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Julie Burke
Editor

Regular Articles

As part of the journal's commitment to content development, this issue includes a new regular article as highlighted below.

New for 2022: UK & Northern Ireland Tax Update

Marie Farrell covers recent changes to and developments in UK tax law, highlighting key areas of interest to CTAs.

Policy & Representations Monitor

Lorraine Sheegar provides a comprehensive overview of key developments, including recent submissions from the Institute, and tax policy news. All Revenue eBriefs issued between 1 November 2021 and 31 January 2022 are listed.

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

Tara Duggan

Irish High Court

- Costs of the High Court proceedings in *Hanrahan v Revenue* [2022] IEHC 43 have been addressed. The original case 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.
- *Ann Corcoran & Joseph Corcoran v The Revenue Commissioners* [2022] IEHC 199 concerned an appeal against a determination of the Tax Appeals Commission that the respondents were not liable to the domicile levy for the relevant tax years of assessment within the meaning of Part 18C TCA 1997.
- *Listowel Race Company Ltd v Revenue Commissioners* [2022] IEHC 253 concerned an appeal against a determination of the Tax Appeals Commission (17TACD2021) of a refusal of sporting tax exemption under s235 TCA 1997 on the basis that appellant was not a body or a body of persons established for and existing for the sole purpose of promoting athletic or amateur games or sports.

Tax Appeals Commission Determinations

- **13TACD2022** concerned the claim for additional relief from capital gains tax on the disposal of a residential property.
- **27TACD2022** examined the appellant's entitlement to manufacturing relief from corporation tax under s448 TCA 1997 in respect of its processing of zinc and lead.
- **28TACD2022** was a determination on a preliminary issue that arose for the first time before the TAC during the hearing of two linked appeals. The appellants are linked whereby the first appellant is owner of lands on which the second appellant operates a camping site and caravan park. The first appellant and his wife are the owners of the second appellant. The first appellant is also the director and secretary of the second appellant. The substantive appeal revolved around the tax consequences arising from the second appellant carrying out significant works and capital improvements to the camping and caravan site.
- **40TACD2022** arose from a situation where the appellant received gifts of agricultural property and non-agricultural property from her parents on the same day in October 2013 and claimed agricultural relief in accordance with s89 CATCA 2003.

» **52TACD2022** was an appeal against a charge to corporation tax in respect of a loan waiver by a company in the same corporate group as the appellant.

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

» The First-tier Tribunal (FTT) delivered its judgment in *C Drake v HMRC* [2022] UKFTT 25 (TC), the issue in the appeal was whether the taxpayer had an allowable loss for the purposes of capital gains tax equal to a lost deposit.

» In *Megablue Technologies Ltd (in liquidation) v HMRC* [2022] UKFTT 24 (TC), HMRC had not paid out an R&D tax credit within the time period set out in its guidance, and the taxpayer company went into liquidation. HMRC then denied a repayment on the basis that the company was no longer a going concern under a specific piece of legislation.

» *The Wakelyn Trust v HMRC* [2022] UKFTT 23 (TC) the First-tier Tribunal rejected the taxpayer's appeal on the issue of whether the release of a tenant's reinstatement obligation contained in a lease formed deductible expenditure of the lessor for the purposes of the UK equivalent of s552(1)(b) TCA 1997.

» *ScottishPower (SCPL) Ltd and others v HMRC* [2022] UKFTT 41 (TC) examined deductability of redress payments.

» *Gunfleet Sands Ltd and others v HMRC* [2022] UKFTT 35 (TC) examined whether expenditure incurred on various studies carried out before the construction of wind farms qualified for a capital allowance claim.

» *Conran and another v HMRC* [2022] UKFTT 39 (TC) considered the market value of assets transferred from a limited liability partnership to a limited company on incorporation of a business was £1 (and not £8.25m) and therefore the majority partner did not realise a capital gain. It also held that the consideration paid could not be treated as a distribution and that the buyer was not entitled to intangibles relief.

» *HMRC v NCL Investments Ltd and another* [2022] UKSC 9 (23 March), the Supreme Court (SC) rejected HMRC's appeal and determined that accounting debits which arose in the accounts of the taxpayer companies as a result of the grant of share options in the ultimate holding company were deductible in computing the trading profits.

CJEU Case

» In case *C-257/20*, the Court of Justice of the European Union (CJEU) delivered a decision regarding withholding tax on "fictitious" interest that was deemed to arise on an interest-free loan between related parties

International Tax Update

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

» BEPS/OECD: Recent Developments

  » The OECD/G20 Inclusive Framework has released model commentary and guidance on the 15% global minimum tax (Pillar Two) agreed in October 2021.

  » The OECD has released a public consultation on the draft model rules for domestic legislation on "scope" under Amount A of Pillar One.

  » US Tax Developments

    » The White House has released a fiscal year 2023 Budget blueprint which echoes President Joe Biden's long-standing calls for significant tax increases targeting large corporations and high-income individuals but also amplifies them.

    » The President's social spending and tax policy Bill, commonly known as the Build Back Better Act, remains stalled in the Senate after clearing the House of Representatives last November.

    » EU Tax Developments

- Estonia, Malta and Sweden gave support to compromise text at the recent ECOFIN meeting, Poland still expressed concerns insisting on a legal link between the OECD Pillars One and Two and therefore, no agreement was reached at this meeting.
- The European Commission has issued a public consultation on Unshell (also referred to as ATAD3), designed to prevent 'the misuse of shell entities for improper tax purposes'.
- The EU Commission has launched a public consultation questionnaire on its initiative to introduce a common EU-wide system for withholding tax claims on dividend and interest payments within the EU.

» Revenue Tax and Duty manual has been updated in respect of EU Mandatory Disclosure of Reportable Cross Border Arrangements (DAC6).

» India introduced a concept called "Significant Economic Presence" (SEP) for taxing foreign entities in India (irrespective of whether they have physical presence in India or not).

» A long-delayed tax treaty between the US and Chile took a significant step toward ratification as it cleared the US Senate Foreign Relations Committee.

» Belize and Cameroon deposited their instruments of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the OECD.

» Brazil's government and the OECD held a meeting to introduce proposed changes to Brazilian transfer pricing legislation.

» The German Ministry of Finance (MoF) confirmed that a non-EU subsidiary may make a tax-free repayment of capital to a German corporate shareholder and it set forth related rules and documentation requirements to prove the character of such a repayment.

» Germany's lower tax court of Saxony ruled that separate share acquisitions in a given year should not be considered separately when determining whether the required 10% minimum shareholding is met for purposes of the participation exemption for dividends.

VAT Cases & VAT News

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

VAT Cases

» Grundstücksgemeinschaft Kollaustraße 136 (GK13) v Finanzamt Hamburg-Oberalster Case C9/20, concerned the interpretation of Article 167 of the VAT Directive and the time at which the right to deduct input VAT arises.

» Berlin Chemie A. Menarini SRL v Administrația Fiscală pentru Contribuabili Mijlocii București – Direcția Generală Regională a Finanțelor Publice București C-333/20 dealt with the interpretation of Article 44 of the VAT Directive and Article 11 of the Implementing Regulation EU 282/2011 (IR) in the context of the place of supply of services and the concept of fixed establishment.

» Skatteverket v DSAB Destination Stockholm AB (DSAB) C-637/20 examined the definitions and rules applicable to vouchers, single purpose vouchers and multi-purpose vouchers on a touris "citycard" in Stockholm.

» Happy Education SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca, Administrația Județeană a Finanțelor Publice Cluj, C-612/20 examined the exemption for education, vocational training and retraining.

Tax Appeals Commission Determinations

» 33TACD2022 examined if certain services, namely acupuncture, chiropractic and psychology services, provided by the appellant were exempt from VAT or liable to VAT at the reduced rate

Feature Articles

President's Pages

Karen Frawley
President, Irish Tax Institute

It has been a busy quarter on all fronts in the Institute; it has also been a particularly eventful one as we inched our way back from online through hybrid to in-person gatherings. Our Annual Tax Summit, which took place over three days in late March and early April, was livestreamed from the Institute office to an audience of over 500 members.

In mid-May the Minister for Finance, Paschal Donohoe TD, delivered his opening address to our Global Tax Policy event from our pop-up studio in Longboat Quay. It was a far cry from Dublin Castle, but it was great to have the Minister with us in person. Over the two-day event other distinguished guests, including the Revenue Chairman, Niall Cody, came to our studio to participate in panel discussions with 11 international speakers who joined us virtually from all over the world.

On 2 June we broke free from the virtual world with our return to the Clayton Hotel on Burlington Road for the Institute's Annual Dinner. It felt so good to be back!

Annual Dinner

This was the first big in-person event since the 2020 Annual Dinner, which we managed to get in just before Covid arrived in Ireland.

The relief of having survived the worst of the pandemic and the joy of the return to our big social bash of the year combined to make it a memorable event. And as anyone who attended will attest, the enthusiasm of members for a night out hasn't waned one bit over the last two years!

Our guest of honour, the Minister for Public Expenditure and Reform, Michael McGrath TD, paid generous tribute to the Institute and its members for our positive engagement during the pandemic, and it was gratifying to hear him say: "Your Institute made a difference, and on behalf of Government, I thank you for it."

He said that a strong and stable tax regime was fundamental to the country's success and that it required policy-makers to work in a spirit of collaboration with tax experts. He also said this engagement would continue to be important in the context of the current changes to the tax landscape.

In my own speech I pointed to the critical importance of ensuring that our corporate tax code is competitive now that Ireland has signed up to a global effective minimum rate and the risks of being outbid by other countries.

I also drew attention to the difficulties that our personal tax regime is creating for businesses seeking to attract highly skilled workers to Ireland. As any employer will tell you, our high effective tax rates at relatively modest salaries are now a real issue and have become an obstacle to growth in businesses and the wider economy.

We all know that the Government needs to raise revenue to pay for the improvement in public services demanded by the public in the wake of the pandemic. But in tax it is important to be aware of unintended consequences. Any decision to increase the cost of employment could do serious damage to our economy in the current tight and highly mobile labour market.

After the speeches it was unbounded chatter and laughter as members mingled, and even though it was a school night, many of our guests lingered until the small hours. It was heartening to see that, in this respect at least, nothing has changed.

HKS Global Tax Policy Event

Another flagship event for the Institute is our biennial Global Tax Policy Conference, which we host in partnership with the Ash Center at the Harvard Kennedy School. This year's event, which took place on 16 and 17 May, was the fourth occasion on which we joined forces with the Ash Center to provide this forum for discussion on developments in international tax.

Our first conference took place in 2013 just as international tax reform was gathering pace, and over the last nine years each conference has tracked the progress in that process. In his keynote address the Minister for Finance, Paschal Donohoe, recalled that the 2019 conference – at which he was also our guest of honour – took place just as the OECD had proposed a two-pillar solution to the tax challenges of globalisation. And we all know what happened next!

Over the two days of this year's event, the Professional Services team lined up an impressive array of leading figures in tax who were beamed in from various parts of the globe to discuss the latest topics in international tax policy, and inevitably the prospects for the successful implementation of the Framework Agreement were the hot topic.

Minister Donohoe – who is also President of the Eurogroup – said that he was confident that agreement would be reached on the EU Minimum Tax Directive to transpose Pillar Two into EU law and that legislation to give effect to that agreement would be included in Finance Bill 2023.

Few were willing to make a call on whether the US administration will succeed in getting its tax reform programme over the line in Washington. Pascal Saint-Amans, the main architect of the OECD-brokered two-pillar solution, was optimistic that once the EU implements the agreement, the US will follow suit. But in the concluding session Brian J. Arnold, senior adviser at the Canadian Tax Foundation, said it was 50:50. He added: "I look forward to seeing in 12 months' time if those two pillars are standing tall and proud, or whether they've collapsed in a heap of rubble."

There were some fascinating discussions during both webinars, and although we will all be glad to return to an in-person conference in Dublin Castle in 2024, it was a great achievement to keep up the momentum behind this valued biennial event by hosting it online. Well done to Úna Maguire and her team, and congratulations to those who expertly chaired the sessions over the two days. That job demands a lot of preparation and skill, and thank you for your generosity on both counts.

Reception for Newly Qualified CTAs

As President I have spoken at virtual conferring ceremonies, but until 16 June I hadn't met a single newly qualified CTA in person. Therefore it was a real privilege to host a special reception in the Royal College of Physicians to recognise the achievement of those new colleagues who graduated from the Institute over the last two years.

As we all know, the CTA exams are daunting at the best of times, but completing them online at the height of the pandemic was a whole other level of achievement that they should be proud for the rest of their lives.

Like most of us, our new member colleagues have moved to hybrid working, and in that new model there is a risk of missing out on the kind of networking opportunities that can be of such benefit in a career. The Institute is cognisant of this risk and will work with new members to find ways of bringing them together for the valuable interaction with peers that has helped us all in our lives.

It was great to be able to meet this resilient group in person and to wish them well in their careers.

Submissions

Public consultations – both international and domestic – have been coming thick and fast since the beginning of the year. In this quarter the Policy and Technical team responded to six consultations, and more fall due in the coming weeks.

The consultations on the R&D tax credit and the KEEP share scheme are of particular interest, as both of these measures will be critical to our competitiveness in the current economically difficult and uncertain trading environment.

The R&D tax credit is one of the few competitive levers left to us, and it is essential that it is considered a "qualified refundable tax credit" for the purposes of the OECD Model Rules on Pillar Two. Accelerating the refund to one year for all businesses would clearly demonstrate that the credit meets the requirements of a "qualified refundable tax credit", while also providing valuable assistance to smaller companies that tend to be cash constrained.

We also need legislative clarification to ensure that rent is a qualifying cost. It is a substantial cost for most SMEs, and the change in Revenue's guidance in July 2020 has significantly narrowed the circumstances in which rent may qualify, which has affected the attractiveness of the credit to SMEs.

The KEEP share scheme should be inundated by small businesses seeking to improve their packages for key staff in the current tight labour market. But the reality is that a very limited number of companies avail of the scheme. As I said in my address at the Annual Dinner, it's just not working. In our submission the Institute made some detailed recommendations, most of which we have made before. Let's hope that some of them will be taken on board on this occasion. You can read more about our submissions this quarter in "Policy and Legislation Monitor" in this issue.

Meanwhile, the team is working on the Institute's Pre-Budget and Pre-Finance Bill submissions to ensure that your concerns and ideas are brought to the attention of the Government as it begins work on the formulation of Budget 2023.

New Compliance Intervention Framework

Revenue's new Compliance Framework and revised Code, which came into effect on 1 May, is, without doubt, the tax administration issue of most concern to our members.

The Institute had extensive and constructive engagement with Revenue at TALC on the Framework and Code in the development phase. The new regime has significant implications for all taxpayers, and it is not yet clear how it will work in practice.

Our Annual Tax Summit featured a very informative session on the new Framework delivered by Aidan Lucey of PwC. It was followed by a Q&A session in which Sarah Waters of Revenue's Accountant General's and Strategic Planning Division answered members' questions and provided some useful clarifications on the practical application of the new Framework and Code.

The Institute has also provided detailed updates on Revenue clarifications in TaxFax. We will continue to monitor the experience of its application to ensure that taxpayers' interests are protected, and we will continue to liaise with Revenue.

Conclusion

These are my last "President's Pages" for *Irish Tax Review* – the months flew by! Although I will remain in the role until early September, I want to take this opportunity to thank members for your support and for your service to the profession over the last year.

Thanks also to my fellow Council members and the immediate Past President, Sandra Clarke, for their help and advice during my term. And a special word of thanks to all of the members who contribute to all areas of the Institute's work. Your valuable and selfless work benefits the entire profession, and I want personally to acknowledge that.

It has been an honour to preside over many Institute events during my term, and I was particularly delighted that over 800 of us could come together to enjoy our Annual Dinner in early June.

My one regret is that we couldn't have an in-person conferring ceremony. I think we can all agree that, with due respect to Zoom, there is no substitute for the big live gathering of peers that makes conferring ceremonies so memorable. Now that we are over the worst of the pandemic, I know that plans are afoot to return to the O'Reilly Hall in November.

It has been my privilege to serve as your President, and my best wishes go to my successor and current Deputy President, Colm Browne.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

When this time last year is compared to now, it's clear that we have come a long way. The important Covid-19 supports are being wound down, with Revenue doing the final checks to make sure everything is in order. Thousands of people are flocking to outdoor concerts across Ireland. And our flagship event, the Annual Dinner, was able to take place once again!

Yet we face new challenges. Inflation makes headlines daily. The war in Ukraine continues without an end in sight. Fuel prices and food supplies are causing worry. And issues with the Northern Ireland Protocol are causing political turmoil and indecision, elongating the uncertainty for our island.

The Institute will continue to help you to keep abreast of the evolving tax landscape so you can support your clients through these unsettled waters.

Education

In the last three months our autumn 2021 students finished lectures, sat exams and received their results – except for Part 3 students, who will receive their results in the coming weeks. Congratulations to all who were successful, and to those who didn't receive the results they wanted, the Institute is here to support and help you reach your goal.

The summer lectures have begun, with healthy numbers across our courses. They will run until the end of July, and the students will sit their exams in August. Best of luck to all our summer students with their studies.

One of our objectives is to get tax in front of second- and third-level students as early as possible. In that context, at the end of April we showcased the opportunities that the world of tax offers to transition year (TY) students at the School Summit, held in Mayo. It was our first face-to-face careers fair event since late 2019. There is a lot of competition from other career options, each trying to attract graduates. Yet our stall received plenty of interest from students and teachers alike. To our delight, some schools have included tax as part of the TY curriculum, which has garnered great enthusiasm from their students.

The application deadline for our Third-Level Scholarship closed recently. The scholarship offers one Leaving Cert 2022 student financial support through college and a place on the Chartered Tax Adviser (CTA) programme after they graduate. The dedicated selection panel will consider each application, a lengthy process thanks to the volume of applications received. The winner of the scholarship will be announced in autumn 2022.

The Fantasy Budget is our annual competition encouraging undergraduate students to explore the Budget, critically analyse key measures and propose their own measures. Fantasy Budget 2022 saw applications with a creative, entrepreneurial flair come from eight third-level educational bodies in Ireland. Congratulations to our first-place winners from Trinity College Dublin, who, under the guidance of their lecturer, Ciara Deane, examined remote working relief; the 32% relief on design, production and testing expenditure for digital gaming companies; and the interest limitation rule – an impressive feat. They proposed a sustainable innovator tax credit in response to the climate crisis. Well done to all involved.

Policy and Representations

First and foremost, thank you to everyone who responded to our surveys. Your feedback shaped our most recent submissions, and without your valued input we cannot fully represent the concerns of you and your clients.

Since April we have made six submissions to stakeholders in Ireland and abroad, including responses to:

- The European Commission's consultation on the proposed Directive to prevent the misuse of shell entities, also known as the Unshell or ATAD3 Directive. We emphasised the need to evaluate the full impact and effectiveness of the extensive EU and international tax reforms before determining if the proposed additional measures in the Directive are necessary.
- The OECD's consultation on the Pillar Two GloBE Implementation Framework. Our response outlined your feedback under five headings – the importance of guidance; a standardised GloBE information return; the imposition of penalties; the development of safe harbours; and mechanisms to maximise tax certainty and avoid the risk of double taxation.
- The Department of Finance's consultation on the R&D tax credit and Knowledge Development Box. We submitted 18 recommendations from the practical experiences shared with us by you and businesses in Ireland in response to our survey.
- The Department of Finance's consultation on the KEEP. We reiterated the need for six key reforms to the existing legislation to improve the uptake by SMEs based on the priorities identified by you in our survey.

The Policy & Reps team is also finalising the Institute's Pre-Budget 2023 and Pre-Finance Bill 2022 submissions to the Minister for Finance in conjunction with our Policy & Technical Committee.

The Branch Network has been hard at work, addressing issues with the Large Corporates Division, Medium Enterprises Division and Personal Division. A detailed update on this engagement was sent to members on 20 June 2022. At the same time, TALC has been remarkably busy. In June, in-person meetings of Main TALC and seven sub-committees took place. We will keep you updated on the important developments from these meetings.

As you are aware, Revenue's new Code of Practice for Revenue Compliance Interventions has been in effect since 1 May 2022. We are monitoring its implementation in practice and will be in contact with you later in the year looking for feedback.

Professional Services

The Annual Tax Summit 2022 was hosted online once more. With more than 560 people tuning in over the thee days, each panel provided attendees with updates on and insights into topical tax and related issues such as tax technology – an increasingly prominent area of focus for tax professionals. Thanks to all of our speakers and attendees for another great summit.

The international tax policy landscape is ever evolving. Our international ties are imperative to ensuring that you and the Institute know how each stream of the global tax reforms is progressing. In that context, our work with Ash Center, Harvard Kennedy School, is very important, and we were delighted to host our fourth joint Global Tax Policy event in mid-May. Over the two-day virtual event we had 11 international speakers, including the Minister for Finance, Paschal Donohoe TD, tackling the topics of international tax reform; digital tax administration; climate and tax; and a five-year tax forecast for every continent. Thank you to all of our speakers for providing valuable information and helping the attendees to digest it.

With in-person events allowed again, we are offering hybrid CPD. We have had three hybrid events now, and it is great to see people back in the room and engaging with our expert speakers. We are finalising our autumn/winter CPD programme now and will continue to offer hybrid CPD events for the rest of the year.

Finance Act 2021 – The Professional's Guide is available soon. Thank you to our authors and editor for providing expert section-by-section analysis of the legislation: Emma Arlow, Paul Nestor and Denis Herlihy. Those who attended our Finance Bill/Act webinars on 3 November 2021 and 3 February 2022 will receive their complimentary copy of *Finance Act 2021 – The Professional's Guide* over the coming weeks. You can also order it separately from taxinstitute.ie or by contacting Michelle Byrne (mbyrne@taxinstitute.ie).

Thank you for your continued support of the Institute and its work. All members have access to *Taxation Summary: Finance Act 2021* in soft-copy format through TaxFind and as an ebook download in your Dashboard (under My Publications). A PDF of the tax rates and tables is also available under My Publications. Shortly we will start the delivery of *Taxation Summary: Finance Act 2021* to all members who paid their membership fees by 31 May 2022. Additional copies are available to order from taxinstitute.ie.

We are excited to announce a new title that will be published this autumn. *Valuations for Tax Purposes* by Marie Flynn, PwC, will be available to order from our website shortly. It will be a valuable reference for Chartered Tax Advisers (CTAs), students, lawyers, accountants and all readers with an interest in this key area.

Annual Dinner 2022

We were absolutely delighted to host the Annual Dinner in early June. If you had asked me 12 months ago whether Annual Dinner 2022 would happen, I would have been quite sceptical. Thankfully, on 2 June we welcomed over 800 guests to the Clayton Hotel, Burlington Road, for an enjoyable evening. The atmosphere was great, with the hum of chatter filling the room as old friends and new colleagues caught up on the past two years.

Thank you to everyone who came, especially our guest of honour, the Minister for Public Expenditure and Reform, Michael McGrath TD, and I would like to extend the thanks to the team in the Institute, who did not miss a beat in organising our flagship event after two years.

President's Reception for CTA Classes 2020 and 2021

The pandemic put paid to our in-person conferring ceremony two years in a row. Both occasions were marked with virtual ceremonies, allowing our new members to celebrate safely with their family and friends. Despite the success of the virtual events, we sorely missed the interaction between the conferees and ourselves.

