be retained on the internal register of the trust.

Although CRBOT does not of itself automatically seek information on the assets within the trust, it requires each beneficial owner to set out a statement of the nature and extent of his or her interest in the trust or control exercised. This may, depending on the nature and extent of the interest or control, require certain trust assets to be detailed. Generally, what is meant by nature and extent of interest held is the level of benefit owned, such as being a sole beneficiary, a beneficiary of a share with others and indeed specifying the level of share, holding a life interest and holding a reversionary interest. The nature and extent of the control exercised would include matters such as adding or removing beneficiaries or trustees and power to dispose of or invest in property. It is assumed that a trustee holding quite typical trust powers would not have to list all of the powers set out in the trust, and so in practical terms, filing to date has been made on the basis that such powers are standard. CRBOT is currently carrying out data checks on trusts that have been registered to date in relation to the information provided on the nature and extent of control or interest. We have been informed that its due diligence of trusts has shown that more information may be required than many trustees/agents have to date provided in that category.[11]

Where a legal entity is a beneficiary and is already registered on another register (such as the RBO), the name, registered address, filing number and name of the register are required, together with the statement of the nature and extent of interest held or control exercised in relation to the relevant trust. Initially, if the legal entity is not a beneficiary (i.e. is a trustee, settlor or protector or holds a controlling interest), then the details of each individual beneficial owner of the legal entity are required, which was quite a frustration, although this is due to be updated.[12]

Foundations can be considered hybrids of trusts and corporates, and care should be taken to ensure that if a foundation is not registered on CRBOT, then it might need to be registered on the RBO, or vice versa.

Access to the Register

The register is stand-alone from the Revenue Commissioners, insofar as Revenue's role in managing CRBOT is completely separate from its role in tax administration. Revenue records will not therefore link with CRBOT and so will not automatically update the register.

This can be seen when accessing registration through ROS. The business user/agent using ROS accesses the Trust Register from the ROS home page, but despite notice numbers issuing when filing the information on CRBOT similar to regular Revenue filing notice numbers, the notification does not show up on the main ROS inbox page. Instead, a separate identification number (separate from the filing notification number) is allocated to the trust on the CRBOT register home page within ROS.[13]

Revenue, with other stated bodies and competent authorities,[14] can obtain details from CRBOT about trusts to improve transparency and make it clear who owns and controls Irish trusts.

Furthermore, designated persons can access limited information of a trust for verification purposes through an access code provided

11 Through the working group, we have requested greater clarity on and examples of this registration requirement, as it would seem unnecessary to list typical (and lengthy) trustee powers in a trust for this purpose.

12 It is understood that this will change, but it is not yet in place at the time of writing this article.

13 Insofar as the identification number is only initially allocated and there is no obvious record of times and details of when changes are made, it is advisable to print any amended pages submitted with a date stamp and retain the notice number automatically issued by ROS for potential cross-reference. Unfortunately, the CRBOT registration number is not alphabetised and is allocated on the filer's CRBOT inbox list in time order, so for those registering multiple trusts, it could be difficult to manage these going forward. A request for a search function on this list has been made by the working group.

14 Revenue Commissioners, An Garda Síochána, Financial Intelligence Unit Ireland, Criminal Assets Bureau, competent authorities engaged in the prevention, detection or investigation of money laundering or terrorist financing, e.g. the Central Bank, Law Society, Bar Council, designated accountancy bodies, LSRA, PRSA, Minister for Justice.

by the registering trustee or agent.[15] We understand that the newly provided facility to print out the registration status of the trust will also serve as the certificate of proof of registration for the purposes of trustees providing the proof to designated persons in other jurisdictions who otherwise would be seeking to have the trust registered in their jurisdiction when the trustees deal with them. We are seeking clarity on the reliance by designated persons on certificates issued from other EU registers as fulfilling the AML requirements for designated persons.[16]

There are obligations on designated persons to report discrepancies[17] between what is reported to them by the trustees and what is made available to the designated person by CRBOT. There is no prohibition on “tipping off” in relation to discrepancies, and so on a practical level it is anticipated that the designated person might suggest to the trustees to update the register correctly and then give an updated access code to provide the designated person with the correct information on CRBOT.[18]

There is limited power for persons showing legitimate interest to access the information on CRBOT. The legislation effectively envisages access being available to investigative journalists on a case-by-case basis specifically requesting details on someone who already has an AML conviction or holds assets in high-risk third countries. It is therefore not the case that a broad sweep can be made by a journalist seeking information generally on a well-known person.

There are protections for minors so that information on such minors will not be released. Unfortunately, this is not the case for beneficial owners who are vulnerable persons.

Maintaining Up-to-Date Information

Any changes to the status of the trust should be updated on CRBOT, such as changes of address and change of status of the trust or of the beneficial owners (e.g. where a life tenant has died; where a previously unvested interest vests and remains in trust; where the trust is wound up in full; where a beneficiary is added or removed; and where trustees, settlors, protectors or other controllers have died or their powers have changed).

There is no specified time limit on when the update should occur, so presumably registration of the necessary change can be done within a reasonable time from when the information is to hand. The trustees of the trust are under a duty to maintain both the internal register and the CRBOT register and ensure that it is up to date. However, beneficial owners themselves are also under a duty to notify trustees of changes to their status, such as change of address.

The details remain on CRBOT until the beneficial ownership ceases (such as on the death of the beneficial owner or the cessation of the trust), in which case the details remain on CRBOT until 10 years after notice of cessation. There was a requirement initially to register settlors who had died before 23 April 2021, but that has since changed.[19] There is no facility to automatically

15 Initially only the registering party can obtain an access code, although this is under review by CRBOT and it is proposed that trustees will also be able to access and amend the filing and generate an access code. Practitioners may wish to consider with their trustee clients whether it would be more efficient that the trustee registers the trust direct with CRBOT, rather than the practitioner doing this, as the presenter will later need to be contacted each time the trust deals with a designated person to obtain an access code. If the presenter is an agent filing initially, care should be taken to print what has been registered by the agent and date stamp this manually as proof of filing, on the basis that the trustees may change the details later without the agent’s being aware of such change.

16 At the moment the Irish legislation indicates that the EU registration can be relied on only if the EU register contains the same information at a minimum as CRBOT. This would require the designated person to assess the content of another EU Member State’s registration requirements, which seems to defeat the principle of consistency throughout the EU. This is under review, but the current position is that the designated person will be obliged to review the information on the EU register and ensure that it is consistent with the information required by CRBOT.

17 Forms for such reporting are now available on the CRBOT website.

18 It is also not clear whether the designated person is under the obligation anyway to check the register because of the option to rely on the information provided to them by the trustees from the internal register by virtue of the amendment of s35(3A) of the 2010 Act in SI 188 of 2021.

19 A person who was a beneficial owner on or after 24 April 2021 and who dies within six months of then or within six months of the trust’s being set up if set up after 24 April 2021, i.e. before the requirement to register arises, must still be registered as a beneficial owner, and the date of death of that person should be inserted as the date of the person’s ceasing to be a beneficial owner.

remove those details, so anyone who registered these details should mark the deceased as ceasing to be a beneficial owner and, if wished, request the removal of the information from the register by separate email to CRBOT.

Conclusion

After quite a teething period in the early autumn, the registration process has settled down, but it is hoped that there will be more updates to the functionality of the register to allow it to be more user-friendly for trustees, their agents and designated persons.

It remains to be seen how access via the EU to the information on CRBOT will be managed to ensure that the Irish limitations on public viewing can be maintained.

It also remains to be seen how the availability of these registers will reduce money laundering and terrorist financing in practice and whether the public will see the results of this in reviews of the registers over the next few years. There is already significant international criticism that such trust registers are disproportionate and ineffective and seem to be a mechanism to reduce the use of trusts generally. The administrative burden on compliant trusts and the potential loss of privacy for compliant beneficiaries is excessive to those who believe that the concept that AML as a crime-stopper is dead.

*This article was written on 15 January 2022, and updates to CRBOT may have occurred since writing.

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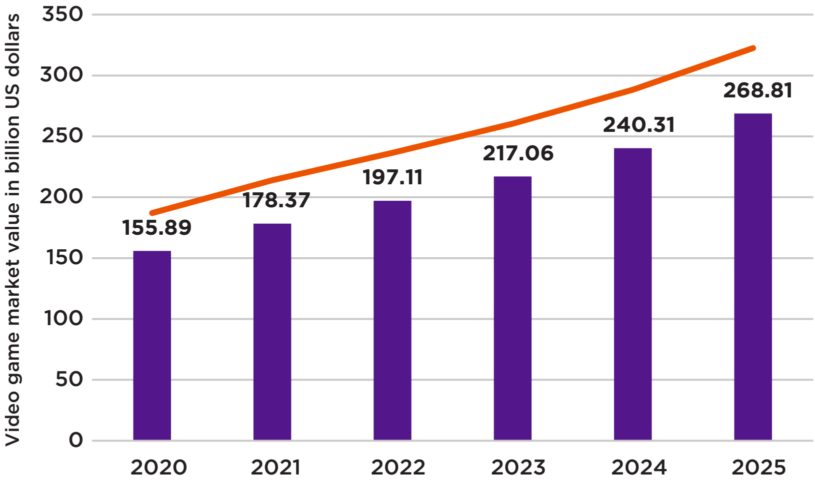
Digital Games Tax Credit: Can Ireland Become the Next "Hollywood of Video Games"?