Considering that, we organised a reception for all of the 2020- and 2021-qualified CTAs as an opportunity for them to connect with their classmates and the Institute team. It was an enjoyable evening at the Royal College of Physicians; spirits were high; and networking was in full flow. We look forward to meeting more of our new members in the future and collaborating with them throughout their careers.

Policy and Representations Monitor

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

News Alert

News Alert

Revenue's new Code of Practice for Revenue Compliance Interventions, effective from 1 May 2022

Revenue's new Code of Practice for Revenue Compliance Interventions ("the new Code") came into effect on **1 May 2022** and applies to all interventions notified from that date. It replaces the Code of Practice for Revenue Audits and Other Compliance Interventions ("the 2019 Code"). Compliance interventions in progress before 1 May 2022 will continue under the 2019 Code. The new Code applies to all taxes and duties (except customs).

The new Code reflects Revenue's new Compliance Intervention Framework ("the Framework"), which also came into operation on 1 May 2022. The Framework introduces substantial changes to Revenue's long-standing approach to compliance interventions and consequential changes to disclosure opportunities.

All new Revenue compliance interventions notified from 1 May will be dealt with under the new Code and classified as Level 1, Level 2 or Level 3 Revenue compliance interventions. Use of the aspect query designation will cease from 1 May.

The Institute has a range of information resources for members on these important developments to the new Code and Compliance Intervention Framework. Issue 1 of *Irish Tax Review* 2022 includes three articles covering the new Code and Framework and related legislative changes to the publication threshold for settlements; amendments to disclosures in relation to offshore matters; and Institute representations.

The Institute has also provided members with complimentary access to the webinar on the new Code and Framework that featured in Stream 3 of the Annual Tax Summit on 1 April 2022. This webinar includes a presentation by Aidan Lucey of PwC and a Q&A with Sarah Waters from Revenue's Accountant General's and Strategic Planning Division. The recording can be found in the complimentary CPD section on Blackboard Learn.

The Institute has engaged extensively with Revenue on the new Code and Framework during their development and updated members on our representations, issues of concern and clarifications received from Revenue. We outlined several concerns about the new Framework to Revenue and notified members of our representations and important clarifications in TaxFax on 11 February and 29 April 2022.

Most recently, the Institute has made suggestions to Revenue regarding the standard text of compliance intervention notifications to help taxpayers understand their entitlements when responding. We have also requested that the list of information that Revenue seeks to be made available for an audit or risk review outlines specifically what Revenue requires.

To safeguard against the risk that a desk-based risk review could begin without the taxpayer's or adviser's knowledge if a letter is misdirected or overlooked, the Institute sought that a reminder letter would issue within the 21-day period to notify of an intention to make a disclosure. We understand that Revenue has developed an automated reminder in the notification process.

In the months ahead the Institute will gather members' feedback on the volume of interventions and the levels at which they are instigated, to raise any concerns regarding patterns of activity with Revenue compliance policy personnel at an early stage. Revenue has advised the Institute that Level 2 interventions will be instigated where a specific tax risk has been identified and that their use will not replicate the broad use of aspect queries. During our engagement the Institute had raised concerns about the scope of risk reviews and their potential implications regarding costs and risks for businesses and tax advisers.

The Institute will also update members on significant developments in Revenue's compliance intervention activities notified to us through our Branch Network engagement with Revenue. We have a dedicated webpage on Revenue Compliance Interventions, where we are collating written submissions, together with Institute and Revenue information resources, for members on the new Code and Framework.

Developments on Pillar Two GloBE Rules

On 14 March 2022 the OECD released Commentary on the Pillar Two Global Anti-Base Erosion (GloBE) Model Rules. The GloBE Rules provide a coordinated system to ensure that multinational enterprises (MNEs) with annual revenues over €750m pay a minimum effective tax rate on the income arising in each of the jurisdictions in which they operate.

The Commentary is intended to promote a consistent and common interpretation of the GloBE Rules, which were published by the OECD on 20 December 2021, to facilitate coordinated outcomes for both tax administrations and MNEs.

OECD consultation on GloBE Implementation Framework

The next step in the OECD's work on the GloBE Rules is to develop the Implementation Framework outlined in the Statement on a Two-Pillar Solution to Address the Tax Challenges of the Digitalisation of the Economy ("the October Statement"). The Implementation Framework will facilitate the coordinated implementation and administration of the GloBE Rules and provide agreed administrative procedures, such as filing obligations, and multilateral review processes. It will also consider the development of "safe harbours" to facilitate both compliance by MNEs and administration by tax authorities. To assist with this next step, a public consultation was launched by the OECD on 14 March 2022 to inform the development of the Implementation Framework. The Institute issued a Tax Policy & Reps Bulletin on 15 March that included further details on the Commentary and the consultation.

On 11 April 2022 the Institute responded to the OECD public consultation on the Implementation Framework of the Pillar Two GloBE Model Rules. Our response emphasised the importance of clear and comprehensive guidance in ensuring the effective and consistent implementation of the rules and that such guidance would need to be developed and updated on an evolving basis, as taxpayers and tax authorities seek clarification on the operation of the rules during the initial years of implementation.

We proposed that the OECD develop a standardised GloBE information return to provide uniformity in the information required across jurisdictions, giving certainty to taxpayers as they seek to design and implement the system changes necessary to capture the required information.

We emphasised that in the initial years of implementation a collaborative and proportionate approach to penalties should be adopted by tax authorities and that the OECD should confirm this in guidance. We also highlighted the need for multinational groups to understand the scope of any safe harbours at the earliest opportunity if they are to be effective in reducing the compliance burden.

Finally, we recommended that the GloBE Implementation Framework provide clear guidance on what constitutes a qualified Income Inclusion Rule (IIR) and include a tracking mechanism for an approved list of qualified IIRs, to provide more certainty to tax administrations and taxpayers and help to avoid the lengthy disputes that are likely to arise and the risk of double taxation.

The OECD published the comments that it received from stakeholders on the Pillar Two GloBE Implementation Framework before the public consultation meeting, which took place on 25 April 2022. The general consensus from the feedback to the consultation is that stakeholders want clarity and simplification. The themes from the responses were summarised at the meeting and covered four main areas: potential topics that would benefit from further administrative guidance; information collecting and compliance obligations; the possible design of safe harbours; and rule coordination and tax certainty.

European Commission's proposed Directive to implement the GloBE Rules into EU law

Meetings of the Economic and Financial Affairs Council (ECOFIN) took place on 15 March and 5 April 2022, with Finance Ministers discussing the European Commission's proposed Directive to implement the GloBE Rules into EU law, which was published in December 2021. The Commission requested feedback on the proposed Directive from stakeholders by 6 April 2022.

Although EU Member States made progress on the Directive, they were unable to reach agreement on the compromise text at the April or May ECOFIN meetings, with one Member State, Poland, opposing the proposed Directive. The proposed Directive was discussed again at the meeting of ECOFIN on 17 June 2022, however, Hungary which had previously supported the proposed Directive, stated it could no longer support the adoption of the Directive, referencing factors such as the unfavourable geopolitical situation arising from the war in Ukraine, increasing prices of energy and commodities, inflation and interest rate increases and their impact on economic growth. In his press remarks, the French Minister of Economy, Finance and Recovery, Bruno Le Marie, stated that the French Presidency remains determined to reach conclusion on the Directive under their Presidency. The Czech Republic Presidency of the European Council commences on 1 July.

OECD consults on building blocks for Pillar One Amount A

As part of the two-pillar solution to address the tax challenges arising from digitalisation of the economy, the OECD Inclusive Framework on BEPS has been consulting with stakeholders on a number of aspects of Pillar One since early 2022.

The Inclusive Framework is releasing OECD Secretariat working documents (Draft Model Rules) on each building block for Amount A of Pillar One in stages to obtain feedback quickly and before the work is finalised. The rationale for taking this approach, rather than waiting for a comprehensive document to be ready, is to allow work to continue in parallel, in order to remain within the political timetable agreed in October 2021.

The Model Rules are being developed to provide a template that jurisdictions could use as the basis to give effect to the new taxing rights over Amount A in their domestic legislation. The Model Rules will be supported by a Commentary.

OECD releases Draft Model Rules on Amount A of Pillar One

At the time of writing, the OECD has undertaken five consultations on the building blocks for Amount A of Pillar One:

- On 4 February a consultation on Draft Model Rules for Nexus and Revenue Sourcing was launched. According to the introductory statement, the new special-purpose nexus rule applies solely to determine whether a jurisdiction qualifies for profit reallocation under Amount A and will not alter the nexus for any other tax or non-tax purpose. The purpose of the revenue-sourcing rules is to allow in-scope multinational enterprises to identify the relevant market jurisdictions from which revenue is derived and to apply the revenue-based allocation key.

- On 18 February a consultation on Draft Model Rules for Tax Base Determinations was launched. The purpose of the rules is to establish the profit (or loss) of an in-scope MNE that will be used for the Amount A calculations to reallocate a portion of its profits to market jurisdictions. The rules determine that profit (or loss) will be calculated on the basis of the consolidated group financial accounts, while making a limited number of book-to-tax adjustments. The draft rules did not include the tax base rules that will be necessary for in-scope MNEs that are subject to segmentation for Amount A purposes as these will be released at a later date.

  The draft rules on tax base determination also included provisions for the carry-forward of losses. The introduction of time limitations on the utilisation of net losses was also considered, a question that is still under discussion within the Task Force on the Digital Economy.
- On 14 April a consultation on the extractives exclusion was released. The extractives exclusion will exclude from the scope of Amount A the profits from extractive activities.
- On 4 April a consultation on the Draft Model Rules for Domestic Legislation on Scope was launched. The purpose of the scope rules is to determine whether a group will be in scope of Amount A. The rules are designed to ensure that Amount A applies only to large and highly profitable groups and have been drafted to apply in a quantitative manner, so that they are readily administrable and provide certainty on whether a taxpayer is within scope.
- On 6 May a consultation on the Draft Model Rules for Regulated Financial Services Exclusion was launched. The regulated financial services exclusion will exclude from the scope of Amount A the revenues and profits from regulated financial institutions. The defining character of this sector is that it is subject to a unique form of regulation, in the form of capital adequacy requirements, that reflect the risks taken on and borne by the firm. The scope of the exclusion derives from that requirement, meaning that entities that are subject to specific capital measures, and only those, are excluded from Amount A.

Although the Draft Model Rules were agreed for release by the Inclusive Framework to obtain public comments, they do not reflect consensus regarding the substance of the documents.

At the time of writing, the OECD had released the public comments that it had received in response to the above-mentioned consultations, apart from the consultation on the regulated financial services exclusion.

Institute responds to consultation on Draft Model Rules for Nexus and Revenue Sourcing under Amount A of Pillar One

On 18 February the Institute responded to the OECD public consultation on the Draft Model Rules for Nexus and Revenue Sourcing under Amount A of Pillar One. In our letter we noted how the interaction of the thresholds for the purpose of the nexus test with the revenue-sourcing rules in borderline cases could give rise to disputes. Therefore, it is essential to have a clearly defined dispute resolution mechanism for such cases.

We highlighted the inherent complexity of the transaction-by-transaction basis proposed under the draft rules for revenue sourcing, which will necessitate businesses rebuilding their systems to document their approach to revenue sourcing. We emphasised the need for detailed guidance on various aspects of the rules and stressed the importance of close engagement with business, throughout the development of the Model Rules and the Commentary, to ensure that the practical challenges and the complexities involved for businesses can be fully understood. As businesses will require certainty regarding the operation of the Model Rules before rebuilding their systems, the impact of any potential delays in the publication of the final Model Rules and the Commentary must also be considered.

Next steps

A public consultation document will be issued in mid-2022 for Amount B of Pillar One, with a public consultation event to follow the feedback period.

The Institute will keep members updated on developments throughout 2022.

Institute tax policy submissions

Consultation on proposed Directive to prevent misuse of shell entities

On 5 April 2022 the Institute responded to the European Commission's call for feedback on the proposed Directive laying down rules to prevent the misuse of shell entities for tax purposes, known as "the Unshell Proposal" or "ATAD3".

In our response we highlighted how the stated aim of ATAD3, which is to combat tax avoidance and evasion practices directly affecting the functioning of the Internal Market, overlaps with the primary objective of extensive EU and international tax reforms that have been implemented in recent years and the further measures that will shortly be transposed into the domestic legislation of EU Member States.

We emphasised the need to evaluate the full impact and effectiveness of these extensive tax reforms before determining whether the additional measures proposed in ATAD3 are necessary, given that existing transfer pricing and controlled foreign company (CFC) rules would appear to tackle many of the issues that the proposed Directive seeks to address.

In our submission we raised concerns that ATAD3 could potentially infringe the EU fundamental freedoms of establishment and movement of capital and does not reflect the judgments of the Court of Justice of the European Union that have determined the circumstances in which tax laws can impose restrictions on the fundamental freedoms.

Finally, our submission detailed a number of fundamental practical issues with the proposed Directive, which highlight the disproportionate outcomes that are likely to arise in many circumstances, and outlined some technical observations on several articles in ATAD3.

Consultation on a territorial system of taxation

On 7 March 2022 the Institute responded to the Department of Finance's public consultation on moving from a worldwide tax system to a territorial system of taxation. In responding to the consultation questions on the possibility of adopting a participation exemption for dividends and/or a foreign branch exemption in the Irish corporation tax code, we made 19 detailed recommendations and emphasised the following key matters that policy-makers should consider when evaluating a move to a territorial system of taxation:

- A participation exemption for dividends and a foreign branch exemption should be adopted into Irish tax legislation to help simplify the Irish 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.
- If policy-makers do not intend to include measures in Finance Bill 2022 to introduce a participation exemption and foreign branch exemption into Irish law, we urged the Government to provide a firm commitment this year to introduce such measures, setting out a clear timeline for implementation. Such a commitment would provide the necessary certainty to business over a critical issue that is already a key influential factor in the decision-making process regarding long-term future investments in Ireland.
- Given the base erosion protections that exist in Ireland's corporation tax code, including

CFC rules, extended transfer pricing rules, ATAD interest limitation rules and anti-hybrid rules, we believe that the rules governing a participation exemption and a foreign branch exemption should be clear and simple with limited exceptions and that the exemptions should have a broad territorial scope.

- Both a participation exemption for dividends and a foreign branch exemption should be at the election of taxpayers.
- Although the introduction of a participation exemption and a foreign branch exemption must be the priority, we also recommended that simplification of Schedule 24 TCA 1997 be undertaken. Such simplification is necessary even if Ireland adopts a participation exemption for dividends and a foreign branch exemption, as Schedule 24 will continue to have application to foreign income that is outside the scope of such exemptions.

Consultation on transposition of Public CbCR Directive

On 18 February 2022 the Institute responded to the Department of Enterprise, Trade and Employment (DETE) public consultation on the transposition into Irish law of the EU Directive 2021/2101/EU, also known as the Public Country-by-Country Reporting (CbCR) Directive. 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 they pay.

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. 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 Directive allows two policy options for Member States to consider when transposing into national law, and these options were the focus of the DETE consultation. In our submission we recommended that Ireland adopt both of the policy options permitted under the Directive.

The first policy option would allow information to be temporarily omitted for a period of up to five years from the report on tax information where its disclosure would be seriously prejudicial to the commercial position of the undertaking.

In our response we highlighted the importance of ensuring that the Directive's objective of achieving corporate transparency is balanced with the need to protect against the disclosure of commercially sensitive information. Otherwise, the measure could result in unfair competition for undertakings within the scope of the Directive compared with businesses that are out of scope.

As the Directive provides that any omission of commercially sensitive information would be temporary and the undertaking availing of the option must clearly indicate this on the report and provide a duly reasoned explanation, we recommended that an undertaking should have the option to temporarily delay the disclosure of commercial sensitive information. We also recommended that the decision regarding whether the disclosure of the information would be seriously prejudicial should be a matter for the directors of a company, as they are best placed to make this decision.

The Directive also provides Member States with the option to exempt undertakings from publishing the report on their website subject to the condition that the report is simultaneously made accessible to the public on the Companies Registration Office website and is free of charge to any third party located in the EU. Given the strict criteria that would apply should an undertaking avail of this option and as the exemption does not in any way detract from the corporate transparency that the Directive is seeking to achieve, we recommended that the option to avail of the exemption be included in Irish legislation.

All of the above submissions are available on the Institute's website, www.taxinstitute.ie.

Public consultation launched on R&D tax credit and KDB

On 14 April 2022 the Department of Finance launched a public consultation on the Research and Development (R&D) tax credit and the Knowledge Development Box (KDB). The purpose of the public consultation is to consider the current challenges facing firms that are active in R&D, as well as the implications of recent domestic and international tax reforms for both reliefs. This tax review will consider the potential impacts of the agreement reached at the OECD/G20 Inclusive Framework on BEPS on the R&D tax credit and the KDB, in particular the Pillar Two GloBE Rules. All input received will be considered in the context of this year's Budget and Finance Bill.

Interested parties are invited to respond to 15 specific questions, although not all questions need to be answered. Respondents are also invited to provide details of any alternative approaches or options that might be beneficial in addressing the matters under consideration, highlight any relevant issues not covered in the consultation paper and comment generally on their preferred direction of tax policy in this area. The consultation will run until **30 May 2022**.

At the time of writing, the Institute is drafting its submission in response to this public consultation.

Public consultation launched on a new EU system for withholding taxes

On 1 April 2022 the European Commission launched a public consultation questionnaire on a new EU system for withholding taxes. Input received will feed into a legislative initiative planned for adoption in the fourth quarter of 2022. The aim of the initiative is to introduce a common, EU-wide system for withholding tax on dividends or interest payments. It will also include a system for the exchange of information between tax authorities. The consultation period runs until **26 June 2022**.

At the time of writing, the Institute is drafting its submission in response to this public consultation.

Policy News

New workplace pension scheme for Ireland announced

On 29 March the Minister for Social Protection, Heather Humphreys TD, announced the details of the "Final Design Principles of an Automatic Enrolment (AE) Retirement Savings System for Ireland".

Ireland is the only OECD country that does not operate an auto-enrolment or similar system as a means of promoting pension savings. The aim of automatic enrolment is to address this pension coverage gap. It will apply to all employees who meet certain age and earnings criteria and who do not already have an occupational pension plan. Employees will make contributions from their salary, which their employer will be required to match, and the State will make a top-up contribution. Participation in the new scheme will be voluntary, and workers will have the ability to opt out.

The system will be set up by 2023 for employee enrolments in 2024. Auto-enrolment will be very gradually phased in over a decade, with both employer and employee contributions starting at 1.5% and increasing every three years by 1.5% until they eventually reach 6% by Year 10 (2034). All employees who are not already in an occupational pension scheme, who are aged between 23 and 60 and who earn over €20,000 across all of their employments will be automatically enrolled.

Administrative costs and burdens will be kept to a minimum for both employers and employees through the establishment of a Central Processing Authority to administer the system.

The design principles agreed by the Government will now form the basis for drafting the required legislation and putting the necessary operations in place.

UK Spring Statement 2022[1]

On 23 March 2022 the UK Chancellor of the Exchequer, Rt. Hon. Rishi Sunak MP, presented the Spring Statement to the UK Parliament, which included a Spring Statement Tax Plan to bring together proposals to reduce and reform taxes. Measures announced in the Tax Plan included:

- Increasing the National Insurance threshold from July 2022 to align it with the income tax personal allowance.
- Reducing the basic income tax rate from 20% to 19% from 2024.
- Increasing the employment allowance to £5,000 from April 2022.
- Temporarily reducing fuel duty on petrol and diesel by 5 pence per litre for 12 months from 23 March 2022.
- Reducing the VAT rate on energy-saving materials from 5% to 0% for a limited period.
- Improvements to research and development tax reliefs, including broadening the scope of the schemes to include the costs of pure mathematics research, cloud computing and data storage as qualifying expenditure. The UK Government will also legislate for expenditure on overseas activities to qualify where material or regulatory requirements make it necessary for these activities to be carried on overseas. Draft legislation covering these changes is expected over the summer and will take effect from April 2023.
- Reform measures are being considered for capital allowances once the temporary enhanced first-year capital allowances, i.e. "super-deduction", ends in April 2023.

European Commission adopts Implementing Regulation to combat VAT fraud

On 6 April the European Commission adopted a Commission Implementing Regulation that provides essential details for payment service providers on how to report payment data in a harmonised format. This follows the adoption by the European Council of a legislative package on 18 February 2020 to collect payment data in order to combat e-commerce VAT fraud, estimated at around €5bn in 2015.

The legislative package adopted by the Council envisaged the creation of an EU-financed central database, called the Central Electronic System of Payment information (CESOP), where all of the payment data collected will be stored and processed for the benefit of Member States. The CESOP is due to go live on 1 January 2024.

European Commission seeks feedback on rules related to excise duty rates

On 11 April 2022 the European Commission launched a general call for feedback and a more targeted public consultation on the EU framework governing excise duty rates for alcohol. The rules around minimum excise duty rates for alcohol products have not been updated since 1992 and have not kept pace with inflation, the evolution of the market, consumption patterns or growing public health concerns. The aim of the consultation is to gather the views of stakeholders on the minimum excise duty rates for alcohol and alcoholic beverages. The consultation will run until **4 July 2022**.

European Council reviews list of non-cooperative countries for tax purposes

On 24 February 2022 the Council of the European Union adopted conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes and decided to maintain the following countries on the list: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, the US

1 See also article by Patrick Duggan "UK 2022 Spring Statement and What Might Be Next for UK Tax" in this issue.

Virgin Islands and Vanuatu. The revised list (Annex I) includes countries that either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms.

In addition to the list of non-cooperative tax jurisdictions, the Council approved the usual state-of-play document (Annex II) identifying cooperative jurisdictions that have made further improvements to their tax policies or related cooperation. The updates are reflected in the Code of Conduct Group report that the Council also approved.

OECD consultation on new tax transparency framework for crypto-assets and amendments to the Common Reporting Standard

On 22 March 2022 the OECD released a public consultation document concerning a new global tax transparency framework to provide for reporting and exchange of information with respect to crypto-assets, as well as proposed amendments to the Common Reporting Standard (CRS) for the automatic exchange of financial account information between countries. The purpose of the consultation is to inform decisions by policy-makers on the possible adoption of any such framework and its related design components.

The new Crypto-Asset Reporting Framework (CARF) provides for the collection and exchange of tax-relevant information between tax administrations with respect to persons engaging in certain transactions in crypto-assets.

Alongside the CARF, the OECD has also developed proposals as part of the first comprehensive review of the CRS to extend the scope of the CRS to cover electronic money products and central bank digital currencies.

On 2 May 2022 the OECD published the comments that it received in response to the public consultation, and it was to hold a public consultation meeting on the Crypto-Asset Reporting Framework and amendments to the Common Reporting Standard on 23 May 2022.