Introduction

First mentioned in Budget 2021 discussions, the digital games tax credit (DGTC) was introduced in Finance Act 2021, which was signed into law by the President on 21 December 2021. Although subject to Ministerial Order to come into operation (pending European Commission approval), the DGTC is a massive step towards Ireland becoming a major player in the gaming industry. It follows the recent introduction of a number of university courses geared towards video game development.

Worldwide, the gaming industry has been growing steadily for a number of years, reaching a value of *c.* US$180bn in 2021 and expected to reach *c.* US$270bn by 2025.

Fig. 1: Global video game market value, 2020–2025.



Source: J. Clement, https://www.statista.com/statistics/292056/video-game-market-value-worldwide/

Video games in Ireland have a great history, with a significant number of indigenous developers operating at the moment, as well as the majority of the big names in the industry having operations here. Couple that with the pool of Irish talent in the audio and visual arts, and we have a perfect recipe for a successful industry. However, without an appropriate incentive to stimulate growth and attract new talent, Ireland has been falling behind countries such as the UK, France, Canada and Germany.

The introduction of the DGTC should help Ireland to bridge the gap to industry leaders and, perhaps at some point in the future, unseat Montreal as the world's capital of video game development.

Overview of the DGTC

The DGTC will provide for a cash-refundable tax credit (where the amount of DGTC exceeds the corporation tax liability of the company claiming the credit) for expenditure incurred by a digital games development company on the design, production and testing of a digital game. The rate of credit will be 32% of the **lowest** of:

- the eligible expenditure (being a portion of the qualifying expenditure expended in the State or in the European Economic Area (EEA));
- 80% of the qualifying expenditure (being the total expenditure incurred by the company on the design, production and testing of a digital game – regardless of the territory in which it was spent); and
- €25m.

The effective rate of the DGTC will be heavily affected by the portion of spend incurred within the EEA. In the above example, the effective rate of DGTC is 17.1% (i.e. €2.4m/€14m) as a significant portion of the expenditure was incurred outside of the EEA (i.e. €6.5m), which doesn't qualify. The maximum effective rate of the DGTC would therefore be 25.6% where all expenditure incurred on the design, production and testing of a digital game was incurred within the EEA. It is important to note that there is also a minimum amount of qualifying expenditure that must be incurred before a claim for DGTC is made, which is €100,000.

There are aspects of the DGTC that will likely prove key to whether the regime will be a success, namely: the certification process;

Table 1: Example of DGTC calculation.

	Total expenditure	Total available for DGTC	Total
EEA eligible expenditure		€7.5m	
Total qualifying expenditure of €14m	€14m		
Total qualifying expenditure of €14m @ 80%		€11.2m	
Max. expenditure		**€25m**	
Lowest of the above			€7.5m
DGTC rate			32%
DGTC amount			€2.4m
Total cost of developing the game			**€14m**
Less DGTC amount			(€2.4m)
Net game development cost			**€11.6m**

which companies will meet the definition of "digital games development company"; the requirement for the game to developed **and completed** by the Irish entity; the ability to track all development expenditure and documentation per game; and indeed the limit applied to the DGTC for a single game.

Certification process

The cultural test to be satisfied for companies to avail of the DGTC is a common control point in video game incentives in many countries. As is typical with tax incentives, the scheme must be approved by the European Commission to ensure that competition within the Single Market is not disrupted by providing State Aid to certain groups of companies. The cultural test helps to satisfy the requirement that video games promote culture and heritage conservation, which in turn allows the credit to be compatible with the Single Market (Article 107(3)(d) Treaty on the Functioning of the European Union).

One would expect that the cultural test could be administered in a similar way to the film credit. Applicants would likely be required to assess the game based on a number of conditions (e.g. location of the story within Ireland or elsewhere in the EEA, whether it concerns historical figures connected with Irish or European culture, whether the story addresses issues relevant to Irish people or people from another EEA country etc.), with the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media issuing the certificate after a review of the submission and the game's meeting some or all of the cultural test criteria. Although it is expected that further regulations and guidance will be published, the importance of satisfying the cultural test cannot be overestimated. In this respect, the contribution that the development of the digital game is expected to make to the promotion and expression of Irish and European culture needs to be considered, by reference to the following (s481A(5)(b) TCA 1997):

> *"(i) the cultural content of the game, including its setting, principal characters, language and subject matter;*
>
> *(ii) any cultural creativity employed in the development of the game, including innovation in the portrayal of Irish or European culture, the use of materials written or created in Ireland or Europe as the basis for the game, technological innovation or the use of music created by a composer who is a national of or ordinarily resident in Ireland or another EEA state;*
>
> *(iii) the contribution of the game to the development of a concentration of*

cultural activity, by reference to such matters as the proportion of the creative work carried out in Ireland or another EEA state, the number of key positions in the development of the game occupied by persons who are nationals of or ordinarily resident in Ireland or another EEA state, and the proportion of the members of the development team who are nationals of or ordinarily resident in Ireland or another EEA state;

(iv) *the concomitant cultural contribution of the game, by reference to matters including the educational content of games aimed at children and the inclusion of themes relating to diversity and equality;*

(v) *whether the content of the game promotes the protection, restoration and promotion of sustainable use of Irish or European terrestrial ecosystems or the raising of awareness of the exigencies of increasing environmental sustainability and minimising climate change."*

Currently, the cultural test for film relief requires the applicant to pass three of eight requirements. It will be interesting to see how this compares with the requirements of the gaming cultural test.

Qualifying companies

Although it might appear relatively straight forward, the conditions that a company must satisfy to be considered a "digital games development company" could have some negative influence on how successful the DGTC regime is in Ireland.

It appears from the legislation that the company must have filed tax return(s) in the past, essentially removing new companies from the equation, at least in their first year of trading. This rule could be seen as favouring indigenous and/or long-established companies and could potentially have an impact on future investments by gaming companies in Ireland. It could also have an effect on existing games development companies that may be acquired by foreign entities interested in setting up operations in Ireland and availing of the credit. The impact on start-up companies in the games development industry in Ireland should not be overlooked either. Having to trade for a period of time before making the claim delays access to the incentive for companies.

Another point to consider is the requirement to be carrying on a trade of developing digital games. Guidance would be welcome on whether this means that the company's principal or only trade must be the development of digital games or whether such trade can fall under the broader umbrella of software development. Requiring games development to be the only trade of a company wishing to claim the credit could disincentivise multinational companies from setting up or expanding their operations in Ireland. The latter option (i.e. developing digital games as part of a software development trade) seems to be the ideal option, eliminating any additional administrative costs. We understand that the intention behind the DGTC is not to create an additional burden on companies wishing to avail of the incentive by mandating the establishment of a separate digital games development trade and that, as long as a company is developing a digital game, it should meet this requirement.

Developed and completed

Another aspect to consider can be derived from s481A(2)(b) Taxes Consolidation Act 1997 concerning the final certificate: "...in relation to a digital game that is developed and completed by the company...". This could be interpreted as requiring the digital games development company wishing to avail of the credit to be the "principal" developer of the game, i.e. carrying out a substantial portion of the overall development work and finalising the product. This test will likely be more influenced by whether the activities carried out by the Irish company meet the cultural test rather than the amount/significance of the work carried out.

Guidance in this area would be very welcome to ensure a level of certainty for investors before they choose Ireland as their place of business, as well as for smaller companies looking to enter the premium games sector by cooperating with well-established games developers and publishers.

Limit on DGTC per game

The DGTC is available in many jurisdictions in one form or another. The limit applied on a per-game basis could place Ireland behind competitor locations such as the UK, Germany and Canada (Quebec). The cost of developing a video game in the current economic environment can range from tens of thousands to hundreds of millions euro. It is hoped that the €8m maximum credit per game available in Ireland (i.e. €25m at 32%) will not be a disincentive for any of the largest games developers in the world when deciding whether to set up development operations in Ireland and/or which games could be developed here. Needless to say, such games tend to create the most jobs and take significantly longer to develop. It would be very beneficial if the maximum amount of DGTC was removed, capped at a much higher amount or changed to an annual limit.

Interaction with Other Reliefs

It is not immediately apparent, but the DGTC could potentially be combined with the R&D tax credit. Although the legislation prevents companies from claiming both incentives on the same expenditure, the R&D tax credit could come into play for the larger games, those exceeding the €25m threshold. However, an important takeaway here is the fact that legislators have formally (albeit indirectly) recognised that qualifying R&D activities can take place in the games development sector. This is an important message, as the gaming industry has typically not been considered "R&D prone", with naysayers often commenting that it is focused on audio-visuals, story, social interactions and other, non-scientific, aspects. Examples of where R&D activities can potentially be found in games development are:

- projectile tracking and guidance,
- collision detection,
- pathfinding,
- developing a new graphics and/or physics engine,
- multiplayer queuing and matchmaking and
- new compression techniques/algorithms to reduce loading times and file size.

The legislation also denies a claim for a DGTC where the claiming company obtained relief on the same expenditure under the R&D tax credit, the Knowledge Development Box or film relief, or indeed where the expenditure has been met by grant aid.

Conclusion

Once approved and implemented, it is hoped that the DGTC will be a "game changer" (no pun intended!) in attracting, promoting and growing the digital games industry in Ireland. The skills and talent in this space that are available here combined with the attractiveness of this regime could be a recipe for success.