President Biden announces Budget for fiscal year 2023

On 28 March 2022 the US President, Joe Biden, announced his Budget for the fiscal year 2023. Key tax measures announced as part of the Budget include:

- A new “billionaire’s tax”, which would impose a 20% minimum tax on total income (generally including unrealised capital gains) for taxpayers with wealth greater than US$100m.
- Increasing the top marginal income tax rate to 39.6% for high earners.
- Increasing the corporate income tax rate from 21% to 28%. This would consequently increase the global intangible low-taxed income (GILTI) rate in tandem. The proposal is scored under the assumption of a Build Back Better Act baseline. Therefore, the new GILTI effective rate would be 20%, applied on a jurisdiction-by-jurisdiction basis.
- Repealing the Base-Erosion and Anti-Abuse Tax (BEAT) and replacing it with an undertaxed profits rule (UTPR) that is consistent with the UTPR described in the OECD Pillar Two Model Rules. The UTPR would apply only to financial reporting groups that have global annual revenue of US$850m or more in at least two of the prior four years. In addition, a US domestic minimum top-up tax would be part of the rules to protect US revenues from the imposition of a UTPR by other countries.

The US Treasury also released its “Green Book” for the Biden administration’s fiscal year 2023 revenue proposals, providing general explanations and detailed revenue estimates.

Revenue eBriefs Issued from 1 February 2022 to 30 April 2022

No. 024 Stamp Duty Manuals Updated

The manual on“Section 126AA: Further Levy on Certain Financial Institutions – Bank Levy Part 9” reflects the extension of the bank levy on certain financial institutions to 2022, as provided for by s60 of Finance Act 2021. KBC Bank Ireland plc and Ulster Bank Ireland DAC are excluded.

The manual on“Transfers of Land to Young Trained Farmers Part 7: Section 81AA” has been amended in section 1 to reflect the extension of the relief to the end of 2022, as provided by s59 of Finance Act 2021.

The manual on “Section 125A: Levy on Authorised Insurers – Levy on Health Insurers Part 9” has been amended in section 2 to advise of payment rates for the year 2022, as provided by s8 of the Health Insurance (Amendment) Act 2021.

No. 025 Stamp Duty Levies Manual Updated

The manual “Stamp Duties Consolidation Act 1999 Part 9: Levies”, which provides guidance on stamp duty to be levied on certain financial cards and insurance policies and a levy on financial institutions, has been amended to include guidance on the application of s126C Stamp Duties Consolidation Act 1999. This section provides for a surcharge for the late filing of a return and was introduced by s63 of Finance Act 2021.

No. 026 Third Party Returns – Requirement to Report Information Automatically

Revenue has amended the manual “Third Party Returns: Requirement to Report Information Automatically” to update instructions on filing Forms 8-2, 8B-A, 8-3 and 21R through MyEnquiries or myAccount.

In addition, the manual “Return of Rent/Rent Subsidies Paid by Certain Bodies” has been removed as it is no longer relevant.

No. 027 Guidelines for Registration for IT, CT, RCT, PREM and Certain Minor Taxheads

Revenue’s manual “Guidelines for Registration for IT, CT, RCT, PREM and Certain Minor Taxheads” has been updated at section 7.5 to outline the registration process for Betting Duty.

No. 028 State Aid Transparency Requirements

Revenue’s manual “State Aid Transparency Requirements: Publication of Information Regarding State Aid Granted to Individual Taxpayers” has been updated to include an additional scheme, Acceleration of Wear and Tear Allowances for Farm Safety Equipment (s285D TCA 1997), as it is subject to State Aid transparency requirements.

No. 029 Income Tax Return Form 2021 – ROS Form 11

Revenue has published a new manual “Income Tax Return Form 2021 – ROS Form 11” to highlight updates and changes to the 2021 form. The 2021 Form 11 has been available since 1 January 2022 in both the online and offline ROS facilities and reflects the changes introduced by Finance Act 2021, including updated credits and the increased 2% USC band, and other reporting requirements. The changes and additional questions and validations are referenced in this manual.

The “Personal Details” panel includes an introductory screen, the purpose of which is to:

- set out a chargeable person’s obligations,
- increase awareness about the requirement to file a Form 11, including the applicable gross and net non-PAYE income thresholds, and
- advise filers how to update their Revenue record if their circumstances have changed and they are no longer chargeable persons.

At least one box must be ticked, in respect of either “Self” or “Spouse” before the taxpayer/

agent can continue with the filing. In line with prior years, the ROS Form 11 will be updated in mid-year (May 2022), and the manual will be updated at that time to reflect those changes.

No. 030 Part 10 Enforcement – Sections 127–13A

Revenue has updated the manual "Stamp Duties Consolidation Act 1999 Part 10: Enforcement" to reflect Finance Act 2021 amendments. Part 10 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) contains several enforcement provisions that help to ensure that instruments that are chargeable to stamp duty are presented to Revenue for stamping.

Section 63 Finance Act 2021 introduced a number of amendments to Part 10 to ensure that the electronic statements required to be delivered to Revenue under Part 9 SDCA 1999 (Levies) are subject to the enforcement provisions.

Section 75 Finance Act 2021 amended s134A SDCA 1999, which makes provision for the imposition of penalties, to provide that a tax or duty penalty does not apply where an aggregate tax or duty default does not exceed €6,000 and the default is not in the "deliberate behaviour" category.

No. 031 New Code of Practice for Revenue Compliance Interventions

Revenue has published its new Code of Practice for Revenue Compliance Interventions, which will come into effect on May 1 2022 and will apply to all compliance interventions notified on or after that date.

This Code sets out details of Revenue's revised framework of compliance interventions. This framework provides for a consistent, graduated response to taxpayer compliance behaviour, ranging from easily accessible opportunities to correct errors voluntarily to criminal investigation for serious cases of fraud or evasion.

The revised Code is being published at this time to facilitate preparation for the changes. The existing Code of Practice for Revenue Audits and Other Compliance Interventions will continue to apply to all interventions currently open and any further interventions notified before 1 May 2022.

No. 032 Common Contractual Fund (CCF) February 2022 Filing – Updated Form CCF1 Available

A new version of the Form CCF1 is available on the Revenue website in the "Related Forms" panel. Common Contractual Funds (CCFs) are required to file this updated statement on or before 28 February 2022, including, where applicable, a statement with a nil amount, as provided by s739I TCA 1997. The form should be completed electronically and returned via MyEnquiries to largecasesdiv@revenue.ie.

The Form CCF1 has been updated by the addition of following panels:

- the name of the signatory on the form in plain text,
- the Net Asset Value of the CCF at the end of the accounting period,
- unitholding of each unit holder at the end of the accounting period and
- nature of assets held by the CCF during the year of assessment. This panel should confirm the overall investment strategy of the fund or sub-fund, which should include details regarding the type and general location of the investments.

No. 033 Exempt Unit Trust (EUT) February 2022 Filing – Updated Form EUT1 available

A new version of the Form EUT1 is now available on the Revenue website in the "Related Forms" panel. Exempt unit trusts (EUTs) are required to file this updated statement on or before 28 February 2022, as provided by s731(5)(a)(iii) TCA 1997. The form should be completed electronically and returned via MyEnquiries to largecasesdiv@revenue.ie.

The Form EUT1 has been updated by the addition of the following panels:

- the name of the signatory on the form in plain text,
- the Net Asset Value of the EUT at the end of the accounting period,
- unitholding of each unit holder at the end of the accounting period and
- nature of assets held by the EUT during the year of assessment. This panel should confirm the overall investment strategy of the EUT, which should include details regarding the type and general location of the investments.

No. 034 Stamp Duty Tax & Duty Manual Part 2: Charging and Stamping of Instruments

Revenue has updated the manual "Stamp Duties Consolidation Act 1999 Part 2: Charging and Stamping of Instruments Executed on or after 7 July 2012" by deleting obsolete references to certain Finance Act 2008 amendments from paragraph 2.2.

No. 035 Help to Buy (HTB)

Revenue's "Help to Buy (HTB)" manual has been updated as follows:

- Paragraph 1 confirms that Finance Act 2021 extended the enhanced HTB relief to 31 December 2022.
- Paragraph 2.3 specifies that claims relating to the retrospective period must have been made before 31 December 2019.
- Definitions have been provided for each of the following terms:
  - first-time buyer, in paragraph 4,
  - qualifying residence, in paragraph 5,
  - qualifying period, in paragraph 6,
  - qualifying loan, in paragraph 7.1 and
  - qualifying lender, in paragraph 7.3.
- Paragraph 8 outlines the tax compliance requirements for both self-assessed and PAYE taxpayers.
- Paragraph 11 details the HTB process and breaks it down into three different stages: the application, claim and verification stages.
- References to repayment of DIRT under s266A TCA 1997 (first-time buyer DIRT relief) have been removed. The provisions of s266A do not apply after 31 December 2017.

No. 036 Filing Guidelines for DAC2-Common Reporting Standard

Revenue's manual "Filing Guidelines for DAC2-Common Reporting Standard (CRS)" has been updated with sample correction files in a new section 7.6.

No. 037 Share Schemes 2021 Filing Obligations

Revenue issued a reminder on 18 February 2022 to employers operating share schemes and trustees of certain approved share schemes of their filing obligations and requirements for 2021; the filing due date is 31 March 2022. The eBrief includes a summary of the returns to be filed, which depend on the type of share scheme that was operated.

Trustees of approved share schemes are required to file an annual form (ESS1/SRS01/ESOT1) for each year of assessment, including filing nil returns where no reportable events have taken place during the year in question. For all other share schemes there is no requirement to file a nil return if no reportable events have taken place during that period.

The eBrief also includes a list of the common filing issues and errors identified by Revenue, such as values not entered in euro, blank rows left in between blocks of data, and issues encountered with copying and pasting from a different file into the return.

Detailed information, including explanatory notes on the completion and filing of the relevant forms, together with common filing issues, is included in the share schemes manual "Chapter 15 – Filing Guidelines for Share Scheme Reporting (SSR)".

No. 038 Exchange Traded Funds

Revenue has updated the manual "Exchange Traded Funds (ETFs)" to confirm the interaction of the eight-year "deemed-disposal rule with updated guidance published on 1 September 2021, which took effect from 1 January 2022. Where, after an analysis of an ETF that was covered by the previous guidance, the ETF is found to be equivalent to an Irish ETF, the eight-year "deemed-disposal rule will apply. Although the eight years should be counted from 2022, meaning that the earliest deemed disposal will be in 2030, the actual acquisition cost of the ETF will remain unchanged.

In addition, the following manuals have been updated to further clarify the appropriate Case under which income and gains are taxed, where not already confirmed:

- Part 27-02-01 – "Offshore Funds: Taxation of Income and Gains from Certain Offshore States",
- Part 27-04-01 – "Offshore Funds: Taxation of Income and Gains from EU, EEA and OECD Member States" and
- Part 27-01A-02 – "Investment Undertakings".

No. 039 Controlled Foreign Company Rules

Revenue's "Controlled Foreign Company Rules" manual, which deals with s835YA TCA 1997 regarding Irish defensive measures in respect of the CFC rules, has been updated. Chapter 11 of the manual now includes more details on the provision and reflects a legislative amendment introduced by Finance Act 2021.

No. 040 Taxation of Couriers

Revenue has updated the "Taxation of Couriers" manual to clarify how the engagement status of couriers will be determined. The manual also highlights the requirement for some courier firms to file a Form 46G in relation to certain payments.

No. 041 Stamp Duty Manual – Section 83D: Residential Development Refund Scheme – Updated

Revenue has updated the stamp duty manual "Residential Development Refund Scheme Part 7: Section 83D". Section 83 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) provides for a refund of the difference between the stamp duty at the rate of 2%, which applied before 11 October 2017, and subsequent increased rates where non-residential land is acquired and is subsequently developed for residential purposes.

A new Part 2 has been inserted in the manual to confirm that where the non-residential rate of stamp duty has been paid under s31C SDCA 1999 on the indirect acquisition of non-residential land by the takeover of a corporate entity that owns such land, any subsequent residential development will be eligible for a refund under s83D (provided all of the conditions for the refund scheme are met).

No. 042 Stamp Duty Manual – Section 79: Associated Companies Relief – Updated

Revenue updated the stamp duty manual "Section 79: Associated Companies Relief" in section 5, "Bodies Corporate", to provide that Irish limited and general partnerships, and foreign partnerships that are similar in form and character to Irish partnerships, may be "looked through" for the purposes of establishing the bodies corporate comprising a group for stamp duty purposes.

No. 043 VAT Treatment of Staff Secondments

Revenue has updated the manual "VAT Treatment of Staff Secondments" to provide further clarity on this topic. A sentence has been added to the end of section 2, "Revenue's concessionary treatment of certain secondments". The sentence notes that the concession does not apply where PAYE, PRSI (employer and/or employee) and/or USC liabilities do not arise as a result of the secondment.

No. 044 Requests for Clearance in Death Cases

Revenue has released a new manual titled "Requests for Clearance in Death Cases". The manual explains the process for persons acting in a representative capacity to request clearance to distribute an estate after the death of a taxpayer. The new process outlined in this manual will be subject to ongoing review by Revenue. The manual sets out:

- how the clearance request should be submitted (by MyEnquiries),
- the necessary advance actions, checks and due diligence and
- the required documentation and returns.

No. 045 Section 56 Zero-Rating of Goods and Services

Revenue has updated the manual "Section 56 Zero-Rating of Goods and Services" to provide further clarity with regard to VAT 56 authorisations, particularly regarding qualifying persons, imports and the cancellation of authorisations.

The manual confirms that for renewals of existing valid authorisations, the turnover from audited financial statements for an accounting year-end that falls within the 12 months preceding the application may be used.

The manual notes that a qualifying person is an accountable person whose turnover from zero-rated intra-Community supplies of goods, export of goods outside the EU and supplies of certain contract work amounts to 75% or more of their total annual turnover for the 12 months preceding the making of an application for authorisation under these provisions. Revenue has clarified that it will accept that where an accountable person in a start-up situation does not meet the 12-month trading requirement, that person may, in the circumstances in paragraph 1.1, apply to Revenue for authorisation for the zero-rating facility on an interim basis until such time as the 12-month requirement has been met.

No. 046 VAT Groups

Revenue has updated the "VAT Groups" manual to clarify the effective date of a VAT group. Amendments have been made to section 3 and section 5.1 of the manual in this regard.

No. 047 Form P11D

The "Form P11D" manual has been updated to include a link to the relevant guidance on share scheme reporting.

No. 048 Changes to Personal Tax Credits and Standard Rate Cut-off Point

Revenue's manuals "Employee (PAYE) Tax Credit" and "Earned Income Tax Credit" have been updated to reflect changes introduced by Finance Act 2021.

Section 6 of Finance Act 2021 increased a number of personal tax credits, along with the standard rate cut-off point, with effect from 1 January 2022, as follows:

- The value of the basic personal tax credit has increased by €50 per person. For married persons and civil partners who are jointly assessed to tax, the basic personal tax credit available for the 2022 year of assessment and subsequent years will be €3,400, whereas in all other cases the value of the tax credit will be €1,700.
- The value of the employee (PAYE) and earned income tax credits have also increased by €50 each to €1,700. The qualifying criteria for each credit remain unchanged.
- The standard rate cut-off point has also increased by €1,500 per person for the 2022 year of assessment and subsequent years.

No. 049 Benefit in Kind on Employer Provided Vehicles

Section 6.3 in "Chapter 2 – Employer-Provided Vehicles" of Revenue's consolidated manual on employer-provided benefits has been updated to reflect Finance Act 2021 changes to the benefit-in-kind (BIK) regime applying to electric vehicles.

The preferential BIK regime was due to cease on 31 December 2022. However, Finance Act 2021 extended the regime for another three years, so that it also applies to vehicles made available in the period from 1 January 2023 to 31 December 2025. The relief from the BIK charge arising during this period applies on a tapered basis.

No. 050 Transborder Workers Relief COVID-19 Temporary Concession

Revenue has updated its guidance to confirm that the Covid-19 temporary concession in place for Transborder Workers' Relief will remain available to such workers up to and including 31 March 2022.

This temporary concession, which was introduced in 2020, allowed an individual to avail of transborder workers' relief while working from home in the State where:

- they were required to work from home in the State due to public health guidance arising from Covid-19 and
- all other conditions of the relief are met.

The concession continued to apply for 2021 and was later extended to 2022 for the period during which public health guidance in the State, or in the country where the duties of the employment are normally performed, requires individuals to work from home.

On 21 January 2021 the Government announced a plan for the easing of Covid-19 restrictions. Under this plan, employees began returning to their workplaces on a phased basis from 24 January 2022. As public health guidance does not require employees to work from home from that date, the basis for the concession no longer exists.

However, to support the gradual return of employees to their places of work, the concession will remain available to transborder workers up to and including 31 March 2022. Revenue will also temporarily dispense with the requirement for the foreign employer to operate the Irish PAYE system by reference to the transborder worker's Irish workdays up to this date.

Revenue has updated its Covid-19 webpage and section 11 of the "Transborder Workers Relief" manual to reflect the position.

No. 051 Community Employment Schemes and Job Initiative Projects

Revenue's manual "Community Employment Schemes and Job Initiative Projects" has been updated to reflect the PAYE procedures to be followed by employers from 1 January 2019 (on page 2, paragraph 3).

No. 052 Manual on EU Sanctions in Response to the Situation in Ukraine

Revenue has published a new manual titled "Manual on EU Sanctions in Response to the Situation in Ukraine". It provides an overview of the import and export prohibitions and restrictions that have been introduced.

The manual has been created to give an overview of the measures adopted, legislative references, guidance for Customs staff and contact details.

No. 053 Stock Relief – Young Trained Farmers

Revenue has updated the manual "Stock Relief – Young Trained Farmers" to reflect the Finance Act 2021 amendment to extend the availability of the 100% stock relief for young trained farmers to 31 December 2022.

No. 054 Annual Average Exchange Rates and Lloyds Sterling Conversion Rates

Revenue's manual "Annual Average Exchange Rates and Lloyds Sterling Conversion Rates" now includes annual average exchange rates for the 2021 calendar year.

No. 055 Relief for Increase in Carbon Tax on Farm Diesel (Section 664A TCA 1997)

Revenue has updated the manual "Relief for Increase in Carbon Tax on Farm Diesel" to reflect the rate of carbon tax on farm diesel with effect from 1 May 2021 and 1 May 2022. Section 664A TCA 1997 provides for relief for expenditure incurred by farmers in respect of an increase in the carbon tax on farm diesel.

No. 056 Importation of Plants and Plant Products

Revenue's manual "Importation of Plants and Plant Products", which provides guidance on the importation of plants, plant products and other objects from outside the EU, has been updated. The manual includes updates in relation to:

- advice on the commercial importation of plants and plant products,
- a list of locations where plants and plant products may be imported,
- a list of legislative references and
- a list of contacts.

No. 057 Stamp Duty Manual – Part 4: Assessment and Appeals – Updated

Revenue has updated the stamp duty manual "Part 4 – Assessments and Appeals" to include contact details for the Tax Appeals Commission. In addition, the structure of the manual has been updated and refreshed.

No. 058 Relief for Investment in Corporate Trades

Revenue has updated the manual on "Relief for Investment in Corporate Trades" to reflect the changes introduced by Finance Act 2021. The manual provides guidance to companies on the reliefs available under Part 16 TCA 1997 for investments in corporate trades, including the Employment Investment Incentive (EII), Start-up Capital Incentive (SCI) and Start-Up Relief for Entrepreneurs (SURE).

The Finance Act 2021 amendments to Part 16 TCA 1997 reflected in the manual include:

- Referencing Qualifying Investment Funds (QIFs) throughout the manual.
- Illustrating the maximum investment for which relief is available in a year, i.e. €150,000 for 2019 and €500,000/€250,000 for 2020 onwards.
- Outlining how a company can make a claim for EII for investments from 1 January 2022, i.e. there is no longer a requirement to wait until 30% of the amount invested has been expended on a qualifying purpose before investors can avail of the relief. The company has from the date of the share issue to four months after the end of the year of assessment in which the shares are issued to issue the statement of qualification to an investor.
- Confirming the conditions in respect of increased employment or expenditure on R&D that must be met for investments from 1 January 2022.
- Updating the definition of a RICT group for the purposes of initial risk finance investment under s496(5) TCA 1997.

Examples have also been updated throughout the manual.

No. 059 Social Welfare Pensions and Allowances

Revenue has archived the manual "Social Welfare Pensions and Allowances" as the content is now included on Revenue's website.

No. 060 Guidelines for Issuing Manual Annual P35 Estimates and Amended Estimates

Revenue's manual "Guidelines for Issuing Manual PAYE/PRSI/USC/LPT Annual P35 Estimates and Amended Estimates" has been archived as its contents are no longer relevant due to PAYE Modernisation and system updates.

No. 061 Bulk Processing of Income Tax Returns for Temporary Assignees of LCD Employers

Revenue has published a new manual titled "Income Tax Processing for Temporary Assignees", which outlines the operational procedures for the bulk processing of income tax returns for temporary assignees of employers dealt with by Revenue's Large Corporates Division (LCD).

The manual notes that some temporary assignees may enter into a tax-equalisation arrangement with their home-country employer upon being assigned to the State or abroad, which means that an assignee pays no more and no less tax on assignment than they would have paid had they not gone on assignment.

A tax-equalised temporary assignee will generally be required to submit a year-end Irish tax return to establish their final Irish tax liability for the year. A refund of tax may be due after the temporary assignee's final Irish tax liability for the year has been established through the submission of a Form 11/Form 12 tax return. Under the principles of tax equalisation, the home-country employer is entitled to the benefit of this refund. In addition, if an employee has a balance of tax payable for the year on their overseas employment income, then the home-country employer will be responsible for payment of the liability.

Under this temporary assignee service, any underpayments or overpayments arising from tax-equalisation arrangements can be dealt with in bulk for each employer. The manual provides more detail on the operational procedures for the bulk processing, including application for inclusion in the scheme and employer obligations. If a tax return includes a claim for SARP relief, then this return cannot be included in the LCD assignee scheme.

No. 062 Update of Budget 2022 Excise Duty Rates TDM – New Rates of Mineral Oil Tax (MOT) for 1 May 2022

Revenue's manual "Excise Duty Rates: Energy Products and Electricity Taxes" has been updated to reflect changes in rates of Mineral Oil Tax (MOT) on certain mineral oils, with effect from 10 March 2022.

The manual also provides details of further changes to MOT rates, effective from 1 April 2022 and 1 May 2022, and changes to Solid Fuel Carbon Tax and Natural Gas Carbon Tax effective from 1 May 2022.

Revenue's "Budget Excise Duty Rates" manual has also been updated to reference changes to the Excise Duty rates.

No. 063 Manual on EU Sanctions in Response to the Situation in Ukraine

Revenue has updated the "Manual on EU Sanctions in Response to the Situation in Ukraine" to include:

- guidance on additional measures in respect of Russia and Belarus,
- updated legislative references and
- updated import/export control instructions.

No. 064 Income Tax Treatment of Married Persons and Civil Partners

Revenue has updated the examples in the manual "Income Tax Treatment of Married Persons and Civil Partners" to reflect increases in the value of the standard rate tax band and basic personal tax credit introduced in Finance Act 2021.

Section 7 of the manual has also been updated to provide clarity on the availability of the basic personal tax credit where one spouse or civil partner makes informal maintenance payments towards the other.

No. 065 Update to Manual Part 13-02-05 Surcharge of Certain Undistributed Income of Close Companies

Revenue has updated the manual "Surcharge on Certain Undistributed Income of Close Companies" to reflect that the Covid-19-related temporary concession regarding the close company surcharge is ending shortly. This temporary concession will apply only to accounting periods ending up to 31 March 2022.