There are, however, some aspects of the regime that could slow down Ireland's progress. Most notably, additional guidance would be welcome to assess the flexibility of the regime and its competitiveness relative to other, long-established regimes. Factors such as the proportion of development done in Ireland vs overseas, the rules governing the cultural test and the level of documentation required will no doubt play a pivotal role in determining how successful this regime will be. Perhaps the DGTC could be expanded for micro enterprises to foster entrepreneurship in the industry. It might also be beneficial to increase the upper limit of the credit, provide a different credit rate where expenditure on a single game exceeds €25m or change the limit to annual rather than per game. Only time will tell whether the regime as it stands will generate sufficient up-take.

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Tax Appeals Commission: A More Appealing Process

Introduction: An Efficient and Effective Process

The past 18 months has seen a significant shift in the management of tax appeals, and we discuss here the progress we have seen driven by the Tax Appeals Commission (TAC), before touching on the main stages of the tax appeals process. We also highlight three key insights relating to the strategy involved in managing an appeal: properly planning the appeal process; the significance of contemporaneous evidence; and exploring the potential resolution of appeals with Revenue outside of the formal appeals process.

We read with interest the insights of Marie-Claire Maney, the Chairperson of the TAC, in *Irish Tax Review*, 34/3 (2021), which reflected on her first year in the role. The article set out the attainments already accomplished, which include a very significant increase of more than 900% in the quantum of appeals determined compared to the previous year, and the aim is to continue in this vein. The future plans for the TAC include streamlining TAC practices and procedures and publishing the TAC's scheduling policy. This will be of particular interest to taxpayers and practitioners alike and is an area that we consider below in the context of planning an appeal. There is also a significant focus on addressing the requirement to introduce a new tiered Commissioner structure, which is intended to match the variety of cases being appealed to the TAC. We have seen a a focus on recruitment of Commissioners for the new tiers, with four new appointees having already taken office and a further appointee to commence in early course. One of the first statements of the Chairperson's goals was in the Comptroller and Auditor General's 2019 Annual Report,[1] in which she made a number of very welcome commitments. Her intentions were clear: the tax appeals process should be accessible to all, and for this to be the case it needed to become more efficient and transparent.

In practice, we have seen efficiencies being driven in a number of ways. From the entry point to the appeals process, the forms required at the various stages of the process have been simplified and are easy to understand; directions are being issued by the TAC on the handling of appeals in a clear and timely manner; and, perhaps most importantly, determinations are being issued far more quickly than in the past. For interested observers, a batch of determinations is published on the TAC's website (www.taxappeals.ie) approximately every two weeks.

The TAC's website provides access to clear guidance and information relevant to taxpayers and practitioners. We are seeing the benefits of investment in the TAC's IT systems, for example, in terms of its ability to adapt to the Covid-19 pandemic by hosting virtual hearings. The latest Statement of Strategy[2] (April 2021) indicates that there is investment in robotics software to assist in processing notices of appeal. This certainly aligns with the TAC's mission statement to provide a "modern, independent and efficient" appeals process.

There is a clear commitment to taxpayers in all of these initiatives, and an acknowledgement that taxpayers should be able to plan an appeal process and be in a position to make informed decisions about their tax affairs.

Overview of the Appeals Process

The appeals process is efficient, speedy and closely case managed. For this reason, the parties have responsibility for ensuring that they are on top of their commitment to deliver in accordance with the directions issued by the TAC. Careful management of timing and ensuring that each step is properly completed are of the utmost importance.

The main steps are:

- notice of appeal,
- statement of case,
- outline of arguments,
- hearing,
- determination and
- decision to appeal to the High Court (if applicable).

Notice of appeal

The first step in the process is, arguably, the most important, for a number of reasons. The notice of appeal[3] must be filed within 30 days of receiving a determination or assessment from Revenue (s959AF TCA 1997). There are very limited exceptions to this deadline (s949O TCA 1997).

The most important point to note about this document is that **all grounds for appeal** must be included (s949I TCA 1997). For an additional ground of appeal to be included later in the process, the Appeal Commissioner must be satisfied that the ground could not reasonably have been included in the original notice of appeal.[4] Therefore, this document sets the parameters for the matters that will be dealt with at the appeal, and it is crucial that all grounds of appeal intended to be relied on are set out clearly.

If no appeal is made within the 30-day deadline, the assessment becomes final and the

1 Report on the Accounts of the Public Services 2019, Chapter 14.

2 Tax Appeals Commission Statement of Strategy 2021–2023, available at https://www.taxappeals.ie/en/about-us/about-us.

3 Available at https://www.taxappeals.ie/en/notice-of-appeal.

4 See section 5 at https://www.taxappeals.ie/en/notice-of-appeal.

relevant tax becomes payable depending on the matter under appeal. It is therefore critical that if there are any issues with the assessment, it is appealed without delay.

Lodging an appeal does not necessarily mean that the matter will end up in a hearing. In 2020 36% of closed cases had been settled;[5] therefore, it is important for taxpayers to preserve their rights in respect of a disputed matter, and lodging an appeal is one way of doing this.

Statement of case

The next stage in the process is the statement of case (s949Q TCA 1997). At this stage, both parties set out the facts and background relevant to their case, as well as the legislation and case law that they rely on to support their position.

In the normal course, the TAC will issue directions after the notice of appeal has been lodged, giving the parties a deadline by which their statement of case is to be lodged and delivered to the other side. In our experience, this direction can come soon after the lodgement of the appeal, and therefore the parties need to be ready to address and comply with the directions within the timeframe directed by the TAC. We often see a period of 42 days being granted for compliance with this step.

This step also involves the provision of key practical information regarding the case, e.g. whether the case can be adjudicated without a hearing (i.e. via written submissions) and the estimated duration of a hearing if a hearing is required. The taxpayer is also asked to indicate whether they wish for the hearing (or a specified part of it) to be held in camera (in private) rather than in public, the latter being the default arrangement. These details assist the TAC in determining a schedule for the appeal and allocating resources for the management and hearing of the appeal.

Outline of arguments

The next stage of the process is the outline of arguments. Although this stage does involve the submission of legal arguments by both parties, in practice it also involves a number of other steps.

It is common, at this stage in the appeal, to receive a direction from the TAC to submit the outline of arguments, together with a comprehensive list of documentary evidence that the parties will present at the hearing, the names of the witnesses who will be called on to give evidence and details of the type of evidence they will provide, a comprehensive list (and copies) of any case law citations to be relied on at the hearing, as well as a statement of agreed facts and issues in dispute between the parties.

The outline of arguments document sets out the legal arguments that the parties will rely on at the hearing. A much more significant task is identifying and arranging the right evidence to support the case. We address this in more detail below.

It is common for the taxpayer to rely on witnesses of fact to give evidence on matters of relevance to the case. It is also common for parties to engage an expert to prepare a report to support a position that they have taken in respect of their appeal. Legal counsel and tax advisers will inevitably be heavily involved in larger cases, but the addition of expertise on the subject matter of an appeal – be it accounting, mergers and acquisitions, supply chain, foreign law or any other area of dispute – can lend weight to the arguments being made by either party and bring a fresh perspective to the dispute.

The statement of agreed facts and issues is a document that the parties negotiate to agree on a set of facts that are not in dispute between them. This is provided to the TAC to assist in its understanding of what facts are agreed

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between the parties (and therefore do not need to be argued at the hearing) and on which matters the parties disagree (which become the issues that are argued at the hearing). This is done by way of engagement, with the taxpayer usually preparing the first draft and seeking agreement from Revenue with regard to the facts agreed and those in dispute. Sometimes the engagement by the parties at this stage can reveal that there is much common ground between them and lead to the possibility of opening discussions that could lead to a resolution of the dispute.

Hearing

An estimate of the duration of the hearing is agreed by the parties in advance, and the TAC will organise its schedule in accordance with this estimate. It will vary widely depending on the complexity of the case, the extent of legal arguments to be submitted and the amount of evidence to be heard.

It is an opportunity to set out all of the arguments relied on, as well as to respond to the other side's arguments. It also provides an opportunity to interact with the Appeal Commissioner, to explain and highlight key points. Facts that are not agreed before the hearing need to be explained further here and proved to the satisfaction of the Commissioner. Practical preparation for the hearing includes compiling books of pleadings, case law and legislation and making sure that the TAC and the other side have all of the material necessary for a smooth hearing. Given the resourcing challenges of the TAC, hearing timelines must be adhered to and the parties must stick to the time allotted for their hearing.

The TAC's target timeframe is that a hearing is held no more than nine months from the lodgement of the appeal, and the target timeframe for issuing a determination should be no more than one to three months from the date of the hearing, depending on the complexity of the case and the amounts involved.[6] Of course, these timeframes depend on various factors, such as the cooperation of all parties involved, the complexity of the case and the readiness of all parties to proceed with an appeal. In total, this results in a timeframe of one year for a taxpayer (and Revenue) to get from start to finish in an appeal.

Determination and findings of fact

As part of the determination that issues from the TAC, the Appeal Commissioner sets out his or her findings of fact, and these are generally the facts that the Commissioner found to be most persuasive.

The legislation (s949AP TCA 1997) provides that a party who is dissatisfied with a determination as being "erroneous on a point of law may by notice in writing require the Appeal Commissioners to state and sign a case (in this Chapter referred to as a 'case stated') for the opinion of the High Court". The notice needs to state in what respect the determination is alleged to be erroneous on a point of law, be sent to the Appeal Commissioners within 21 days after the date of the notification of their determination and be sent to the other party when it is being sent to the Appeal Commissioners.