The close company surcharge applies to certain undistributed income of close companies. Surcharges may apply where income is not distributed within 18 months from the end of the accounting period in which the income arose. By concession, Revenue will, on application, extend the 18-month period by nine months where a distribution cannot be made because of Covid-19 for accounting periods ending from 30 September 2018 onwards, for which distributions to avoid a surcharge would be due by 31 March 2020 onwards.

Normal close company surcharge provisions will apply for accounting periods ending after 31 March 2022.

No. 066 Interpretation of Corporation Tax Acts

Revenue has updated the "Interpretation of Corporation Tax Acts" manual to include information on the exemptions for sporting bodies under s235 TCA 1997 and foreign charities resident in an EEA or EFTA State under s208A TCA 1997. Updated contact details for the Charities Regulator have also been provided.

No. 067 Customs Import Procedures Manual

Revenue has updated the "Customs Import Procedures" manual to include two new paragraphs: paragraph 8.4 – Detention of Goods; and paragraph 8.5 – Partially Detained Goods.

In addition, the following paragraphs have been amended:

- paragraph 4.3 – Form of Report and Particulars Required: updated for clarity and to remove reference to a nil G3/G4 declaration;
- paragraph 4.13 – Imports of Third Country Excisable Goods into a Tax Warehouse: updated to reflect the requirement to submit an advance notification and receipt notification of import of duty-suspended excisable goods to Revenue;
- paragraph 7.6 – Destruction of Goods: updated to provide clarity; and
- paragraph 8.6 – Overtime Goods: moved to accommodate new paragraphs listed above.

No. 068 Stamp Duty Manual – Electronic Share Trading In Euroclear Bank – Updated

Revenue has updated the stamp duty manual"Euroclear Manual Electronic Share Trading Rules, Procedures, Practices, Guidelines and Interpretation" to include in the introduction the background to the legislation providing for stamp duty on the electronic trading of interests in Irish shares in Euroclear Bank. In addition, a new part 10 has been added to address certain questions regarding the application of Part 6 of the Stamp Duties Consolidation Act 1999.

No. 069 Remote Working Relief

Revenue has updated the "Remote Working Relief" manual, which provides guidance on the conditions and operation of remote working relief, mainly to include the new measure for remote working expenses contained in s114A TCA 1997, which was introduced by Finance Act 2021.

No. 070 Taxation of Non-resident Landlords

Revenue has updated the manual "Taxation of Non-Irish Resident Landlords" in section 5 to reflect changes introduced by Finance Act 2021 to the taxation of non-Irish-resident corporate landlords in receipt of Irish rental income but not trading in Ireland through a branch or agency, which are subject to corporation tax rather than income tax on such income since 1 January 2022.

No. 071 myAccount User Manual

Revenue's "myAccount User Manual" has been updated to show the new contact details for the Revenue Matching Unit.

No. 072 Payment of Preliminary Corporation Tax

Revenue has amended the manual "Payment of Preliminary Corporation Tax" to reflect certain Finance Act 2021 amendments. Paragraphs 2 and 5 have been updated to reflect the preliminary corporation tax obligations of non-resident corporate landlords, as Finance Act 2021 brought them within the charge of corporation tax. A new paragraph 8 has been inserted to reflect the introduction of Part 35D TCA 1997, relating to the Interest Limitation Rules (ILR). Special temporary rules for preliminary corporation tax have been introduced as the calculations under ILR are new and novel.

No. 073 PAYE Services – Review Your Tax

Revenue has updated the manual "PAYE Services: Review Your Tax" to reflect the following changes:

- notification that taxpayers can claim in real time for qualifying expenditure incurred under certain categories,
- guidance on how to make a claim for Nursing Home Expenses,
- notification that 2018–2021 are the available review years in PAYE Services,
- guidance to advise taxpayers to enter only days actually worked remotely when making a claim for Remote Working Relief and
- revised system screenshots reflective of the changes detailed above.

No. 074 Stock Relief – Farming Trades

Revenue's manual "Stock Relief – Farming Trades" sets out guidance on a tax deduction for farmers for increases in stock values (i.e. stock relief) provided for by s666 TCA 1997. This manual has been updated to reflect a Finance Act 2021 amendment that extended the availability of stock relief to 31 December 2024.

No. 075 Relief for Increase in Carbon Tax on Farm Diesel

Revenue's manual "Relief for Increase in Carbon Tax on Farm Diesel" now includes an updated example of how the relief provided for under s664A TCA 1997 is calculated.

No. 076 Taxation Issues for Registered Farm Partnerships

Revenue's manual "Taxation Issues for Registered Farm Partnerships" has been updated to reflect an amendment in Finance Act 2021 that extended the availability of enhanced stock relief of 50% for registered farm partnerships to 31 December 2022.

No. 077 Tax Treatment of Flight Crew Members

Revenue's manual "Tax Treatment of Flight Crew Members" has been updated and reordered to take account of an amendment to s127B (1A) TCA 1997, as inserted by Finance Act 2021. This amendment excludes non-resident flight crew from the charge to Irish tax, subject to meeting certain conditions.

The changes to the manual include:

- addition of a new "Chapter 4: Members of flight crews – Exclusion from Irish tax from 1 January 2022", to take account of the insertion of s127B(1A) TCA 1997;
- removal of Chapter 3 on the treatment of flight crew up to 31 December 2010, as the material is historical and is no longer deemed to be relevant to the current treatment of flight crew members;
- removal of Chapter 6 on USC, as the liability to USC of the employment income of flight crew, if applicable, is referenced elsewhere in the manual; and
- updates to the examples, which are provided in the Appendix.

No. 078 EU Mandatory Disclosure of Reportable Cross-Border Arrangements

Revenue has amended the manual "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" to reflect changes introduced by Finance Act 2021 and provide additional guidance on the various hallmarks, filing obligations, nexus and the main-benefit test. Additional examples have also been included.

A summary of the changes to the manual is given below:

- Section 2.2 has been updated to provide additional guidance to deal with situations where a company that is not tax resident in its place of incorporation will also have a nexus with its place of incorporation.
- Additional guidance has been provided in section 2.5 on the main-benefit test, including clarification in section 2.5.2 that the scope of taxes covered includes withholding taxes.

- In respect of Hallmark Category B: Specific hallmarks linked to the main-benefit test, section 2.7 has been updated to include a clarification that the tax amount payable includes any controlled foreign company (CFC) charge, and additional examples have been included of transactions that may fall under Hallmark B3.
- Section 2.8, which details Hallmark Category C: Specific hallmarks related to cross-border transactions, has been updated to add a clarification that certain hybrid entities and reverse hybrid entities may also satisfy Hallmark C1. Further updates to this section include an example under Hallmark C1, the removal of the exempt entities example under Hallmark C(1)(c) and the inclusion of links to the lists of tax regimes assessed by the Forum on Harmful Tax Practices and the EU Code of Conduct Group.
- Section 2.10, which details Hallmark Category E: Specific hallmarks concerning transfer pricing, has been updated to include an example of a unilateral safe harbour, clarification of the word "transfer" under Hallmark E, change to the guidance on the treatment of loss-making entities and clarification of the term intra-group as it applies to Hallmark E3.
- Section 3 provides guidance on filing a return and has been updated at section 3.1(f), which covers the value of the arrangement, to note that where an arrangement consists of multiple transactions, the value reported should be the sum of all transactions, with no offsetting of transactions.
- Section 4, which provides guidance on intermediaries, has been updated at section 4.4, which covers the provision of routine services, to note that the preparation and filing of tax returns may be a routine service, provided "after the fact". However, it may also (depending on the specific facts and circumstances) include an aspect of managing the implementation of a cross-border arrangement. Therefore, such an adviser could fall within the second category of intermediary. Section 4.10, covering legal profession privilege, has also been updated to note that where a lawyer is marketing an arrangement, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation. A new section 4.12 covering Revenue enquiries has been introduced.
- A footnote has been added to section 5.2 for clarity regarding filing obligations.
- Appendix III and Appendix IV have been updated to include changes introduced by Finance Act 2021.

No. 079 Childcare Services Relief

Revenue has updated the "Childcare Services Relief" manual to confirm that the Covid-19-related temporary concession regarding the provision of childcare services in a child's own home is being withdrawn from 30 April 2022.

Therefore, an individual cannot qualify for childcare services relief under s216C TCA 1997 in respect of receipts from the provision of childcare services in a child's own home on or after 1 May 2022.

No. 080 New Rates of Mineral Oil Tax for 1 April 2022

Revenue has notified of a further decrease in Mineral Oil Tax (MOT) rates arising from a change in the non-carbon component of MOT in respect of petrol and auto-diesel that will take effect from 1 April 2022. This decrease also applies to aviation gasoline, to heavy oil used for aviation and for private pleasure navigation, and to substitute fuels used as propellants. The updated rates are included in Revenue's manual "Excise Duty Rates – Energy Products and Electricity Taxes".

No. 081 Irish Real Estate Funds (IREFs) Declaration Forms

Revenue has updated the manual "Irish Real Estate Funds (IREFs) Declarations", which contains relevant IREF declaration forms, to include a declaration form for UK superannuation schemes, having regard to Article 11 of the Double Taxation Agreement between Ireland and the UK. Revenue has also updated the "Irish Real Estate Fund

(IREF) Guidance Note" to refer to that declaration form.

No. 082 Guide to C&E Reports Available Through Revenue's Online System (ROS)

Revenue has updated the manual "C&E TAN Reports Available on ROS" to include details of a new weekly payment report available in ROS to taxpayers who are registered for customs and excise who are actively importing or exporting.

No. 083 Payments on Termination of an Office or Employment or Removal from an Office or Employment

Revenue has updated the text in the manual "Payments on Termination of an Office or Employment or Removal from an Office or Employment", at paragraph 4.2, regarding the conditions pertaining to the increase of €10,000 to the basic exemption.

No. 084 Payment Made Without Deduction of Income Tax

Revenue's manual "Payment Made Without Deduction of Income Tax" has been updated (in section 6) to reflect the Finance Act 2018 change that provides that re-grossed income under s986A TCA 1997 is chargeable on the employee as Schedule E employment income. The examples throughout the manual have also been updated, and a new example has been added in section 3.2.

No. 085 Examinership Caseworking Guidelines

Revenue's "Collection Manual: Examinership Caseworking Guidelines" has been updated to reflect the extension of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 to 30 April 2022. The Act provides for the extension of an examinership to 150 days (previously 100 days) by application to the court.

No. 086 Stamp Duty Manual – Schedule 1: Stamp Duties on Instruments – Updated

Revenue's manual "Schedule 1 to SDCA 1999: Stamp Duties on Instruments" has been updated to include a new paragraph 2.4.1.1, titled "Certain acquisitions of residential property". The paragraph refers to the higher, 10% rate of stamp duty that is applied on certain acquisitions of residential property in accordance with s31E of the Stamp Duties Consolidation Act 1999.

No. 087 Cost of Living Allowance for Clergy

Revenue's manual "Representative Church Body: Cost of Living Accommodation Allowance" has been updated to include the 2021 rate. The examples have also been updated.

No. 088 Pay & File Extension Date – 2022

Revenue has confirmed that the ROS Pay & File deadline is **Wednesday, 16 November 2022**. This extended deadline will also apply to CAT returns and payments made through ROS for gifts or inheritances with valuation dates in the year ended 31 August 2022.

To qualify for the extension, taxpayers must both pay and file through ROS. Where only one of these actions is completed through ROS, the extension does not apply and the deadline for submitting both the tax return and the payment is 31 October 2022.

No. 089 Examinership Caseworker Guidelines

Revenue has updated the "Collection Manual: Examinership Caseworking Guidelines" to include additional details surrounding the role of Revenue in examinership cases.

No. 090 Tax Treatment of Ukrainian Citizens Who Work Remotely in the State for Ukrainian Employers

Revenue issued guidance on the tax position of Ukrainians who continue to be employed by their Ukrainian employer while performing the duties of their employment remotely from Ireland.

PAYE

Irrespective of the tax-residence position of the employee or the employer, income from a non-Irish employment attributable to the performance of duties of that employment in Ireland is within the scope of the PAYE system and is chargeable to income tax and USC in Ireland. However, by way of concession, Revenue will treat:

- these Irish-based employees of Ukrainian employers as not being liable to Irish income tax and USC on Ukrainian employment income that is attributable to the performance of duties in the State and
- the Ukrainian employers as not being required to operate the PAYE system on such employment income.

The concession applies solely to employment income that is paid to the Irish-based employees by their Ukrainian employer.

Corporation tax

An employee, director, service provider or agent may have come to Ireland because of the war in Ukraine and may, as a result, have an unavoidably extended presence in the State. Revenue will disregard such presence in Ireland for corporation tax purposes as respects any company in Ukraine where the employee, director, service provider or agent would have continued to be present in Ukraine but for the war there.

Duration of treatments and conditions

These concessions will apply for the tax year 2022 where:

- in relation to Ukrainian employment income, the employee would have performed his/her duties of employment in Ukraine but for the war there, and the employee remains subject to Ukrainian income tax on his/her employment income for the year; and
- in the case of corporation tax, the employee, director, service provider or agent would have been present in Ukraine but for the war there.

Any individual or relevant entity availing of the concessional treatment outlined above should retain any documents or other evidence, such as a record with the individual's date of arrival in Ireland, which shows that it was due to the war in Ukraine that the individual came to Ireland and performed their work or duties here. Revenue may request such evidence, as needed.

No. 091 CAT Part 02 – Statement of Affairs (Probate) Form SA.2

Revenue has updated the manual "Statement of Affairs (Probate) Form SA.2 – Capital Acquisitions Tax Manual Part 2" to detail the new online application process for clearance under s48(10) of the Capital Acquisitions Tax Consolidation Act 2003 by a resident personal representative or a solicitor to ensure that they are not personally liable to the inheritance tax of a non-resident beneficiary. A new step-by-step guide to the process is included in Appendix 1 of the manual.

No. 092 Tax Treatment of Covid-19 Related Lay-off Payments (CRLP) to Employees in Respect of Reckonable Service

Revenue issued an eBrief summarising the new Covid-19 Related Lay-off Payment Scheme (CRLP) and the tax treatment of the payments. The Redundancy Payments (Amendment) Act 2022 was signed into law on 31 March 2022 and provides for a scheme for payments to employees who were made redundant and who were unable to accrue reckonable service due to layoffs caused by the Covid-19 public health restrictions.

Statutory redundancy payments are exempt from tax under s203 TCA 1997. After approval by the Minister for Finance, Paschal Donohoe TD, the CRLP is exempt from income tax and USC. This brings the payments into line with the tax treatment of statutory redundancy lump-sum payments. Legislation will be enacted in due course to provide for the tax exemption. In the meantime, the CRLP should be paid to employees without deduction of income tax, USC and PRSI.

The scheme is administered by the Department of Social Protection (DSP) . Applications can be submitted via the Welfare Partners website. The opening of the DSP's application process has been aligned with the scheduled commencement of the legislation on 19 April 2022.

No. 093 Revenue Tax and Duty Manual "Section 83E: Repayment of Stamp Duty Where Certain Residential Units Leased (Social Housing)" Updated

Revenue has updated the manual "Repayment of Stamp Duty Where Certain Residential Units Leased (Social Housing) Part 7: Section 83E", which provides guidance on the refund scheme provided by s83E of the Stamp Duties Consolidation Act 1999 (SDCA 1999). The scheme applies in relation to stamp duty paid at the higher, rate of 10% under s31E SDCA 1999 where a residential unit is subsequently leased, for a term of at least 10 years, to a local authority or an approved housing body for the provision of social housing.

Part 4.2 of the manual, which provides guidance on how to make an s83E refund claim, has been updated.

No. 094 The Taxation of Offshore Funds Managed in Ireland and the Taxation of Non-resident Persons Utilising the Services of an Independent Authorised Agent Resident in Ireland

Revenue's manual "The Taxation of Offshore Funds Managed in Ireland and Using the Services of an Independent Authorised Agent Resident in Ireland" has been updated to include guidance in relation to the taxation of non-residents, including offshore funds, who avail of the services of an independent Irish investment or asset manager.

No. 095 Taxation of Crypto-asset Transactions

Revenue has updated the manual "Taxation of Crypto-assets Transactions" to provide further clarity on the tax treatment of transactions involving crypto-assets, including through the provision of worked examples.

Throughout the updated manual, the term "crypto-asset" is used, which includes crypto-currencies, crypto-assets, virtual currencies, digital money and any variations of these terms. The manual notes that the terms cryptocurrency/cryptocurrencies are not defined and that, although referred to as a currency by many, "they are best referred to as assets".

No. 096 Disability Allowance – Disabled Person's Rehabilitation Allowance

Revenue has updated the manual "Disability Allowance and Disabled Person's Rehabilitation Allowance" to include an update on the phasing out of the rehabilitative training allowance since 1 September 2019.

No. 097 Provision of Services in Irish

Revenue has updated the "Provision of Services in Irish" manual to include information relating to the Official Languages (Amendment) Act 2021 and its forthcoming changes.

No. 098 Horticultural Repayment Relief Guide

Revenue has updated the manual "Excise Guide to Horticultural Production Relief" at section 3.2 to reflect changes to the Excise Duty Rates and the "pre-determined rates" that take effect from 1 May 2022. Appendix 1, "Historical Net Rates of Repayment", has also been updated.

No. 099 Compliance Intervention Framework

Revenue's new Compliance Intervention Framework comes into effect on 1 May 2022 and will apply to all compliance interventions notified on or after that date. The Code of Practice for Revenue Compliance Interventions was published on 11 February 2022 and sets out what taxpayers can expect from Revenue if contacted in relation to their tax affairs and how Revenue will conduct the interventions under the new framework. The Compliance Intervention Framework provides for a consistent, graduated response to taxpayer compliance behaviour ranging from easily accessible opportunities to voluntarily correct errors up to criminal investigation for serious cases of evasion.

Taxpayers should read any correspondence received from Revenue carefully to ensure that they understand the actions, if any, required by them.

No. 100 Excise Duty Rates on Energy Products and Electricity Taxes

Revenue has updated the manual "Excise Duty Rates on Energy Products and Electricity Taxes" to reflect new rates of mineral oil tax, natural gas carbon tax and solid fuel carbon tax introduced with effect from 1 May 2022.

No. 101 Accounting for Mineral Oil Tax Manual

Revenue's manual "Accounting for Mineral Oil Tax" has been updated at section 8.1.3.1 to reflect changes to the vapour recovery allowance that came into effect from 1 April 2022.

Mineral oil tax rates have also been updated in Appendix I to reflect changes that apply from 1 May 2022. In addition, historical rates of mineral oil tax in Appendix XI have been updated.

No. 102 Solid Fuel Carbon Tax Compliance Procedures Manual

Revenue has updated the Solid Fuel Carbon Tax Rates in section 2 of the "Solid Fuel Carbon Tax (SFCT) Compliance Procedures" manual to reflect changes to the excise duty rates that apply from 1 May 2022.

The rates applicable to biomass products in section 6.1.1 of the manual have also been updated to reflect changes to the excise duty rates that apply from 1 May 2022.

In addition, Appendices I and II have been updated with historical SFCT Rates and Historic Rates for Biomass Products respectively.

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

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Tax Appeals Commission Determinations

01 Tax Litigation – Recovery of Costs

The Irish High Court delivered its principal 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*, 35/1 (2022).] On 24 February 2022 Stack J delivered her judgment addressing the costs of the substantive High Court proceedings.

The recovery of costs is governed by ss168 and 169 of the Legal Services Regulation Act 2015 and Order 99 as amended with effect from 3 December 2019. It is not entirely clear whether this regime is intended to replicate the old rule that costs follow the event or has replaced the concept of the "event" with the principle that only a party who has been "entirely successful" should be entitled to all of the costs of the action.

The net issue in this case was an attempt by the appellant to have the Notice of Opinion and its consequences set aside. There were four arguments put forward in the case, directed entirely to the same purpose of having the Notice of Opinion set aside: the applicability of s955(2) TCA 1997; whether the transaction was a "tax avoidance transaction" within the meaning of s811 TCA 1997; whether the Notice of Opinion was void as containing a misdescription of the transaction; and the issue of double taxation. The first and second issue took up equal time and the vast majority of the three-day hearing. Revenue was successful on the time limit point, whereas the appellant was successful on the substantive issue. Revenue submitted that the appellant was therefore not "entirely successful" within the meaning of s168 of the 2015 Act such that the appellant should get only 50% of his costs, representing the time spent on the issue on which he succeeded, and Revenue should get 50% of the costs, representing its success on the time limit issue. This would have the consequence of no order regarding costs, as the partial success of each side would essentially cancel each other out.

Justice Stack outlined that the general discretion of the court in connection with ordering costs is preserved. Where a party has been "entirely successful" in the proceedings, he or she is "entitled" to an award of costs against the unsuccessful party, unless the court orders otherwise (and gives a reason for doing so). Where a party has been only "partially successful", the court may exercise its discretion so as to make an order that the partially successful party will recover costs relating to the successful element or elements of the proceedings. The court held that it is not necessary to succeed on all questions in the case stated to be regarded as "entirely successful". But even where a party has not been "entirely successful", they can still recover all of the costs of the action, as the court retains its general discretion when deciding whether to award costs.

The judge went on to conclude that in this case it was not appropriate to award costs to the appellant solely on the basis that he undoubtedly won the "event", nor was it appropriate to look at individual arguments on any of the four issues to see which side was successful (and it should be noted that both sides won and lost individual arguments on the two main issues); and the appellant was only "partially successful" because although he succeeded on the question of whether the transaction was "a tax avoidance transaction", he did not succeed in demonstrating that the Notice of Opinion was out of time by reason of s955(2) TCA 1997. Consequently, the appellant is not "entitled" to his costs, but the court still has full discretion regarding how costs should be awarded.

The judge determined that the raising of issues in respect of time limits was reasonable in the circumstances and did not materially add to the time spend on the case. She also noted that in exercising any discretion regarding costs, achieving a result that is just overall must surely rank highly in the approach to be taken by the court. In this case, if Revenue's approach were adopted, the appellant would have achieved a significant success but would have had to fund that entirely from his own resources, even though Revenue had failed on the central substantive point in the appeal, which would not be a just outcome. She rejected the submission of Revenue that the appellant, and the other appellants whose appeals it had been agreed would be determined by the outcome here, would gain significantly from their success, holding that they have gained only in that Revenue had intended to deprive them of substantial sums of money on what has been found to be a legally erroneous basis. To deprive wealthy appellants from recovering their costs from Revenue might dissuade even litigants with significant means from asserting their rights.

Although the appellant's argument that clarity had been brought to the jurisdiction of the Appeal Commissioners where the relevant statutory provisions were less than clear was rejected (similar to circumstances in *Kenny Lee v Revenue Commissioners* [2021] IECA 114, where no order to costs was made), the court concluded that it was appropriate to exercise discretion in favour of granting the appellant all of the costs of the case stated. It was clarified that this included the hearing of the costs application and also that there is to be a stay on that order as Revenue intend to appeal the principal judgment.

02 Income Tax – Domicile Levy

The Irish High Court delivered its judgment in the case of ***Ann Corcoran & Joseph Corcoran v The Revenue Commissioners*** [2022] IEHC 199 on 5 April 2022. It concerned an appeal against a determination of the Tax Appeals Commission that the respondents were not liable to the domicile levy for the relevant tax years of assessment within the meaning of Part 18C TCA 1997.

The primary issue before the High Court was whether the "world-wide income" of the respondents for the purposes of the domicile levy exceeded €1m for each of the years in question. This in turn depended on whether wear-and-tear allowances of the respondents' hotel trade under s284 TCA 1997 were deductible in computing "world-wide income" for the purposes of the domicile levy.

As noted by Twomey J in *Louis Fitzgerald v Revenue Commissioners* [2021] IEHC 487, in the context of whether trading losses arising pursuant to s381 TCA 1997 were deductible, in very broad terms, the definition means that in determining the "world-wide income" of a person, no account is taken of various deductions that a person might normally make when calculating their tax bill. In that case it was held that a taxpayer's allowance/losses could not be deducted from his "world-wide income" to bring it below €1m.

In this case, the court undertook an analysis of the correct approach to the interpretation of "world-wide income" and determined that if on its natural and ordinary meaning the definition reveals an intention on the part of the legislature to exclude wear-and-tear allowances from the computation, then the court must adhere to the statutory wording and effectuate the intention of the legislature. This is the case even if the provision is complex and difficult to interpret. This applies irrespective of whether the result might appear harsh to the taxpayer and regardless of whether another approach might, by overstatement of trading income, appear more reasonable.

Applying this approach to interpretation, Egan J unpacked the definition of "world-wide income" into two parts: (A) "income...from all sources as estimated in accordance with the Tax Acts" and (B) "without regard to any amount deductible from or deductible in computing total income". The issue to be determined was whether wear-and-tear allowances form part of the exercise at (A) or part of the exercise at (B). If they form part of the exercise at (A), then they are deductible in computing "world-wide income", whereas if they form part of the exercise at (B), then they are not.

Revenue contended that, in so far as concerns trading income, the exercise at (A) is essentially the exercise of computing trading profit or gain (as opposed to "gross" income). This permits only the deduction, pursuant to s81 TCA 1997, of trading expenses but does not permit the deduction of any capital allowances/wear-and-tear allowances. As a matter of tax practice and statutory construction, it is only after this exercise is completed that one deducts from that profit wear-and-tear allowances under s284 TCA 1997, such that capital allowances/wear-and-tear allowances fall within (B).

The respondent taxpayers argued that (A) connotes only that portion of an individual's income as is charged to tax in any given year of assessment. To calculate their Schedule D, Case I, income, their taxable profits must first be calculated in accordance with the rules under Schedule D, Case I (by deduction of s81 TCA 1997 trading expenses), but their capital allowances/wear-and-tear allowances must then also be deducted from this figure before one arrives at their estimated Schedule D, Case I, income such as is charged to tax. The respondents contended that this exercise forms part of the exercise at (A) as capital allowances/wear-and-tear allowances are amounts deductible **when** and not **in** estimating a person's total income.

The court accepted that total income as it appears in (A) of the definition cannot simply means gross receipts because, among other reasons, the phrase suggests that some process of estimation has been necessary rather than simply the adding up of gross receipts. Therefore, it was accepted that estimation of total income at (A) is an exercise that incorporates at least the deduction of trading expenses and of other amounts properly deductible pursuant to s81 TCA 1997.

The court did not, however, accept that this estimation of total income at (A) incorporates the deduction of capital allowances, and in particular wear-and-tear allowances, as contended by the respondents. This is because s81 TCA 1997 itself expressly excludes capital expenditure from the amounts that are deductible in computing the amount of profits or gains to be charged to tax, which suggests that capital allowances/ wear-and-tear allowances are intended to be treated differently. Furthermore, it would be incompatible with a number of provisions in Part 9 TCA 1997 governing capital allowances, which suggest that capital allowances are not part of the initial estimation of total income at (A) but come in at a later stage in assessing income to be charged to tax. Accordingly, no deduction for capital allowances/wear-and-tear allowances is allowed as part of the definition of "world-wide income".

03 Corporation Tax – Sporting Tax Exemption

The Irish High Court delivered its judgment in the case of ***Listowel Race Company Ltd v Revenue Commissioners*** [2022] IEHC 253 on 22 April 2022. It concerned an appeal against a determination of the Tax Appeals Commission (17TACD2021) of a refusal of sporting tax exemption under s235 TCA 1997 on the basis that appellant was not a body or a body of persons established for and existing for the sole purpose of promoting athletic or amateur games or sports.

The specific circumstances of the appellant's activities are that the appellant provides facilities for horse racing comprising a racetrack and infrastructure such as stands, parade ring, restaurants and bars; however, it is Horse Racing Ireland (HRI), as the governing body for horse racing in Ireland, that carries on the activity of horse racing by controlling the activity itself, including entries, type of race, weights, jockeys, trainers, prize money, bookmakers, SIS and medical access, and Tote Ireland. The appellant company receives prize money contributed by HRI as well as income from ancillary sources, including concessionaire receipts for food and drink, rental receipts, catering income, pitch fees and a levy, income from bookies for the entitlement to trade at the venue and the Tote Ireland stipend.

The Appeal Commissioner took no view on whether horse racing is a sport, amateur or otherwise, but formed the view that the gateway requirement of s235(2) TCA 1997 – that the body be established for and existing for the sole purpose of games or sports – was not met because the appellant had significant income from other sources and because it was found that HRI, and not the appellant, carries out the activities of horse racing and controls every element of it. The Commissioner decided against the appellant on the narrow ground that the appellant was in receipt of certain income that meant that, as a matter of fact, it did not exist for the sole purpose of promoting athletic or amateur games or sports. This was in light of his analysis of the income of the appellant and the role of HRI.

On appeal, the appellant submitted that the Commissioner had erred in his determination that, by virtue of its sources of income and HRI's involvement, the appellant was not established for the "sole purpose of promoting an athletic or amateur game or sport". In particular, the appellant suggested that by coming to his conclusion from an analysis of its income, the Commissioner failed to have regard to the different purposes of ss235(1) and 235(2) TCA 1997, arguing that s235(1) TCA

1997 operates as a gateway provision, whereas s235(2) operates to permit the ascertainment of that part of the income of a qualifying entity entitled to the exemption. It was outlined that sports bodies will often seek to generate income by activities not related to sporting activity as a means to an end rather than an end in themselves, and in this case all of the income of the appellant is directly related to the race meetings that it organises.

The respondent argued that the Commissioner was correct to have regard to the sources of the appellant's income as reflecting the activities being carried on by the appellant in his consideration of s235(1) TCA 1997 and was also correct to have regard to the manner in which it carried out its activities, as well as HRI's involvement.

Baker J determined that income is not only relevant to the application of s235(2) TCA 1997 but also relevant, and in many cases a highly relevant, indicia of the purpose for which the appellant was established and for which it continues to exist. However, although income may be an indication of purpose, it is not determinative, as the provision does not envisage a narrow interpretation that exempts only those sporting bodies that derive all of their income from sporting activity. She noted that, in the case of a body corporate, its objects clause must be a critical factor, and the memorandum of association of the appellant company clearly identifies the promotion of horse racing as its primary object, with other objects as powers ancillary to, and to be engaged for the purposes of, that primary object. It was held that the Commissioner did not explain in his determination the connection that he drew between sources of income of the appellant company and its purpose as identified in its constitution and as borne out by the evidence of 150 years of operating the races at Listowel. Also, it is the use to which the appellant put the income that is relevant. On the facts, the company did not pay a dividend and applied all of its income to the development and maintenance of its facilities at Listowel.

Furthermore, the analysis of the role of HRI was legally flawed as the Commissioner failed to conduct an analysis of the statutory function of HRI as a regulatory body whose functions are wholly controlled by the statute. HRI regulates and therefore "controls" the activity of racing but does not carry out the activity, since it is the regulator and is required to be independent of the body or activity that it regulates. The Commissioner had fundamentally erred by basing his conclusion on the role of HRI, a regulatory body, when he ought to have had regard to the nature of the activity performed by the body that was regulated.

There was also a failure to conduct an analysis of what it meant to "promote" a sport in the context of s235(1) requiring that a body be established and exist for the promotion of a sport. The judge held that the true test is how and for what purpose the income of the appellant was applied. The fact that all of the appellant's income was applied to the development and maintenance of its horse riding facilities meant that, as a matter of fact and law, it was a "promoter" of the activity conducted at its venue.

Apart from the specific facts of the case, Baker J made a number of comments in respect of the operation of s235 TCA 1997 generally. She outlined that the legislation envisages a two-stage process: first, a determination of whether a body is an "approved body"; and, second, the ascertainment of what part, if any, of the income of that body is applied towards the relevant sporting activities. The first question involves determining whether a body is "established for" and "existing for" the sole purpose of promoting athletic or amateur games or sports.

The judgment considered at length the distinction between a sport and an industry, as well as whether the s235(1)(a) definition should be interpreted disjunctively (as argued by the appellant) or conjunctively (as argued by the respondent) to either allow or disallow, respectively, sports that are not amateur. Ultimately, Baker J held that horse racing, the riding of horses in competition, is a sport and, furthermore, the riding of horses at speed in competition is an athletic activity. It is not necessary that an athletic sport be understood as one where the player has no prop or equipment, as that definition would immediately exclude cycling, which suggests an absurdity. Finally, after making reference to a number of the 4,000 bodies approved for the s235 TCA 1997 exemption, she also concluded that whether the persons engaged in the sport are professionals or amateurs is not a guiding factor for Revenue in the assessment of whether a body is an "approved body" under the provisions.

04 CGT – Relief for Principal Private Residence

Tax appeal **13TACD2022** concerned the claim for additional relief from capital gains tax on the disposal of a residential property. The Appellant purchased the property and occupied it as his principal private residence (PPR) until 2011. Thereafter the property was rented until 2019, when it was sold.

Revenue allowed relief for the 175 months that the Appellant occupied the property together with the deemed statutory period of the final 12 months of ownership. However, Revenue denied the Appellant's claim that the gain should be reduced by substituting the value of the property at the time it ceased to be his principal private residence in 2011 for the actual purchase price as the base cost.

The Appellant argued that the exceptional circumstances of the financial collapse and the associated movement of the housing market, combined with the application of time apportionment in this case, resulted in an oppressive and penal distortion of market realities. He argued that where the application of normal rules is unjust and unreasonable, s604(7) TCA 1997 applies to allow alternative methods of calculation of the gain.

The Respondent argued that s604(7) TCA 1997 did not apply as there was no "change of use" of the property in 2011. It ceased to be the PPR of the taxpayer but remained a private residence. It was not accepted that the change of use from a PPR to an investment property was a change of use sufficient to trigger s604(7) TCA 1997.

The text of s604(7) TCA 1997 allows for this discretion to be exercised in two circumstances: a change in the structure of the property or where there have been "changes as regards the use of part of the dwelling... for any other purpose". The Appellant argued that this applies the widest possible interpretation of change of use as it is without any qualification. The Appellant suggests that even if one was inclined to apply the principle of *ejusdem generis* to the sub-section, then surely the letting of property was a business in that it was an activity of individuals to produce housing for profit.

The Appeal Commissioner rejected the Appellant's claim on the basis that although there was no doubt a change of use by the Appellant from a PPR to a rented property, as well as the inherent ambiguity in the meaning of sub-section (7), any consideration of adjusting the relief can apply only where "there have been changes as regards the use **of part** of the dwelling house". He held that his discretionary authority to adjust the relief cannot be invoked where there has been a complete change in the use of the property.

05 Income Tax and Corporation Tax – Commencement and Set-up of a Trade

The core issue in tax appeal **27TACD2022** was the Appellant's entitlement to manufacturing relief from corporation tax under s448 TCA 1997 in respect of its processing of zinc and lead. Eligibility for relief would entitle the Appellant to be taxed at the reduced rate of 10% on its profits.

To determine the substantive issue, the key question was the date on which the Appellant's trade had either been set up **or** commenced. The determination contains an interesting analysis of the application of the relevant principles derived from case law on the distinction between set-up and commencement in the context of s448 TCA 1997.

In support of both the primary argument that it had set up and commenced and the secondary argument that it had simply set up, the Appellant referred to *Mansell v Revenue and Customs Commissioners* [2006] STC (SCD) 605. Special Commissioner Helliers stated at page 621 of the *Mansell* decision that:

> "I conclude that a trade cannot commence until it has been set up (to the extent that it needs to be set up), and that acts of setting up are not commencing or carrying on a trade. Setting up a trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up."

The Appellant also referred to the conclusion of the Special Commissioner that:

> "It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise."

In *Mansell* the Special Commissioner found against the taxpayer, as his actions did not represent the beginning of operations because nothing had actually been acquired, ventured, risked or expanded. The Appellant contrasted this position with circumstances where it had purchased land and had begun construction works for a processing plant, had placed orders for expensive mining equipment and had entered into forward-selling agreements for supply of materials. In a capital-intensive business such as the processing of minerals, commencement could not simply be taken as the day that the first exchange of concentrate was made for money. Moreover, even if the foregoing was not considered to constitute commencement, the Appellant argued that it was clearly part of the ongoing process that had reached such an advanced stage that the business was "set up". The Appellant's trade was contrasted with the circumstances in *Mansell*, as there was an advanced organisational structure and a "definite concept of business".

The Respondent argued that the meaning of s444(1)(a) TCA 1997, read by reference to s442(1), is that for a company to benefit from manufacturing relief its trade must have been both set up and commenced by the relevant date. It rejected the Appellant's contention that set-up and commencement were separable and that the fulfilment of the former alone would have been enough to permit a company to avail of manufacturing relief.

The Respondent argued that the question of whether the Appellant's trade had been set up and commenced meant asking whether it had started to trade. In seeking to demonstrate that it had not, the Respondent referred to the accounts of the Appellant, which showed when production and sale commenced. Greater emphasis, however, was placed on the Appellant's corporation tax returns for the relevant periods, which contained the statement by the Appellant that it had "not yet commenced trading", which it was suggested was an effective admission by the Appellant that it had set up and commenced after the relevant date. Addressing the argument of the Appellant that it had spent large capital sums, it was submitted by the Respondent that this could not equate to being set up. Even if it could, it was pointed out that the balance sheet from this period indicated that by the relevant date only some 21% of the total capital expenditure for the project had been spent.

The Respondent pointed out that *Mansell* was a decision of a foreign tribunal of limited assistance and also challenged the Appellant's fundamental assertion that the forward-selling contracts entered into before the start of production constituted the kind of operational activity giving rise to risk or obligation that denoted set-up. In *Mansell* it was the absence of these factors that persuaded the Special Commissioner to find that the taxpayer had not set up and commenced his trade. The Respondent argued that this submission was supported by the UK decision in *Birmingham & District Cattle By-Products* [1919] 12 TC 92, which was cited with approval by Kenny J in *Spa Estates v O hArgain* (unreported, High Court, 20 June 1975). In *Birmingham & District Cattle By-Products* the purchase and installation of plant machinery and the erection of works were preparatory in nature and did not amount to commencement. It was argued that the steps taken by the appellant in the current case were, despite their greater cost and scale, of the same kind. They were suggested to be steps in preparation that were, at most, part of a process of setting up that did not meet the requirements of s442(1) TCA 1997.

The Appeal Commissioner agreed with the Appellant that the set-up and commencement of a trade are separate and distinct concepts that can occur at different times. He went on to find that the two terms are not synonymous and stated that legislators do not include words in statutes that are superfluous, such that the Respondent's argument that "set up and commenced" means, in effect, commenced was rejected.

On the question of how to define when a trade has reached the point of being set up for the purposes of availing of manufacturing relief, the Commissioner agreed that it could not simply be the date of establishment. The conclusion in *Mansell* was endorsed, and it was determined that at the heart of the analysis is the idea that something must already have been risked in the form of the acquiring of rights and the incurring of obligations. When this is done, the trade can be said to have been set up, even though it has not been commenced. The suggestion that the first sale resulting in income must have occurred or be on the cusp of occurring is excessively strict and not in conformance with the reality of how many businesses begin their trade, especially when the legislation makes express provision for set-up as a stage before commencement.

Notwithstanding the decision that set-up is distinct from commencement and that it is not necessarily tied to production and sale, on the facts in this appeal, the Commissioner determined that the Appellant's business could not reasonably be said to have commenced by the relevant date because there was no processing facility in existence at that time. Although essential equipment had been purchased, it had not been delivered, installed and made operational. This was not reflective of a business that had begun its trade, and this was borne out by the appellant's company accounts, which stated that it had not yet commenced trading.

06 Tax Administration – Alternative and Double Assessments

Tax appeal **28TACD2022** was a determination on a preliminary issue that arose for the first time before the TAC during the hearing of two linked appeals.

The Appellants are linked whereby the First Appellant is owner of lands on which the Second Appellant operates a camping site and caravan park. The First Appellant and his wife are the owners of the Second Appellant. The First Appellant is also the Director and Secretary of the Second Appellant. The substantive appeal revolves around the tax consequences arising from the Second Appellant carrying out significant works and capital improvements to the camping and caravan site. A substantial VAT deduction was claimed by the Second Appellant, and after an audit Revenue came to the view that the Second Appellant had transferred value to the First Appellant by way of the improvement expenditure owned by him in his personal capacity. As there was no consideration given by the First Appellant, the expenditure giving rise to the benefit should be treated as either a distribution pursuant to s130(3) TCA 1997 or a benefit-in-kind pursuant to s118 TCA 1997.

Revenue proceeded to issue a Notice of Amended Assessment on the First Appellant in respect of benefits-in-kind taxable under Schedule E and, furthermore, distributions taxable under Schedule F: the same figure was included twice. An estimate for PAYE/PRSI was also raised on the Second Appellant in respect of the same transactions. Revenue contended that the Appellants were at all times aware that the assessments were alternative, which it was entitled to raise. The Appellants contended that one or both of them had been the subject of a double assessment, which is prohibited by s959F TCA 1997.

The Appeal Commissioner found that the Appellants were not assessed to tax more than once where Revenue made distinct assessments in respect of the same transaction or series of transactions that were expressly stated to be in the alternative. Where the taxpayer is made aware that it is liable to pay only one assessment and not the aggregate of the amounts assessed in distinct assessments and the distinct assessments are advanced on the alternative basis, they are alternative assessments and not double assessments that fall foul of s959F TCA 1997. Although there are no Irish court judgments on this issue, the Appeal Commissioner followed the reasoning and logic in a UK line of authority whereby the absence of an express statutory power to make alternative assessments is not a bar to the making of alternative assessments in the express circumstances outlined above.

It was further contended by the Appellants that the raising of alternative assessments demonstrated that the Revenue Inspector did not exercise "best judgment" as required by s959Y TCA 1997 such that he or she could not have had "reason to believe" that the Second Appellant was liable to PAYE/PRSI in respect of the same transactions (as required by s990 TCA 1997). Their argument that the use of the phrase "best judgment" required the Revenue Inspector to reach a "singular or unique" judgment, thereby precluding an Inspector from raising alternative assessments, was rejected by the Appeal Commissioner as an overly narrow interpretation of the phrase. Instead, the requirement to exercise "best judgment" simply means a decision made to the best of his or her judgment on the information available and reached with an open mind.

Similarly, in relation to the phrase "reason to believe" with regard to the Second Appellant being liable to PAYE/PRSI in relation to the transactions, as required by s990(1) TCA 1997, the Appeal Commissioner held that this does not require an Inspector to have reached certainty or a concluded belief or a settled conclusion. Instead, the Inspector must have some cause or explanation or justification for his or her belief and cannot be acting on the basis of suspicion, hunch or mere caprice. It confers a degree of latitude and discretion on the Inspector making an estimate. In this case, the raising of an assessment on another taxpayer as an alternative to the estimate made on an employer does not of itself mean that the Inspector could not have had reason to believe that the employer had not remitted the correct amount of tax.

07 CAT and Tax Administration – Agricultural Relief and Grounds of Appeal

Tax appeal **40TACD2022** arose from a situation where the Appellant received gifts of agricultural property and non-agricultural property from her parents on the same day in October 2013 and claimed agricultural relief in accordance with s89 CATCA 2003. The Appellant argued that she received the agricultural property before she received the residential property and therefore that after receiving the agricultural property she was a “farmer” for the purposes of claiming agricultural relief. The determination deals with a number of issues: the date on which the Appellant took the properties as gifts; whether the gifts taken on the valuation date are to be considered collectively or in isolation; a consideration of residential property qualifying as agricultural property; and a claim of agricultural relief where it was not included in the grounds of appeal to the TAC.

During October 2013 the appellant received three separate gifts of property from her parents: a one-quarter share of agricultural land, a full interest in agricultural land and a residential property subject to an exclusive right of residence in favour of her parents. She made a claim for agricultural relief on both gifts of land, which Revenue refused on the grounds that the provisions of s89 CATCA 2003 were not satisfied throughout the entirety of the valuation date and that, where there is more than one gift on the valuation date, all gifts must be looked at collectively as if all benefits had been received contemporaneously and not in isolation. The Appellant appealed, contending that she is entitled to agricultural relief as she was a farmer on the valuation date and after taking the gifts of agricultural property, which was not affected by the receipt of a separate gift of non-agricultural property later on the same day.

In terms of the date and sequencing of the transactions, there was a conflict of evidence; however, the facts determined on appeal were that the appellant’s parents signed the documents as presented by their solicitor but were unable to recollect in what particular order, and this solicitor had passed away before the appeal. The appellant’s solicitor collected the deeds of transfer as signed by the her parents on 9 October 2013. The appellant signed the deeds on 26 October 2013 and signed the deeds in respect of the agricultural property first, as it was the practice of the solicitor to sign the more valuable properties first.

It was determined that the Appellant’s solicitor accepted delivery of the deeds of transfer on 9 October 2013 on her behalf; the act of taking delivery of such documents confirmed the acceptance of the gifts, and as a consequence all of the requirements of s64 Land and Conveyancing Law Reform Act 2009 had been satisfied. Once the deeds were signed and delivered by the Appellant’s parents and not disclaimed by the Appellant, the interest in the land passed to the Appellant and she became entitled in possession to the property. Accordingly, the Appeal Commissioner held that the appellant had not satisfied him that the agricultural lands were transferred to her before the transfer of residential property, such that she was precluded from availing of agricultural relief.

The Appeal Commissioner went on to consider the position if he was incorrect in his finding that the date of gift was 9 October 2013 and it was in fact 26 October 2013, the date the Appellant signed the deeds. The question arose of whether the Appellant was a "farmer" on the "valuation date... after taking the gift". He agreed with the Appellant's submissions that, from a timing perspective, s89 CATCA 2003 provides that the beneficiary must be a farmer "on the valuation date and after taking the gift". The wording does not express/state that the person must be a farmer throughout the entirety of that day. The wording expresses that the timing for the application of the test is "after the taking of the gift" and, furthermore, there is no wording in the legislation that adds the criterion that all benefits received on the valuation date should be considered collectively. Accordingly, an individual's status as a "farmer" requires a consideration of the individual's property holding at the specific time during the day when each gift is taken, and agricultural relief would necessarily follow.

During the appeal, the appellant became aware that the residential property in which she received an interest in expectancy could be considered a "farmhouse" and therefore "agricultural property". Accordingly, she submitted that the appeal was now irrelevant as all of the gifts received were "agricultural property", and therefore it was no longer necessary to consider the timeline of the gifts. Revenue countered that such an argument was a new ground of appeal and that the appellant failed to identify this issue in her notice of appeal, pursuant to s949I(6) TCA 1997, and therefore she should be precluded from relying on such a ground. The Appeal Commissioner determined that he was not satisfied that whether the property was a farmhouse was a matter that could not "reasonably have been stated in the notice".