An appeal to the High Court in respect of a TAC decision can be made only in respect of a point of law (s949AP TCA 1997). We touch on the case stated process below, but we highlight here the importance of differentiating between a point of fact and a point of law, as this is the first step in determining any potential right of appeal. A leading Irish authority on questions of law vs questions of fact is *Mara v Hummingbird*.[7] This case concerned whether the sale of a property was part of a property investment or part of a trade of the taxpayer.

Kenny J set out the following explanation of the differences between facts and law:

6 Report on the Accounts of the Public Services 2019, Chapter 14.

7 *Mara (Inspector of Taxes) v GG (Hummingbird) Limited* [1977] ITR Vol. 2.

- **Findings of primary fact** are, for example, the intentions of the taxpayer, and these should not be set aside unless there was no evidence to support them.
- **Mixed questions of law and fact** are those where a conclusion or inference is drawn from these primary facts. These findings should be set aside if the interpretation of those documents (i.e. the primary facts) is incorrect or if the conclusion was one that no reasonable person could draw.
- Finally, there are **questions of law**, where if a wrong view of the law was adopted, these findings should be set aside. If the conclusions are not based on a mistaken view of the law or a wrong interpretation of documents, the findings should not be set aside unless the inferences are ones that no reasonable Commissioner could draw.

Kenny J stated:

> "A case stated consists in part of findings on questions of **primary fact**, e.g. with what intention did the taxpayers purchase the premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them The Commissioner then goes on in the cases stated to give his conclusions or inferences from these primary facts. These are **mixed questions of fact and law** and the courts should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in a good position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted **a wrong view of the law, they should be set aside**. If, however, they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw [emphasis added]."

Appeal by way of case stated

Once a determination issues, a right of appeal exists only on a point of law. The appealing party must notify the TAC of its intention to appeal within 21 days of receipt of the determination. The notice must state in what respect the determination is alleged to be erroneous on a point of law. The Appeal Commissioner then drafts a case stated to go to the High Court, in respect of which both parties are given the opportunity to comment. Once the case stated is finalised and signed by the Appeal Commissioner, it is the appealing party's responsibility to lodge it with the High Court, and the appeal then comes within the jurisdiction of the High Court.

Statistics demonstrate that this occurs in only a minority of cases (191 appeals were determined in 2020, but 28 cases were stated to the High Court[8]). This low appeal rate (albeit that it has increased from 2019, when 10 out of 119 cases were appealed[9]) may be for any number of reasons: there may be no points of law to appeal, or the prospect of entering a public forum (the High Court), as well as additional time, cost and uncertainty, can deter the losing party from bringing an appeal.

Strategy for Managing an Appeal: Our Key Insights

Agreeing a timetable

Agreeing a timetable is a key step in the strategy for handling any appeal. Given the efficient targets of the TAC for processing appeals from start to finish, it is crucial that

8 Tax Appeals Commission Annual Report 2020.

9 Tax Appeals Commission Annual Report 2019.

parties are ready for an appeal. For this reason, it is always worth addressing at the outset whether the parties can engage with a view to agreeing a mutually convenient timetable for the completion of each of the stages of the appeal. This means that the parties can check each other's (and their advisers') availability in advance and project plan the appeal in the most efficient way possible. In practice, the parties then present the proposed timetable to the TAC and seek its agreement to making it part of the directions for the case. In our experience, Revenue is very amenable to this approach, as it is sensible to ensure, at the outset, the availability of all relevant parties (counsel, witnesses etc.) at each stage of the process.

We have found the TAC to be extremely pragmatic and willing to facilitate the parties in respect of this approach, although it is critical that the timetable, once agreed between the parties and proposed to the TAC for consideration and agreement, is adhered to by the parties.

Contemporaneous evidence

Another key area to highlight is that of evidence, and its importance in any case cannot be overstated.

The burden of proof is on the taxpayer to prove its case in the TAC. This was highlighted by the TAC in determination 56TACD2019, which quoted a key case in relation to the burden of proof, *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49. The Appeal Commissioner in that case first pointed out that the general principle is that "he who asserts must prove" – i.e. in a self-assessment system, it is the taxpayer who is asserting the original position – so the burden falls on the taxpayer in the first instance.

A taxpayer's evidence can win or lose a case. At the hearing, the TAC will hear from both sides in terms of the law and evidence before it and will make its decision based on the most persuasive of those. For that reason, where a taxpayer has taken a position with respect to its tax affairs, it is imperative that there is contemporaneous documentary evidence to demonstrate when and why the position was taken. The ability to produce such evidence goes to a number of points – including meeting the burden of proof required to support the technical position taken, the credibility of the taxpayer's position, and the ability to demonstrate good governance and record keeping – and can ultimately sway a decision maker.