Although it was not included in the grounds of appeal, the Appeal Commissioner determined that s89 CATCA 2003 provides an automatic entitlement to agricultural relief where the property is "agricultural property". Therefore, although the appellant failed to include the interest in expectancy as "agricultural property" in the grounds of appeal, it appeared that no formal claim had to be made for "agricultural relief", notwithstanding the obligation to report the entitlement of the relief to the respondent. The Commissioner was satisfied that the property was indicative of a typical farmhouse due to its having a utility room for storage of wellington boots, outerwear and farming equipment, and a hand basin to wash hands before entering the kitchen. Within the property, the Appellant's parents stored work wear, animal medicine and some farming tools, and they had an office downstairs where diaries, files and all relevant documents regarding the farm were stored. Furthermore, there was access to the lands from the back door, together with wide vehicular access that connected the front of the house to the farm behind. Thus it was a dwelling occupied by a farmer and therefore a "farmhouse", notwithstanding its appearance as a detached house in a suburban residential area. However, the ordinary meaning of the legislative term "land occupied with such... farm houses" means that the farmhouse is attached to, or at least that can be accessed directly from, the farm land farmed by the farmer. Therefore, although the property is a farmhouse, it is not "agricultural property", as the appellant had no access to her lands from the property and also she had no entitlement to occupy that property after taking the gift. Furthermore, the Appellant did not become beneficially entitled in possession to the property on the date of the transfer but received the remainder interest in the property and therefore did not receive a gift for CAT purposes on that date.

08 Corporation Tax – Accounting Standards

Tax appeal **52TACD2022** was an appeal against a charge to corporation tax in respect of a loan waiver by a company in the same corporate group as the Appellant. Revenue raised an assessment on the basis that the sum representing the loan waiver constituted profits or gains of the trade and was a taxable receipt for corporation tax purposes. The Appellant contended that the loan was capital and that the subsequent waiver of the debt was a capital transaction and did not give rise to corporation tax.

The Appellant company is the treasury company for a corporate group, and its function is to provide centralised cash-pooling and treasury services for the group. The lender company executed a deed of waiver of debt and waived its right of repayment of a debt in the amount of *circa* $265m from the Appellant. The amount of this waiver was included as non-operating income in the Appellant's profit and loss account in accordance with financial reporting standards and the correct accounting treatment. The corporation tax computation for the period deducted the sum of *circa* $265m under the description "Non-taxable capital gain arising on the waiver of the loan by [the lender company]" in arriving at the Appellant's tax-adjusted loss for the period. The question in the appeal was whether the loan waiver sum was capital or income for corporation tax purposes. Arguments were advanced by both sides in respect of the accounting treatment of the waiver and its classification under company law.

The appellant submitted that the loan was fixed capital used in the business to fund the Appellant's loan book, from which the Appellant derived income in the form of interest. Correspondingly, the Appellant took the view that the waiver of the loan was a capital item. The Appellant's position was that the loan principal write-off was not part of the "profits or gains of the trade" in accordance with s76A TCA 1997. The waiver of the loan was not a trading transaction; the loan itself was a capital item; and the waiver was a capital advance to the Appellant company and was not a trading receipt.

Revenue argued that the loan waiver arose as part of the Appellant's trade of treasury services, was advanced for the purposes of the Appellant's trade and was not capital in nature, such that it was taxable as Schedule D, Case I, income. Their position was based on the fact that the promissory note documenting the loan provided that it was repayable on demand and it was accounted for within creditors (amounts falling due within one year). Revenue submitted that s76A TCA 1997 establishes the basic rule that taxable trading profits of a company will be based on the profits according to the company's financial statements and that the Appellant has not established a basis for excluding the non-operating income of *circa* $265m as an exception to the rule. Section 76A TCA 1997 provides "[f]or the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes". Revenue argued that what appears in the accounts as a profit is a profit and falls to be taxed as a profit. The accounting treatment indicated that the loan waiver was profit, and therefore it fell within the charge to corporation tax on the basis that it was profit.

The Appeal Commissioner determined that, in accordance with FRS 3, the loan was reflected in "creditors falling due within one year" in the Appellant's balance sheet on the basis that the promissory note provided that the loan was repayable on demand, notwithstanding the letter of comfort. The consequence of FRS 3 was that all exceptional items were required to be recorded in the profit and loss account and disclosed in the financial statements. Accordingly, the waiver of the loan was required to be disclosed as an exceptional item on the face of the profit and loss account of the Appellant company. There was no dispute between the parties that the accounting treatment of recording the loan waiver in the profit and loss as non-operating income was correct.

The Appeal Commissioner determined that the fact that the correct accounting treatment of an item is to credit it to the profit and loss account does not make it taxable if on tax principles the expenditure is not of a revenue nature. She carried out a review of the relevant authorities in respect of the legal principles governing the characterisation of capital versus revenue. Applying these principles to the facts, she determined that the permanent removal of the debt by means of the loan waiver gave rise to an enduring capital benefit in the Appellant's treasury trade and that the waiver did not convert the loan liability to trading income of the business nor to a sum in substitution of interest. Once the loan was waived, the net assets increased – that is capital. Accordingly, the waiver amount falls outside the charge to corporation tax.

In terms of the classification of the waiver for the purposes of company law and the consequent entitlement to pay dividends, the Appellant submitted that the entry in the profit and loss account flowed through, giving rise to a distributable profit because of the accretion in the net assets of the company. The Appellant's position was that distributable profits may be used, and they were used in this case, for dividends and distributions. The net asset accretion was profit for the purposes of company law but not a taxable profit for the purposes of tax law because it was capital in nature. The Appellant submitted a passage from Clarke J (as he was then) in *Re Irish Life & Permanent plc* [2010] 3 IR 513 stating that accretions to the capital of a company can give rise to distributable profits.

Revenue argued that the loan waiver monies generated a profit that was distributed by dividend, and the position in relation to dividends is that one cannot distribute equity capital of a company.

The Appeal Commissioner acknowledged that capital can, for company law purposes, be a distributable profit and often is because of accretions to assets. The available distributable profits enable a dividend to be paid by virtue of that fact. Accordingly, it does not impact the tax treatment.


Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Capital Gains Tax – Forfeited Deposits**	UK First-tier Tribunal
02	**Corporation Tax – HMRC Guidance**	UK First-tier Tribunal
03	**Capital Gains Tax – Allowable Expenditure**	UK First-tier Tribunal
04	**Corporation Tax – Deductibility of "Redress Payments"**	UK First-tier Tribunal
05	**Capital Allowances – Wind Farm Studies**	UK First-tier Tribunal
06	**Income Tax – Distribution Treatment**	UK First-tier Tribunal
07	**Corporation Tax – Tax Deduction**	UK Supreme Court
08	**Withholding Tax – Deemed Interest**	Court of Justice of the European Union

01 Capital Gains Tax – Forfeited Deposits

The First-tier Tribunal (FTT) delivered its judgment in ***C Drake v HMRC*** [2022] UKFTT 25 (TC). The facts of the case were quite straightforward. The taxpayer entered into a contract for the lease of land under which, at completion, he was to be granted a lease of a property (still under construction at the time of the contract) in return for payment of a premium of £2.2m. A 20% deposit was payable by him on the date of the contract, and a 10% stage payment was payable one year later, both as advance payments of the premium. The taxpayer defaulted on payment of the stage payment; this was a repudiatory breach, and the contract never completed. The issue in the appeal was whether the taxpayer had an allowable loss for the purposes of capital gains tax equal to his lost deposit.

The FTT rejected the taxpayer's appeal on the issue of whether a forfeited deposit on an agreement for lease gave rise to an allowable loss for capital gains purposes. In arriving at this conclusion, the tribunal considered the decision in *Hardy* [2016] UKUT 332 (TCC) to be binding authority. *Hardy* decided that no allowable loss arises for capital gains purposes where a deposit for acquisition of a property is lost due to the taxpayer's defaulting on his obligations to make the full payment at completion, thus triggering rescission of the acquisition contract. The decision in *Hardy* was primarily based on the ground that the taxpayer had no relevant asset (and an allowable loss for capital gains tax purposes can arise only on disposal of an asset). The correctness of the decision in *Hardy* has previously come in for scrutiny, most notably in *Lloyd-Webber v HMRC* [2019] UKFTT 717 (TC), which was discussed in "Direct Tax Cases: Decisions from the UK Courts", *Irish Tax Review*, 33/3 (2020). The FTT, having reviewed the relevant case law, concluded that the decision in *Hardy* was not per incuriam. As an Upper Tribunal decision, it was then binding on the FTT.

The tribunal stated that even if it was wrong about the correctness of the conclusion in *Hardy* (and reservations were expressed), the appeal would still be rejected. This conclusion was predicated on the basis that a forfeited deposit of purchase money does not constitute the disposal of a capital gains asset: the FTT stated that the UK equivalent of s540 TCA 1997 required this conclusion.

02 Corporation Tax – HMRC Guidance

In ***Megablue Technologies Ltd (in liquidation) v HMRC*** [2022] UKFTT 24 (TC) the First-tier Tribunal rejected the taxpayer's appeal. HMRC had not paid out an R&D tax credit within the time period set out in its guidance, and the taxpayer company went into liquidation. HMRC then denied a repayment on the basis that the company was no longer a going concern under a specific piece of legislation.

The appellant pointed to HMRC guidance that stated "most claims" will be paid within 28 days, and that where a payment is not made because HMRC thinks that the claim may be incorrect, HMRC will "aim" to open an enquiry within 60 days of receiving the claim.

The R&D tax credit in this case was not paid out, and HMRC opened the enquiry 81 days after the making of the claim. The company was put into liquidation before the company responded to the enquiry.

The appellant argued that the company was treated unfairly and unreasonably by HMRC. It was argued that the company was entitled to rely on the guidance. It was submitted that given that the company's previous claims had been paid in accordance with that guidance, the company had a legitimate expectation that HMRC would comply with it in relation to subsequent claims. However, the tribunal held that it had no power to consider whether HMRC's conduct was unreasonable or unfair, and that the FTT's task was limited to determining whether the amendments were made in accordance with the provisions of the Acts. On that point, the tribunal concluded that the guidance was not binding, and the refusal by HMRC to pay the R&D tax credit was in accordance with relevant legislative provisions. The tribunal suggested that the company may have grounds for a judicial review but was pessimistic on the likelihood of success, given the caveats contained in the HMRC guidance.

03 Capital Gains Tax – Allowable Expenditure

In ***The Wakelyn Trust v HMRC*** [2022] UKFTT 23 (TC) the First-tier Tribunal rejected the taxpayer's appeal on the issue of whether the release of a tenant's reinstatement obligation contained in a lease formed deductible expenditure of the lessor for the purposes of the UK equivalent of s552(1)(b) TCA 1997. The tribunal determined that the Trust was not entitled to a deduction in its CGT computation on the grant of a lease of land for the value of its releasing the previous tenant from an obligation to reinstate the land on the surrender of its lease.

In 1972 the Trust executed a 30-year lease of land to a company (B&R). B&R constructed a dock and fabrication yard partly on the land contained in the B&R lease and partly on B&R's own adjacent land. In 1996 the lease was extended for a further 30 years. However, in 2011 B&R agreed to sell the fabrication yard to another company (GE) and consequently sought a surrender of the B&R lease. As part of the surrender, the Trust received a £1m payment from the company acquiring the yard from the lessee in return for the grant of a new lease.

It was common ground between the parties that the grant of the lease to GE by the trust required that a part-disposal computation of the allowable base cost be made under the UK equivalent of s557 TCA 1997. The dispute, however, related to whether the trust was permitted to bring in the cost of releasing B&R from the reinstatement provisions. The terms of the lease with B&R dictated that B&R had to remove all buildings and structures on the leased land and fill in and reinstate the land on the termination of the lease. The estimated cost of doing so would be significant. In the interests of getting the 2011 deal completed, the trust agreed to release B&R from this obligation.

Therefore, no payment had been made by either the trust or B&R for the surrender of the lease.

Nevertheless, the trust advanced the argument that the release of B&R from the onerous reinstatement provision contained in the lease was allowable expenditure when calculating the trust's capital gains tax position. The trust attributed a value to the reinstatement right that it had forgone.

The tribunal disallowed a CGT deduction for the value of the reinstatement right. It held that there was a mutual relinquishment by both parties of all of their rights and obligations under the lease and that the lease was surrendered for no expenditure. The tribunal emphasised that the crucial word in the UK equivalent of s552(1)(b) TCA 1997 is "expenditure" and that the use of that word imposes limits on what may be deducted in a CGT computation. The release of B&R from the obligation to reinstate the property was not "expenditure" within the meaning of the term in s552(1)(b). Given that finding, there was no need to consider any further requirements imposed by s552(1)(b).

04 Corporation Tax – Deductibility of "Redress Payments"

In ***ScottishPower (SCPL) Ltd and others v HMRC*** [2022] UKFTT 41 (TC) the taxpayers held electricity generation licences. Between 2010 and 2014, Ofgem, a regulatory body in the energy sector, opened several investigations into the appellants for a number of matters, one of which related to a mis-selling.

Four settlement agreements were reached, under which the appellants made redress payments and paid token £1 financial penalties. The appellants sought to deduct the redress payments (but not the £1 penalties) when computing their taxable profits. The element of the redress payments that was related to mis-selling was paid directly to affected customers who were mis-sold. HMRC disallowed the deductions. The appellants appealed.

The First-tier Tribunal held that, with the exception of the amount paid under the mis-selling settlement (compensatory in nature), the redress payments, although made wholly and exclusively for the purposes of the trade, were in the nature of penalties which were not deductible in computing the profits on policy grounds because they were the price paid to achieve closure of the investigations.

05 Capital Allowances – Wind Farm Studies

In ***Gunfleet Sands Ltd and others v HMRC*** [2022] UKFTT 35 (TC) the First-tier Tribunal (FTT) had to conclude on whether expenditure incurred on various studies carried out before the construction of wind farms qualified for a capital allowance claim.

The taxpayer companies all own and operate offshore wind farms and are engaged in the business of the generation and sale of electricity. The appellants incur significant expenditure in relation to the construction of offshore wind farms. The case predominantly concerned the extent to which capital allowances were available to the appellants for expenditure incurred on studies and project management in relation to offshore wind farms. Expenditure was incurred on environmental impact studies and assessments; metocean studies; geophysical and geotechnical studies; and project management, design and procurement.

The tribunal considered the extent to which expenditure on the studies was qualifying expenditure incurred “on the provision of” the plant and machinery. Irish capital allowances legislation contains similar requirements. HMRC argued that the expenditure on the studies was too remote from, and not “on the provision of”, plant and machinery.

The FTT applied that logic to the various studies costs and held that certain elements qualified for capital allowances as the wind farms would be operationally useless if that expenditure had not been incurred. The expenditure that did not qualify for capital allowances also did not qualify as pre-trading revenue expenditure as it was a capital cost.

06 Income Tax – Distribution Treatment

In ***Conran and another v HMRC*** [2022] UKFTT 39 (TC) the taxpayer, Mr Jasper Conran (JC), was the 99% owner of a UK LLP that sold a business to a related company that was ultimately 100% owned by JC. The business transferred was valued at £8.25m. The related company made a payment equal to that amount to the LLP partners. The appellant returned the amount as a capital gain, paying capital gains tax of £1.4m. The related company recognised the consideration paid in its accounts and claimed relief under the intangible assets regime.

However, HMRC submitted that the valuation was overstated. HMRC valued the business at a nominal value of £1, based on the fact that certain licences had not been transferred, without which the business would not be able to operate. It denied intangible tax relief on the £8.25m that was paid to acquire the business. HMRC also considered the £8.25m consideration paid to be a distribution to JC.

The tribunal agreed. The outcome meant that the related company that acquired the business was unable to obtain any relief for the amortisation of the £8.25m that it actually paid. The tribunal concluded that the market value of the assets actually transferred to the related company was £1, such that JC did not realise a chargeable gain on the disposal by the UK LLP. Accordingly, JC was entitled to a repayment of the CGT paid. Furthermore, the £8.25m was held not to be a distribution within the distributions legislation. The tribunal did not accept that the payment was made by the related company to JC as the (indirect) holder of the shares in the related company, i.e. in respect of shares in the related company. Rather, JC received the payment as he was the majority partner in the UK LLP that conducted the business. The related company was also considered not to be entitled to intangibles relief on the £8.25m that it paid.

07 Corporation Tax – Tax Deduction

In ***HMRC v NCL Investments Ltd and another*** [2022] UKSC 9 (23 March) the UK Supreme Court (SC) rejected HMRC's appeal and determined that accounting debits that arose in the accounts of the taxpayer companies as a result of the grant of share options in the ultimate holding company were deductible in computing the trading profits.

The taxpayers were members of a corporate group of companies whose ultimate parent was Smith & Williamson Holdings Limited (SW). The group carried on a professional services business that included the provision of tax and accountancy services. The taxpayer companies employed staff whom they made available to other group companies in return for a fee. SW set up an employee benefit trust (EBT), which granted options to staff employed by the taxpayer companies to acquire shares in SW.

The applicable standard in relation to the grant of the options was IFRS 2, entitled Share-based Payment. IFRS 2 required the taxpayers to recognise an expense reflecting the consumption of the services. Given the practical difficulty in measuring directly the fair value of the employee services received, IFRS 2 required the fair value of the equity instruments granted for those services to be used as a surrogate for the fair value of the services. The corresponding credits in the balance sheets represented capital contributions from the holding company.

HMRC denied a deduction for the expense recognised in the income statement. The main thrust of HMRC's argument was that for an expense to be deductible for corporation tax purposes, it has to be incurred, in that it must reflect money actually spent or to be spent by the taxpayer, as opposed to simple accounting entries. However, the SC rejected this argument. In line with s76A TCA 1997 in Ireland, the court determined that there was no "adjustment required or authorised by law" that would require the debits to be disallowed for corporation tax purposes. The profits and losses of the trade were to be calculated in accordance with the principles of commercial accounting.

The SC also held that the debits were incurred wholly and exclusively for the purposes of the trade and were not capital in nature. HMRC's appeal was unsuccessful. The SC upheld the decisions of the First-tier Tribunal, the Upper Tribunal and the Court of Appeal.

European Court Cases

08 Withholding Tax – Deemed Interest

In case C-257/20, ***Viva Telecom Bulgaria' EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia***, the Court of Justice of the European Union (CJEU) delivered a decision regarding withholding tax on "notional" interest that was deemed to arise on an interest-free loan between related parties. A Bulgarian company, Viva Telecom, received an interest-free loan from its parent, a company in Luxembourg. The loan's maturity was 60 years, and it could be converted into equity at any time. The Bulgarian tax authorities applied domestic anti-avoidance provisions and imposed an arm's-length interest rate, with a resulting withholding tax obligation. Viva Telecom appealed the decision to operate withholding tax.

The Court held that the matter was not covered by the EU Interest and Royalties Directive or the Parent–Subsidiary Directive. In particular, deemed interest does not involve an actual payment between the companies, and therefore the lender cannot be considered as the "beneficial owner" under the Interest and Royalties Directive. The "interest" also could not be regarded as a “distribution of profits” within the meaning of the Parent–Subsidiary Directive.

The CJEU also considered the compatibility of the withholding tax imposed by the Bulgarian tax authorities with the fundamental freedoms. A measure which restricts the free movement of capital is permissible only if it is justified by an overriding reason in the public interest and observes the principle of proportionality, which means that the measure must be appropriate for ensuring the attainment of the objective pursued and not to go beyond what is necessary in order for it to be attained. On this issue, the CJEU determined that the Bulgarian measure did not go beyond what is required to achieve the objectives that it pursues (i.e. the prevention of tax evasion), primarily due to the presence of a refund mechanism for non-resident lenders.

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International Tax Update

01 BEPS – Recent Developments

OECD Inclusive Framework on BEPS

After the agreement reached in October 2021, by over 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

Model commentary and guidance

On 14 March 2022 the OECD/G20 Inclusive Framework released model commentary and guidance on the 15% global minimum tax agreed in October 2021. The commentary elaborates on the application and operation of the global anti-base erosion (GloBE) rules agreed and released in December 2021.

The commentary provides technical guidance on the operation and intended outcomes of the rules and clarifies the meaning of certain terms. The Inclusive Framework will now develop an implementation framework to support tax authorities in the implementation and administration of the GloBE rules. As the first step in this process, the Inclusive Framework held a public consultation meeting on 25 April 2022. The purpose of this meeting was to collect input from stakeholders on the matters that they consider need to be addressed as part of the implementation framework to ensure that tax administrations and multinational companies can implement and apply the GloBE rules in a consistent and coordinated manner.

Pillar One

Public consultation on "scope" rules

On 4 April 2022 the OECD released a public consultation on the draft model rules for domestic legislation on "scope" under Amount A of Pillar One. According to the OECD announcement, "[t]he purpose of the Scope rules is to determine whether a Group will be in scope of Amount A. The rules are designed to ensure Amount A only applies to large and highly profitable Groups and have been drafted to apply in a quantitative manner, such that they are readily administrable and provide certainty as to whether a taxpayer is within scope".

The announcement indicates that although public comments are being sought on the draft model rules, the draft rules do not reflect consensus regarding the substance of the consultation document. Input received on the draft rules will assist Inclusive Framework members in further refining and finalising the relevant rules. Interested parties were invited to send their written comments no later than 20 April.

Public consultation on "extractives exclusion" under Amount A

On 14 April 2022 the OECD released a public consultation on the "extractives exclusion" under Amount A of Pillar One. The extractives exclusion will exclude the profits from extractive activities from the scope of Amount A. The exclusion applies if a group derives revenue from the exploitation of extractive products and the group has carried out the relevant exploration, development or extraction. Interested parties were invited to send their written comments no later than 29 April, and on 3 May the OECD published the comments received.

Public consultation on regulated financial services exclusion under "Amount A"

On 6 May 2022 the OECD issued an announcement inviting public comments on a consultation document on the regulated financial services exclusion under Amount A of Pillar One, i.e. the exclusion of revenues and profits from regulated financial institutions from the scope of Amount A.

According to the OECD announcement, the "defining character of [the regulated financial services] sector is that it is subject to a unique form of regulation, in the form of capital adequacy requirements, that reflect the risks taken on and borne by the firm. It is this regulatory driver that generally helps to align the location of profits with the market. The scope of the exclusion derives from that requirement, meaning that Entities that are subject to specific capital measures (and only those) are excluded from Amount A."The announcement indicates that although public comments are being sought on the consultation document, this does not reflect consensus regarding the substance of the consultation document. Input received on the regulated financial services exclusion will assist Inclusive Framework members in refining and finalising the relevant rules. Interested parties were invited to send their written comments no later than 20 May.

02 US Tax Developments

White House releases Budget Proposal

The White House released a fiscal year 2023 Budget blueprint on 28 March 2022, which, as expected, echoes President Joe Biden's long-standing calls for significant tax increases targeting large corporations and high-income individuals but also amplifies them. Thus, for example, the administration has included a familiar proposal from its fiscal year 2022 tax-and-spending plan to increase the top income tax rate to 28% for corporations but also includes a new proposal that would repeal the current-law base erosion and anti-abuse tax (BEAT) and replace it with an undertaxed profits rule consistent with one described in the OECD's Pillar Two Model Rules.

Along with the Budget blueprint, the White House released the "Green Book", which provides more granular details from the Treasury Department on the administration and revenue proposals and their projected impact on federal receipts.

Build Back Better Act

While the President's social spending and tax policy Bill, commonly known as the Build Back Better Act, remains stalled in the Senate after clearing the House of Representatives last November, it is of note that the revenue projections in the Budget blueprint released on 28 March 2022 are built on the assumption that almost of all of those tax policies in the House-passed legislation are enacted into law. In other words, the Budget proposals to raise the top corporate rate to 28% would be in addition to, rather in lieu of, the book minimum tax proposal in the House-passed version of the Build Back Better Act. As discussed in previous issues of "International Tax Update", the proposed changes to GILTI in the Build Back Better Act are relevant to determining whether US GILTI will be permitted as co-existing with Pillar Two and therefore the potential for the income inclusion rule and GILTI applying to the same income.

03 EU Tax Developments

Draft EU Directive: corporate minimum tax

The Economic and Financial Affairs Council (ECOFIN) met on 15 March 2022. Among the topics discussed was the proposed Directive to implement in the EU the Pillar Two global minimum tax rules published by the OECD/G20 Inclusive Framework on BEPS.

The European Commission had released, on 12 March 2022, a compromise text to translate the draft Directive on a corporate minimum tax into national laws. The compromise text included moving the start date for Pillar Two in the EU by 12 months to 31 December 2023 (for the income inclusion rule to apply to fiscal years beginning as from that date) and to 31 December 2024 (for the undertaxed profits rule to apply to fiscal years beginning as from that date). The deferral by one year is a welcome development given the complexity of the rules and will allow greater consultation by Member States on the implementation of the Directive into local law. However, it should be borne in mind that both the draft Directive and the OECD Pillar Two Model Rules provide that transfers of certain assets that take place after 30 November 2021 are treated for Pillar Two purposes as taking place at the carrying value of the transferor and therefore transfers that occur in this gap period before Pillar Two takes effect may still have an impact on the Pillar Two calculations in future periods.

At the ECOFIN meeting on 15 March 2022 Estonia, Malta, Poland and Sweden withheld their support for the compromise text, expressing the following concerns, and therefore no unanimity was achieved on the draft Directive:

- Estonia expressed concerns that some technical details still needed to be addressed for it to maintain its current distribution-based corporate tax system and to avoid a disproportionate administrative burden for the implementation of the rules.
- Malta reiterated the need for the EU Directive to replicate the OECD Model Rules, which are agreed as a common approach, and to provide for flexibility in the transposition of the rules.

- Poland stated that the OECD's two-pillar solution mandates the implementation of Pillar One and Pillar Two in parallel and stipulated that it prefers a legally binding assurance on the link between the two pillars.
- Sweden indicated that it was too early to agree on a general approach at the EU level given that technical work on the implementation framework is still ongoing at OECD level.

A further meeting was therefore scheduled for 5 April 2022 with the aim of reaching the unanimous agreement required to progress the draft Directive. Although Estonia, Malta and Sweden gave support to the compromise text at this meeting, Poland still expressed concerns, insisting on a legal link between OECD Pillars One and Two, and therefore no agreement was reached at this meeting.

There will be two more ECOFIN meetings before the end of June (24 May and another meeting in June), so there are further opportunities to come to an agreement before the French Presidency of the EU Council comes to an end on 30 June 2022.

EU ATAD3 Directive

On 22 December 2021 the European Commission published a draft Directive, Unshell (also referred to as ATAD3), designed to prevent "the misuse of shell entities for improper tax purposes"[1], and issued a public consultation seeking public comments on the draft Directive by 6 April 2022

The Commission received 45 responses from various organisations and individuals. The general view expressed in the responses was that although the aim of the Directive is admirable, it remains unclear whether it will achieve that aim. Key common issues identified by the respondents include:

- It is essential that time is taken to assess the full impact of recent reforms before determining whether the additional measures proposed in ATAD3 are necessary.
- ATAD3, as currently drafted, could potentially infringe the EU fundamental freedoms of establishment and movement of capital and does not reflect the judgments of the Court of Justice of the European Union that have determined the circumstances in which tax laws can impose restrictions on the fundamental freedoms.
- Concerns were raised about the lack of clarity in some definitions in the draft Directive and on the economic-substance indicators.
- No allowance appears to be made in the draft Directive for whether or not an outsourcing is intra-group and domestic.
- There is an exclusion from the rules for listed companies; however, this does not appear to apply to any of their subsidiaries, including those that are in the same Member State. There is also an exclusion in respect of certain regulated financial undertakings; however, again, it would appear that the exception does not apply to their subsidiaries, including domestic subsidiaries.
- The significant administration burden associated with ATAD3 for companies and tax administrations is unduly excessive and will considerably increase compliance costs for business.
- There is no guidance in ATAD3 on how the tax authorities in Member States should assess the documentary evidence provided by the undertaking.
- To override the double taxation agreement between a third country and the shell company jurisdiction would seem highly problematic. In the absence of some form of multilateral instrument, it is not clear how the terms of a Directive could override a double taxation agreement between Member States or between a Member State and a third country.

1 European Commission – Press Release, Brussels, 22 December 2021; "Fair Taxation: Commission proposes to end the missue of shell entities for tax purposes within the EU".

We await how the draft Directive may be amended to take account of the feedback received.

Public consultation on EU withholding taxes framework

The European Commission has launched a public consultation questionnaire on its initiative to introduce a common, EU-wide system for withholding tax claims on dividend and interest payments within the EU. The consultation will run until 26 June 2022.

During the consultation period, all stakeholders – EU agencies and international organisations, civil society organisations and academia, national authorities, private sector representatives, as well as the general public – are invited to answer an online questionnaire. The questionnaire focuses on the problems related to withholding taxes in the European Union and on possible measures and potential impacts. The information gathered under the consultation will be used to support the impact assessment of the European Commission in the context of this initiative.

04 Ireland: Mandatory Disclosure Rules

Revenue eBrief No. 078/22, issued on 1 April 2022, notes that the Revenue Tax and Duty Manual "EU Mandatory Disclosure of Reportable Cross-Border Arrangements" (DAC6) has been updated. The changes mainly reflect the Finance Act 2021 amendments, but below are some others to be aware of.

With respect to Hallmark E3, which relates to the intra-group cross-border transfer of functions and/or risks and/or assets, the previous guidance notes provided that "intragroup" was defined in line with EU Working Party comments, with the below included as a footnote:

> "It was explained at a meeting of Working Party IV – Direct Taxation held on 24 September 2018 that 'the term "intragroup" refers to the concept of "associated enterprise" and the definition provided in Article 3 point 24 of DAC6'. See Chapter 7 for the meaning given to 'associated enterprise' in Article 3(24)."

The conclusion drawn from the above was that an intra-group transfer was to be regarded as a transfer between associated enterprises. Accordingly, a transfer under Hallmark E3 should not include a transfer between a head office and its branch.

In Revenue's revised guidance issued on 1 April 2022, this footnote has been removed, and instead the guidance states that "unlike other hallmarks this is not a transaction between associated enterprises, but an intra group transaction which therefore includes transactions between Head Office and Permanent Establishments". Therefore, a transfer between a head office and its branch may now potentially be caught by Hallmark E3.

With respect to Hallmark E2, which relates to the transfer of hard-to-value intangibles, the revised guidance clarifies that a transfer is not limited to the sale of an asset or the sale of rights in an asset but can include the grant of an exclusive licence to exploit an intangible asset.

05 India: Significant Economic Presence

India introduced a concept called "significant economic presence" (SEP) for taxing foreign entities in India (irrespective of whether they have physical presence in India), and this has been effective since 1 April 2021.

The Indian Government recently released the income tax return (ITR) forms for the financial year 2021–22, and certain disclosures are now required within these forms with regard to SEP. Where SEP is applicable, there is a mandatory requirement for a non-resident to disclose details of the aggregate of payments and the number of users in India. Accordingly, where a non-resident sells goods/services in India exceeding INR 20m (i.e. USD 0.27m/EUR 0.22m) or has users in India of 0.3m or more, SEP disclosure is required.

Typically, non-residents that did not constitute a permanent establishment under tax treaties were not impacted by SEP. Such non-residents also did not have to file a return of income in India. However, given the disclosures now required under the new ITR, non-residents will need to analyse the impact of SEP and the requirement to file an ITR from in India for the period 1 April 2021 to 31 March 2022.

06 US–Chile Tax Treaty

A long-delayed tax treaty between the US and Chile took a significant step toward ratification as it cleared the US Senate Foreign Relations Committee by voice vote on 29 March 2022.

The tax treaty with Chile is one of several that were negotiated and signed before the Tax Cuts and Jobs Act of 2017 (TCJA) was enacted but have been held up since then because of concerns that their language could be interpreted as overriding the TCJA's base erosion and anti-abuse tax (BEAT). Similar tax treaties with Hungary and Poland have also been delayed over BEAT concerns and have not yet been scheduled for Committee consideration.

07 Belize and Cameroon: Multilateral Instrument

Belize and Cameroon deposited their instruments of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("the Multilateral Instrument", or MLI) with the OECD on 7 April 2022 and 21 April 2022, respectively. Belize's list of reservations and notifications to the MLI (i.e. its MLI position) on the deposit of its ratification instrument identifies four tax treaties (Austria, Switzerland, United Kingdom, United Arab Emirates) that it wishes to be covered by the convention, whereas Cameroon's MLI position identifies six tax treaties (France, Canada, Tunisia, Morocco, South Africa, United Arab Emirates) that it wishes to be covered.

The MLI will enter into force for Belize and Cameroon three months after the deposit of their instruments of ratification, i.e. on 1 August 2022. Representatives covering a total of 99 jurisdictions have now signed the MLI, and instruments of ratification, acceptance or approval covering 73 jurisdictions have been deposited with the OECD.

08 Brazil: Transfer Pricing Legislation

On 12 April 2022 the Brazilian Government and the OECD held a meeting to introduce proposed changes to Brazilian transfer pricing legislation. The purpose of new legislation is to increase legal certainty, avoid double taxation and avoid the loss of tax revenue (also referred to by the tax authorities as "double non-taxation"). The new legislation will incorporate the arm's-length principle, in line with the OECD Transfer Pricing Guidelines. The draft of the new legislation will be published for public consultation. After comments and suggestions from different sectors of the economy have been collected, a Bill will be submitted for congressional voting and approval.

09 Germany: Capital Repayments

In a long-awaited decree dated 21 April 2022 the German Ministry of Finance confirmed that a non-EU subsidiary may make a tax-free repayment of capital to a German corporate shareholder, and it set forth related rules and documentation requirements to prove the character of such a repayment. The decree is a response to several federal tax court (BFH) decisions from 2010, 2016 and 2019 and generally aligns with the principles established by the BFH in the decisions.

The decree provides that for companies that are resident in a country outside of the EU/EEA, a repayment of stated share capital (as a result of a share capital decrease) does not result in taxable income to the German corporate shareholder, provided that the repayment takes place at least five years after the new shares were issued (s7(2) KapErhStG). Although no formal procedure is required, the non-EU/EEA subsidiary must provide appropriate documentation to the German tax authorities as proof that a repayment of stated share capital occurred (in particular, a shareholder resolution regarding the share capital decrease and the repayment of capital).

The decree has been long awaited by tax practitioners and confirms the acceptance by the tax authorities of the principles established by the BFH. This is a welcome development for taxpayers. The BFH decisions from 2010, 2016 and 2019 will be published soon in the federal tax gazette, which will mark the official recognition of these decisions by the tax authorities. Even though the decree is a favourable development, taxpayers should not underestimate the potential complexities and documentation requirements when it comes to the tax-free character of a repayment of capital by a foreign subsidiary (irrespective of whether the subsidiary is resident in an EU/EEA country).

10 Germany: Participation Exemption

In a decision dated 13 October 2021 and published on 21 April 2022, Germany's lower tax court of Saxony ruled that separate share acquisitions in a given year should not be considered separately when determining whether the required 10% minimum shareholding is met for purposes of the participation exemption for dividends.

Under the current participation exemption rules, dividends are effectively 95% tax-exempt, provided a minimum shareholding of 10% exists at the beginning of the calendar year. Based on the applicable rules (s8b(4), sentence 6, CITC), the acquisition of a shareholding of at least 10% that takes place during the calendar year is deemed to have taken place at the beginning of the calendar year.

In this respect, it has been unclear whether a shareholder that already owns, or is deemed to already own, a minimum shareholding of 10% at the beginning of the calendar year and acquires additional shares during the calendar year qualifies for the application of the participation exemption for dividends related to the additional shares if the acquired additional shares amount to less than 10% of the company.

The ruling of the lower tax court provides welcome clarity on the question of how the required 10% minimum shareholding that is acquired during a calendar year must be determined for purposes of the participation exemption rules.

VAT Cases and VAT News

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VAT Cases

01 Right to Deduct Input VAT – Timing

The CJEU delivered its judgment on 10 February 2022 in ***Grundstücksgemeinschaft Kollaustraße 136* [“GK136”] *v Finanzamt Hamburg-Oberalster*** C9/20. The case concerned the interpretation of Article 167 of the VAT Directive and the time at which the right to deduct input VAT arises. GK136 was the tenant under a lease of land for industrial and commercial purposes and it also sub-let the property. Both the landlord and GK136 waived exemption in relation to the lettings so that the rental income was liable to VAT. Both were authorised by the German tax office to account for VAT on the cash receipts basis. Some of GK136’s rental payments were deferred and paid at a later date. GK136 deducted input VAT when the rental income was received by the landlord. During an audit, the tax office argued that the input VAT should have been claimed on the basis of the agreed rent each year.

The VAT Directive provides under Article 63 that the chargeable event shall occur and the VAT shall become chargeable when the supply takes place. A derogation is then provided for (in certain cases) under Article 66 whereby VAT is chargeable (a) no later than the time the invoice is issued, (b) no later than the time the payment is received or (c) where an invoice is not issued or is issued late, no later than the expiry of the time limit for issuing invoices. With regard to the deduction of input VAT, Article 167 provides that the right to deduct shall arise at the time the deductible tax becomes chargeable. In the context of the cash receipts scheme, Article 167a allows Member States to provide that the right of deduction can be postponed until the supplier is paid (so that if VAT is accounted for on the cash receipts basis, input VAT can be claimed only when the supplier is paid).

Under the German VAT provisions the right of deduction arises when the goods or services are supplied, irrespective of when the tax becomes chargeable to the supplier and regardless of whether the supplier accounts for VAT on the cash receipts basis or the invoice basis. The German provisions did not apply the derogation permitted in Article 167a so that the right of deduction arises when the supply is made even in cases where the cash receipts basis is used. The referring court raised the question of the compatibility of the German provision with the provisions of the Directive, as under German law a taxable person who has not deducted input VAT cannot then assert the right of deduction for a subsequent tax year.

In considering the question posed, the court noted that German law provides that the right of deduction arises where the goods or services have been supplied, without taking into account the point in time when the tax becomes chargeable to the supplier of the goods or services. It indicated that the wording of Article 167 is "clear and unambiguous" in that the right of deduction arises when the VAT becomes chargeable, and under Article 63 the chargeable event is to occur and VAT is to become chargeable when the goods or the services are supplied. But Member States can derogate from Article 63 by invoking Article 66(1)(b) so that VAT is to become chargeable no later than the time the payment is received (in certain cases). The court noted that for Article 66(1)(b) to be interpreted consistently with Article 167 it must be concluded that when the tax becomes chargeable no later than the time the payment is received, the right of deduction also arises at the time when such payment is received.

The court also referred to the purpose behind the inclusion of Article 167a, which was to enable Member States to provide a derogation for the date on which the right of deduction may be exercised by those using the cash receipt basis and was intended to simplify the payment of VAT for small businesses. The court stated that "it is therefore only in the circumstances provided for in Article 167a that it is possible to sever the relationship between the chargeability of tax to the supplier of goods or services and the taxable person's immediate right of input VAT deduction". The landlord and GK136 were authorised by the tax office to charge VAT on the basis of the remuneration received rather than the remuneration agreed, and "they were therefore, subject to verifications by the referring court, taxable persons on whom VAT becomes chargeable no later than the time the payment is received, within the meaning of point (b) of the first paragraph of Article 66 of the VAT Directive". The court held that, subject to verifications to be carried out by the referring court, the right of deduction for GK136 arose at the time when the payment was received by the landlord. Hence the German provision was contrary to the provisions of the Directive.

Entitlement to input VAT recovery arises here at the time that the input VAT is incurred. It is worth remembering, however, that where VAT is reclaimed and the supplier of goods or services is not paid within a six-month period, the VAT amount reclaimed is to be repaid to Revenue (refer to s62A of the Value-Added Tax Consolidation Act 2010 (VATCA 2010)).

02 Place of Supply of Services and Fixed Establishment

On 7 April 2022 the CJEU delivered its judgment in the case of ***Berlin Chemie A. Menarini SRL v Administrația Fiscală pentru Contribuabili Mijlocii București – Direcția Generală Regională a Finanțelor Publice București*** C-333/20. This case dealt with the interpretation of Article 44 of the VAT Directive and Article 11 of the Implementing Regulation

EU 282/2011 ("the IR") in the context of the place of supply of services and the concept of fixed establishment.

The Romanian tax authority raised assessments on Berlin Chemie A. Menarini SRL (BCAM) in relation to services supplied to a German company and in respect of which BCAM applied the reverse charge. BCAM is a Romanian company with its registered office in Bucharest and was incorporated in 2011. Its main activity is the provision of management consultancy services in the areas of PR and communications, and it also engaged in the wholesale supply of pharmaceutical products, management consultancy, advertising agency activities, market research and carrying out opinion polls. BCAM is a wholly owned subsidiary of Berlin Chemie/Menarini Pharma GmbH (BCMP), which in turn is 95% owned by Berlin Chemie AG (BC). Both BCMP and BC have registered offices in Germany and are part of the Menarini group.

BC markets pharma products in Romania, having done so since 1996, and supplies those products to wholesalers in Romania. BC is supplied with storage services in Romania and is VAT-registered there. It is the sole customer of BCAM. BCAM and BC concluded a contract for the provision of services by BCAM to BC to include marketing, regulatory, advertising and representation services. The services related to the promotion of BC's products in Romania and included taking orders from wholesale distributors in Romania and forwarding same to BC. BCAM was paid a monthly fee, and this was invoiced by BCAM on a VAT-exclusive basis as it considered the place of supply of the services to be Germany (the place of business of BC).

The Romanian tax authority took the view that the place of supply of the services was Romania, where it considered that BC had a fixed establishment. Its assessment that BC had sufficient technical and human resources to carry out regular supplies of goods or services was on account of the technical and human resources that belonged to BCAM but were continuously accessible by BC.

The questions referred to the CJEU were whether Article 44 of the VAT Directive and Article 11 of the IR meant that a company with its registered office in one Member State has a fixed establishment in another Member State as it has a subsidiary there that provides it with human and technical resources and provides services to it on an exclusive basis that directly influence its sales in that Member State. Article 44 (first sentence) provides that the place of supply of services to a taxable person acting as such is to be the place where that taxable person has established its business. Article 44 (second sentence) provides that if those services are provided to a fixed establishment of the taxable person located in a place other than the place where it has established its business, the place of supply of those services is to be the place where that fixed establishment is located.

In considering the appropriate rules, the court indicated that the primary point of reference is the place where the person has established its business. By way of exception, a fixed establishment can be taken into consideration. The existence of a fixed establishment is determined by reference to the taxable person receiving the services (as opposed to the taxable person supplying the services). A fixed establishment is characterised by "a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs". The court considered two criteria in determining the existence of a fixed establishment: (1) whether there is a sufficient degree of permanence and a suitable structure in terms of technical and human resources and (2) whether it is characterised by a structure that is capable, in terms of human and technical resources, of enabling it to receive the services supplied to it and to use them for its own business needs.

In relation to the first criterion, the court noted that Article 44 does not provide details regarding whether human and technical resources must belong to the taxable person that receives the services, and Article 11

IR requires only “a sufficient degree of permanence” and “a suitable structure in terms of technical and human resources”. In this regard the court indicated that there must be a discernible structure evidenced by the existence of human or technical resources and the structure must exist more than just on an occasional basis. It also noted that a fixed establishment cannot depend solely on the legal status of the entity concerned, so although it is possible that a subsidiary constitutes a fixed establishment of its parent, the substantive conditions of the IR must be satisfied in the context of the economic and commercial realities.

The court noted that although it is not necessary that the human and technical resources be owned by the taxable person, the person must have the right to dispose of those resources in the same way as if they were its own. It is up to the referring court to assess whether BC has a structure in Romania in terms of human and technical resources that is sufficiently permanent. It is only if it were established that, by reason of the applicable contractual terms, BC had the technical and human resources of BCAM at its disposal as if they were its own that BC could have a suitable structure with a sufficient degree of permanence in Romania in terms of human and technical resources. This is up to the referring court to verify.

In relation to the second criterion, the court indicated that a distinction should be drawn between the services supplied by BCAM to BC and the goods that BC sells and supplies in Romania. It indicated that a fixed establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs, and not by the decisions that such a structure is authorised to take. It stated that the same means cannot be used both to provide and to receive the same services. The services provided by BCAM seem to be received by BC, and BC uses its human and technical resources situated in Germany to conclude and perform the contracts of sale with distributors of its pharmaceutical products in Romania.

The court held that where these facts are established by the referring court, BC does not have a fixed establishment in Romania. This is because it does not have a structure in Romania allowing it to receive services in Romania as provided by BCAM and to use those services for the purposes of its economic activity of selling and supplying pharmaceutical products.

This case highlights the importance of considering all of the facts and circumstances of a recipient of services in determining the place of supply of those services, and of particular relevance is that whether a fixed establishment exists is determined by reference to the taxable person receiving the services.

03 Multi-purpose Vouchers

The CJEU handed down its judgment in the case of ***Skatteverket v DSAB Destination Stockholm AB*** (DSAB) C-637/20 on 28 April 2022. DSAB sells a card called a “citycard” to tourists in Stockholm. The citycard gives a cardholder the right to be admitted to around 60 attractions, such as sights and museums, for a limited period of time and up to a certain value. It also gives a cardholder access to around 10 passenger transport services, such as tours provided by DSAB’s own “hop-on, hop-off” buses and boats, as well as sightseeing tours with other organisers. Some of those services are subject to VAT at rates ranging from 6% to 25%, whereas others are tax-exempt. The cardholder uses the citycard as a means of payment for admission to or use of a service and does not pay any supplement.

The service supplier receives consideration equal to a percentage of the normal price of admission or use from DSAB in respect of each admission or use of the card. The service supplier is not obliged to grant the cardholder access to its services more than once. DSAB does not guarantee any minimum number of visitors. If the value limit of the card is reached, it can no longer be used by the cardholder. The citycards can have different validity periods and different value limits. DSAB sought a ruling from the Swedish tax authority on the VAT status of the citycard, and it ruled that it was not a multi-purpose voucher within Article 30a of the VAT Directive. In its view a voucher must have a certain nominal value or relate to certain specified supplies of goods or services. It must be clear what can be obtained in return for the voucher.