Examples of helpful contemporaneous documentation are those that show the commercial merits and/or rationale of a tax transaction, the rationale behind key assumptions relevant to the particular tax position and file notes of conversations of the relevant decision makers. As well as providing crucial evidence in the context of any potential dispute, maintaining these records addresses the difficulties presented by a loss of corporate memory.

The benefit of contemporaneous documentation is that it demonstrates, as a matter of fact, the intentions and the understanding of parties involved in transactions at the time. This is very persuasive when it comes to proving a case further down the line. Documentation is far more reliable and compelling than oral evidence provided at a hearing, which relies on a witness's memory. There can be a lengthy period between the occurrence of a dispute and the ultimate hearing; given the various timelines involved in a possible appeal, appeals can arise five years (or longer) after the date on which a disputed issue arose.

Once the necessary evidence has been identified, an analysis of the available contemporaneous evidence can be undertaken to identify any areas of the case that are unsubstantiated, and steps can then be taken to identify potential sources of witness evidence that may assist in closing the gap, e.g. expert evidence.

It is common for the facts themselves to be the central issue in dispute. Having a persuasive set of facts, grounded on contemporaneous evidence, provides the basis for putting forward a very strong case at hearing. The hearing at the TAC is the last opportunity to have the facts of a case analysed and determined by a decision maker, and therefore taxpayers should try to ensure that they have put the best possible case forward at this stage.

Exploring resolution without litigation

Almost two-thirds of disputes do not go to formal appeal and are resolved outside of or withdrawn from the formal appeals process. This is a compelling statistic.

We have found that it is often necessary for a dispute to go to appeal for it to be amenable to resolution and for the parties to be ready and willing to engage. The appeals process focuses minds and requires all parties to analyse their positions critically. We have been involved in a number of cases where, as an appeal progressed, it became clear that there was a path to resolution outside of the formal appeals process. It is common that misunderstandings of fact that may form the basis for a dispute become clearer as the appeals process progresses, and the parties realise that they might be in a position to resolve the matter themselves.

If a taxpayer wishes to embark on this an approach, there should always be a robust legal and factual basis to support any proposal. Presenting a different perspective and bringing new facts to light can give clarity to matters that were perceived as uncertain. This gives the taxpayer the opportunity to clarify any potential misunderstandings of fact that may have led to the dispute.

In cases where parties make genuine progress in resolving the dispute outside of the appeal process, the TAC has been very understanding, and it facilitated a request once for resolution by the parties of the dispute outside of the appeal process.

Conclusion

As is evident from the above, the appeals process run by the TAC is accessible and efficient and provides a forum where appeals can be lodged, heard and determined within 12 months. The TAC has a strategy to unlock any current backlogs in cases. The process is streamlined to facilitate the efficient management and resolution of the matter. Taxpayers considering an appeal should be informed and prepared in advance to meet the close case management of the appeal by the TAC and need to be in a position to respond in a timely manner to the directions of the TAC. Planning of the appeal is crucial and agreeing a timetable with Revenue that the parties then propose to the TAC for consideration is the most critical step at the outset of any appeal. Proving the case is the next big milestone, and we have highlighted the importance of contemporaneous evidence, of analysing the evidence available and of obtaining expert evidence where necessary. Contemporaneous evidence is a critical aspect of governance for all taxpayers and maintaining accurate records that demonstrate a position taken in relation to a transaction or any other relevant matter should become a matter of day-to-day practice. Having comprehensive contemporaneous documentation is key for taxpayers who want to avoid a dispute with Revenue in the first instance, and a good time to review your supporting documents is when you prepare and complete your tax return. On a final note, it is important to consider whether the dispute would be amenable to resolution outside of the formal appeals process and whether an approach to Revenue, setting out a factual and legal basis for potential resolution, might result in such a resolution, saving time and costs for the parties, as well as TAC resources.

News and Moves

McKeogh Gallagher Ryan

McKeogh Gallagher Ryan is pleased to announce the following promotions in the Tax Department of the Limerick office: **Fergus O'Regan (CTA)** as Manager and **Jane Hughes (CTA)** as Assistant Manager.

Speaking about the promotions Tax Partner Mary McKeogh stated: *"Fergus and Jane have been fantastic additions to the tax team and we are delighted to acknowledge their achievements with these promotions. Fergus works closely with myself on our diverse client base across compliance and complex tax consultancy assignments, while also managing the day-to-day activities of a large department of tax trainees and qualified staff. Jane has proven herself a very capable and astute tax consultant, working with myself and our Tax Director Anne Hogan on succession planning, compliance and consultancy assignments. Assisting clients and finding solutions as well as training junior staff. We wish them both continued success in their careers with the firm."*

(L-R) Tax Director Anne Hogan & Tax Partner Mary McKeogh congratulate Janes Hughes and Fergus O'Regan