DSAB argued that the citycard was a muti-purpose voucher as the suppliers of services are obliged to accept the card as a means of payment and that the conditions applicable to cardholders state which services may be paid for with that card and who the suppliers of those services are. The question raised was whether Article 30a means that an instrument that gives the bearer the right to use various services at a given place, for a limited period and up to a certain amount, constitutes a “voucher” within the meaning of Article 30a(1) even if, on account of the limited validity period of that instrument, an average consumer cannot benefit from all of the services offered.

The court first considered the circumstances in which an instrument may be classified as a “voucher”. Under Article 30a a “voucher” is an instrument where there is an obligation to accept it as consideration or part-consideration for a supply of goods or services and the goods or services to be supplied or the identities of their potential suppliers are indicated either on the instrument itself or in related documentation, including the terms and conditions of use of such instrument. These conditions are cumulative.

The court indicated that the two conditions would appear to be satisfied by the citycard but it is up to the referring court to verify this. The court did not accept the argument of the tax authority that the citycard cannot constitute a “voucher” within the meaning of Article 30a(1) on the ground that it is impossible for an average consumer to take advantage of all of the services offered, having regard to the limited validity period of that card. To support this view, the court indicated that the definition of voucher in Article 30a(1) does not provide that the validity period of the card or whether it is possible to use all of the services are relevant elements in classifying it as a voucher.

In addition, because of the variety of services offered by the citycard, the court did not accept that it could be classed as the single provision of a service (which could result in a single VAT rate being applied when, in fact, the services attract different rates or could lead to double taxation). The court indicated that it would be possible to classify the citycard as a voucher, and as vouchers that are not single-purpose vouchers are classed as multi-purpose vouchers, it is necessary to ascertain whether the citycard is a single-purpose voucher. In this regard a “single-purpose voucher” is defined as a voucher where the place of supply of the goods or services to which the voucher relates and the VAT due on those goods or services are known at the time of issue of the voucher. The citycard provides access to various services at various VAT rates, and it is not known which services a user might avail of, so the amount of VAT to be accounted for is not known when the card is issued. As a result, the citycard cannot be classified as a single-purpose voucher, and where it can be classified as a voucher, it is to be considered a multi-purpose voucher.

Sections 43 and 43A of VATCA 2010 set out the definitions and rules applicable to vouchers, single-purpose vouchers and multi-purpose vouchers. Revenue’s Tax and Duty Manual “VAT Treatment of Single-Purpose and Multi-Purpose Vouchers” provides detailed guidance on this topic.

04 Exempt Education Services

On 28 April 2022 the CJEU issued its judgment in the case of ***Happy Education SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca, Administrația Județeană a Finanțelor Publice Cluj*** C-612/20. The tax authorities in Romania refused to grant exemption to Happy Education SRL in respect of its teaching services, which supplemented the school curriculum. Happy Education SRL is a commercial entity that provides various educational services such as homework support classes, educational programmes, foreign language classes, art classes, sporting activities, and after-school collection and provision of meals. The activities fall under the "School after School" programme, and its business classification is "other education".

The question referred was whether the concept of "an organisation recognised as having similar objects" to those of a body governed by public law (under the exemption in Article 132(1)(i)) covers such an entity as Happy Education where it supplies services supplementing the school curriculum and is authorised under the national trade register as providing other education.

In examining Article 132(1)(i) the court noted that the exemption under this particular provision is subject to two cumulative conditions – the nature of the service provided must concern provision of children's or young people's education, school or university education, vocational training or retraining, or services "closely related" to it; and the services must be supplied by bodies governed by public law etc. or by other organisations recognised by the Member State concerned as having similar objects. As Happy Education SRL is not an entity governed by public law, for the exemption to apply, it must be an organisation recognised by the Member State concerned as having similar objects.

The recognition process is up to the Member State (subject to the principle of fiscal neutrality). In Romania the recognition of a commercial entity as having similar objects to a public body entails a partnership arrangement with an education establishment in line with the "School after School" programme. In this case Happy Education SRL did not have such a partnership arrangement, and therefore it did not have the recognition required under Romanian law. Its registration in the national trade register as being engaged in "other education", which was an indication of its commercial purpose, did not constitute recognition as an organisation having similar objects to a public body. As a result, it did not satisfy the conditions for recognition under domestic law and its activities did not fall within the exemption provided for in Article 132(1)(i).

From an Irish point of view, the exemption for education, vocational training and retraining is set out in para. 4(3) of Schedule 1 of VATCA 2010, and the provision details the providers of services that will qualify for exemption. Detailed guidance on this issue is also provided in Revenue's Tax and Duty Manual "VAT Treatment of Education and Vocational Training".

05 Exemption or Reduced Rate for Certain Medical Services

The Tax Appeals Commission (TAC) published its determination in the case of **33TACD2022** on 17 February 2022. The TAC had to determine whether certain services – namely, acupuncture, chiropractic and psychology services – provided by the appellant were exempt from VAT or were liable to VAT at the reduced rate. The appellant indicated that he was primarily a practitioner of Traditional Chinese Medicine (TCM) and was qualified in all four branches of TCM: (1) acupuncture and moxibustion; (2) herbal medicine and nutrition; (3) medical qigong and shengong; and (4) tui na massage and chiropractic. The treatment approaches provided by the appellant were categorised as (a) psychology only; (b) chiropractic only; (c) acupuncture only; (d) composite including acupuncture; and (e) composite including only VAT-exempt services.

The appellant argued that his services should be exempt from VAT under para. 2 of Schedule 1 VATCA 2010. This provides exemption at para. 2(3) for professional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods, and at para. 2(7) for other professional medical care services that, on 1 January 2010, were recognised by the Revenue Commissioners as exempt activities.

Schedule 3 of VATCA 2010 lists the goods and services chargeable at the reduced rate of VAT and includes under the miscellaneous services detailed in para. 21(1) services consisting of the care of the human body, including services supplied in the course of a health studio business or similar business, but not including exempted activities referred to in Part 1 of Schedule 1 or hairdressing services referred to in para. 13(3). Schedule 3 of the Health and Social Care Professionals Act 2005 includes psychologists as one of the professions listed, and the qualification required is a recognised university degree or diploma obtained with first- or second-class honours in which psychology was taken as a major subject and honours were obtained in that subject.

Revenue had raised assessments in relation to all of the appellant's activities. Revenue argued that the provision of psychologist medical care services was exempt from VAT only where those services were "recognised" by the Department of Health and Children and only if those services were not supplied during the carrying on of a business that wholly or partly consisted of selling goods. Revenue also submitted that the health and care profession of chiropractor was not listed as a designated profession under s4 of the Health and Social Care Professionals Act 2005. However, the professional medical services of a chiropractor were treated by Revenue as an exempted activity where supplied by a professional who possessed the necessary qualifications. In relation to acupuncture services, Revenue submitted that the medical service of acupuncture was not an exempted activity and was included in the list of taxable activities in the appendix to the Tax and Duty Manual "VAT Treatment of Medical Services". Revenue also submitted that the practice of TCM was not an exempted activity unless the service provider held a professional medical qualification to practise medicine and the professional medical care service was recognised as such by the Department of Health and Children.

The determination indicates that for the appellant to argue successfully that his services are exempt from VAT, the Commissioner must be satisfied:

> "on the balance of probabilities that he provides 'professional medical care services recognised as such by the Department of Health and Children' within the meaning of subparagraph (3) and/or...that he provides professional medical care services that, on 1 January 2010, were recognised by the Revenue Commissioners as exempt activities, within the meaning of subparagraph 7."

In considering the nature of the services provided by the appellant and his qualifications, the Commissioner was satisfied that the appellant provided medical care to his patients within the plain and ordinary meaning of those words on the basis that the services provided are for the purpose of "diagnosing, treating and, insofar as possible, curing diseases or health disorders" and their principal purpose is "the protection, including the maintenance or restoration, of health". However, the question was whether the medical care services constituted professional medical care services, and in this context it was understood to mean services provided by somebody who has undergone specialist training or education in relation to the provision of those services. The question, then, was whether the appellant had undergone the necessary training or education. The determination details the training received by the appellant in relation to the various services provided and found the following in respect of each of the services.

Acupuncture services

These are professional medical care services provided by the appellant, but they are not recognised as such by the Department of Health and Children and therefore are not exempt from VAT. Instead, the services comprise services consisting of the care of the human body and are liable to VAT at the reduced rate.

Chiropractic services

These constitute medical care services within para. 2 of Part 1 of Schedule 1 to VATCA 2010. Revenue recognised chiropractors as providers of exempt professional medical services on 1 January 2010. Notwithstanding the fact that the appellant was not registered with the Chiropractic Association of Ireland, it was found that he has sufficient skills, training and qualifications to provide professional medical care in the form of chiropractic services and therefore the services are exempt from VAT under para. 2(7) of Part 1 of Schedule 1 of VATCA 2010.

Psychological services

The Commissioner was not satisfied that the appellant carries on the profession of psychologist within the meaning of the Health and Social Care Professionals Act 2005, nor was he satisfied that the psychology element of treatments constitutes professional medical care services recognised as such by the Department of Health and Children. Therefore the exemption under para. 2(3) of Schedule 1 does not apply and, instead, the services come within the reduced rate as services consisting of the care of the human body.

06 Exemption for Psychotherapy and Counselling Services

The Tax Appeals Commission published its determination in case **32TACD2022** on 10 February 2022. The case arose as a result of a decision by Revenue not to allow exemption for psychotherapy and counselling services provided by the appellant. The appellant was a member of the Irish Association of Counsellors and Psychotherapists, which is the body that accredits counsellors, psychotherapists and supervisors. During an audit Revenue informed the appellant that her services were liable to VAT at the reduced rate as it considered the services to come within para. 21(1) of Schedule 3 of VATCA 2010, i.e. services consisting of the care of the human body. It also indicated that whereas s4 of the Health and Social Care Professionals Act 2005 includes the profession of psychologist as a designated profession, it does not include psychotherapists.

Revenue submitted that as psychotherapist is not a designated profession under s4 of the 2005 Act, the appellant did not provide professional medical care services that were recognised as such by the Department of Health and Children, and the services were therefore not exempt from VAT.

Similar to the determination above (33TACD2022), the Commissioner indicated that the services provided by the appellant amounted to medical care within the plain and ordinary meaning of those words and that her services amounted to professional medical care services (again, within the plain and ordinary meaning of the word professional). However, the question was whether the services came within the exemption provided for in para. 2(2) of Schedule 1 and, if so, whether the services were recognised by the Department of Health and Children. Having reviewed and considered the appellant's qualifications, the Commissioner found that her services came within the exemption and were so recognised.

In relation to the question of recognition by the Department of Health and Children and the submission by Revenue that, as the Health and Social Care Act 2005 does not recognise the profession of psychotherapy, her services were not exempt, the Commissioner stated:

> "I believe this to be an overly narrow interpretation, and one that cannot be reconciled with the literal meaning of paragraph 2(2) of the First Schedule. I further believe that it is founded upon a misinterpretation of the 2005 Act; that Act does not 'recognise' any professions, but rather provides for their being made 'designated professions' for the purposes of the Act. Recognition by the Department of Health is not in my view synonymous with designation under the 2005 Act, and I believe that the Respondent has fallen into error in seeking to treat them as meaning the same for VAT purposes."

It was determined that the services provided by the appellant were exempt from VAT in accordance with para. 2(2) of Schedule 1 of VATCA 2010.

VAT News

Ireland

Staff secondments

Revenue eBrief 043/22 (25 February 2022) announced that the Tax and Duty Manual (TDM) "VAT Treatment of Staff Secondments" has been updated. The VAT treatment of staff secondments and Revenue's concession on certain staff secondments to companies established in the State from related foreign companies are set out in the TDM. The concession operates so that no VAT is charged on emoluments paid to the seconded staff under certain conditions, which are detailed in the TDM. As noted in the TDM, the concession does not apply where PAYE, PRSI (employer and/or employee) and/or USC liabilities do not arise as a result of the secondment.

Zero rating

Revenue eBrief 045/22 (25 February 2022) highlighted updates to the TDM "Section 56 Zero-Rating of Goods and Services" with a view to providing clarity on qualifying persons, imports and the cancellation of authorisations.

VAT groups

Revenue eBrief 046/22 (25 February 2022) confirmed that the TDM "VAT Groups" has been updated as a result of changes introduced by Finance Act 2021. The amendments place a legislative requirement on VAT groups to notify Revenue when a significant change in the financial, economic and organisational links between persons in the VAT group occurs and apply a fixed penalty where this requirement is not met. A requirement that a VAT group contain at least one accountable person as a member was also introduced. An obligation is imposed on the group remitter to inform Revenue if a group member is no longer established in the State or the accountable person requirement is not met, and failure to do so will result in a penalty.

EU

VAT Committee meeting

The minutes of the VAT Committee meeting of 21 November 2021 were published on 4 April 2022 and can be found at https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/f9ee2159-1fa9-4662-9b3c-05ce7e234fe0/details.

Reverse-charge mechanism

On 10 February 2022 the European Commission proposed extending the reverse-charge powers contained in the VAT Directive to 31 December 2025. A Directive has been proposed that will amend the VAT Directive and extend the application period of the optional reverse-charge mechanism in relation to supplies of certain goods and services susceptible to fraud and of the Quick Reaction Mechanism against VAT fraud.

The proposal indicates that two changes:

> "First, the application period is extended until the end of 2025. This seems to be a reasonable period in order to allow Council negotiations on the definitive VAT system to continue. If the definitive VAT system does not enter into force before that date, the arrangements in Article 199a of the VAT Directive might, because of the sunset clause, come to an end in 2025. If the definitive VAT system would enter into force before 2025, Articles 199a and 199b will be amended and therefore replace the current rules which are being extended. Similarly, this extension is also linked to the development and adoption of a Commission proposal concerning VAT in the digital age, for which a date of entry into force cannot be provided at this stage. The adoption of the proposal itself by the Commission is scheduled for 2022. The end of 2025 is therefore also in this context a reasonable period for the Council to adopt the proposal. In case by the end of 2025 neither the definitive system nor the VAT in the digital age rules would be in place, a further extension of Articles 199a and 199b of the VAT Directive would be considered. Secondly, a small technical amendment is made as regards the deletion of outdated reporting obligations on which the above-mentioned report of the Commission was based".

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Audit Monitoring Update

All auditors in Ireland and the UK are qualified, registered and licensed by their professional body. The Irish Auditing and Accounting Supervisory Authority (IAASA), and the Financial Reporting Council (FRC) in the UK, monitors audit work on public-interest entity (PIE) audits, and the auditor's professional body monitors non-PIE audits. PIE audits are those of quoted companies, banks and insurance companies.

The FRC in the UK is proposing to take over the registration and licensing of PIE auditors. So, for example, UK "Big Four" auditors will apply to the FRC for their PIE audit licence and apply also to their professional body for their non-PIE audit licence. The proposal is supposed to allow the FRC to "act decisively when it identifies systemic issues in audit". It is also intended to allow the FRC "to impose conditions [and] suspensions and remove registration where required".

The proposal creates some potential issues in that not all auditors in a firm may be PIE auditors and the firm may have two different sets of rules to comply with. There will also likely be an increase in costs if there are effectively two licensing processes and two licence fees. The draft regulations also propose registering only persons with "PIE statutory audit work" experience, effectively creating a two-tier audit profession of PIE and non-PIE auditors. In Ireland, the IAASA has not yet proposed a similar move.

Financial Conditions of Credit Unions

The Central Bank of Ireland has published a report on the Financial Conditions of Credit Unions, 2021. The report notes some positive indicators but also some "medium term vulnerabilities" and some structural challenges.

Taxing Ukrainians

Revenue has issued guidance for Ukrainians who have come to Ireland temporarily due to the war and continue working remotely for a Ukrainian employer, performing their duties remotely from Ireland. Revenue has confirmed that the Ukrainian employer will not need to register for Irish PAYE or deduct Irish tax from the employee and that the employer will not create a permanent establishment in Ireland for the purposes of corporation tax etc. The concession is available for 2022 and is subject to some terms and conditions; see https://www.revenue.ie/en/tax-professionals/ebrief/2022/no-0902022.aspx for more details.

Taxation of Crypto-Assets

This new area of commerce has created some uncertainty in respect of taxation. Issues such as whether any gains or losses are capital or income, VAT and the fact that crypto-currency is not located in any country create problems for taxation authorities. Revenue has issued comprehensive guidance on the taxation of crypto-currency, including worked examples. The guidance will be of particular interest to non-residents and confirms that, for example, simply spending some bitcoin triggers a potentially CGT or income tax liability.

AML Effectiveness and Compliance

The Financial Action Task Force (FATF) has published its Report on the State of Effectiveness and Compliance with the FATF Standards. The FATF produced a suite of 40 recommendations for governments to implement to strengthen their anti-money laundering and terrorist financing regime. The FATF then measures a country's performance to see how well it has implemented the measures. Overall, the FATF said that 76% of countries supervised now have "satisfactorily implemented" the 40 recommendations. Ireland scores particularly well on the FATF evaluation, but it would be fair to say that it is an outlier among small island nations, with most others not scoring nearly as highly.

Working with a Client from a Country in Conflict

Some Irish small and medium practices have continued to work for clients from conflict countries, particularly those resident in the EU. Continuing to work for such clients will require additional anti-money laundering procedures to be applied. It would be appropriate to renew customer due diligence for both the beneficial owners and the directors and to consider using one of the online identification tools to do this, as those applications will spot a forged or altered passport more quickly than an untrained person. The client will need to be checked against the sanction list and rechecked as that list is extended almost weekly. The firm will also need to undertake closer supervision of transactions within the client, be aware of red flags and react to those red flags appropriately. A pre-assignment meeting with staff to address the risks and specifically to plan the approach to money laundering would also be necessary. A post-assignment closing meeting would also be usual. Firms acting for such clients would be advised to bill in advance for the work, as collection of a fee if the client was later sanctioned may be impossible.

Further information on restrictive measures currently in place is available from:

- the European Council website, where the measures agreed at an EU level in response to the crisis in Ukraine are outlined;
- 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.

This information is being continually updated, and these pages need to be kept under constant review.

UK Audit Reports: Change in Wording

UK auditing standards in respect of audit reports have changed and have diverged from Irish standards. For listed entities in Ireland the audit report "shall explain to what extent the audit was considered capable of detecting irregularities, including fraud". In the UK this requirement has been extended to unlisted entities. No "boilerplate" disclosure is available for this disclosure as it is supposed to be client specific. An example wording for an audit report for a small, simple UK company would be something like: "We plan our audit taking into account the risk of irregularity and fraud. We make enquiries of people at different levels within the company. We test journals and post-year-end entries. We also look for unusual entries and carry out analytical review, and we test controls. We test check a sample of invoices and payments and other transactions by the company for regularity." The explanation needs to be specific to the circumstances of the audited entity and take account of how the auditor planned and performed procedures to address the identification and assessment of the risks of material misstatement.

Study on Tax Compliance Costs for SMEs

The European Commission published the final report of the study on tax compliance costs for SMEs in Europe. The results for Ireland make for sobering reading: it had the highest estimated average of audit-related costs for EU enterprises that underwent a tax audit during the last three years for VAT, and the second-highest for corporation tax. Ireland also had the highest estimated average total tax compliance cost and the second-highest corporation tax and VAT compliance cost. We were fifth-highest when the costs were turnover adjusted, although the study noted that "it is difficult to make inference with high certainty based on the data we have".

SMP Podcasts

The International Federation of Accountants has released the second episode of its podcast series "The Fast Future". This episode discusses some pressing issues that small to medium practitioners worldwide are faced with and focuses on pricing models used by practitioners.

EU Accounting Enforcement

The European Securities and Markets Authority has published its report on 2021 Corporate Reporting Enforcement and Regulatory Activities. The report looks at the enforcement of IFRS reporting in the EU.

Sustainability Disclosures

The International Sustainability Standards Board (ISSB) has issued consultations on general sustainability-related disclosure requirements and climate-related disclosure requirements. Accountants in large companies are already implementing sustainability disclosures; small companies will be doing so within the next few years. The proposed standards set out requirements for the disclosure of material information about a company's significant sustainability risks and opportunities. IFRS Sustainability Disclosure Standards are intended to provide a global baseline for sustainability disclosures. The ISSB is inviting submissions to the consultations by 29 July 2022.

In related developments, the European Commission adopted technical standards to be used when disclosing sustainability-related information under the Sustainable Finance Disclosures Regulation. Under these rules, financial market participants will provide detailed information about how they tackle and reduce any possible negative impacts that their investments may have on the environment and society in general.

The Charities Act (Northern Ireland) 2022

The Charities Act (Northern Ireland) 2022 received Royal Assent on 30 March 2022. A summary of the requirements can be found on the Charity Commission's website here and an information pack on the reporting requirements for Northern Irish charities here.

Licensing and Registration of Clubs (Amendment) Act (NI) 2021

Phase 2 of this legislation came into effect on 6 April 2022, with phase 3 due on 1 June 2022. A guide to the legislation is available at this link.

Complaints to the Financial Services and Pensions Ombudsman

The Financial Services and Pensions Ombudsman recently published its Overview of Complaints 2021. A total of 4,658 complaints were received and just over 5,000 complaints were closed in the year. One-quarter of complaints were about the level of customer service. The Ombudsman noted, in particular, that there was an increase in the number of complaints about unregulated investment activities such as crypto-currency trading.

Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016

The statutory instrument enacted to regulate matters such as "hello money" in supermarkets and unilateral supply cancellation clauses in supermarket supply contracts has been revoked by SI 150 of 2022. More details are available from the Competition and Consumer Protection Commission website.

VAT Due Diligence

When commencing a business relationship with an EU customer or supplier, an Irish business is obliged to undertake some due diligence. At a minimum, this should involve entering the supplier's number into the EU VAT database. Revenue guidance on the requirements is available at this link and includes seeking trade references, obtaining credit and background checks, and making personal contact with the customer or supplier. Where Revenue believes that the business knew or should have known that a transaction was connected with fraud, it will deny the input credit relating to that transaction or deny zero rating of the intra-Community supply to identified customers.

Employer-Provided Electric Vehicles

The benefit-in-kind (BIK) position with respect to employer-provided electric vehicles for private use will continue until 2025. It is worth noting that the provision applies to directors and employees irrespective of the level of pay received by the employee. For the avoidance of doubt, an electric vehicle is one that derives its motive power exclusively from an electric motor; hybrid vehicles are not electric vehicles.

For an electric vehicle made available for an employee's private use during the years 2019–2022, a full exemption from BIK is available only for vehicles with a market value of up to €50,000 (with some different rules earlier in the schemes); partial relief applies for vehicles with a value exceeding this amount. Finance Act 2021 extended the BIK regime for electric cars for another three years, so that it also applies to vehicles made available in the period from 1 January 2023 to 31 December 2025. The relief from the BIK charge arising during this period applies on a tapered basis, with relief given effectively for the first €35,000, €20,000 and €10,000 of market value for 2023, 2024 and 2025, respectively. The balance over this amount is charged to BIK as normal. See Revenue's Tax and Duty Manual Part 05-01-01b.

Accounting Issues Related to the Invasion of Ukraine

Accountancy Europe has produced a summary of the issues to consider in terms of accounting and audit arising from the war in Ukraine – see this link. The guidance looks at the need to assess going concern; adjusting and non-adjusting post-balance-sheet events; and a host of other accounting matters such as accounting estimates, fair-value measurements, asset impairment, expected credit loss assessments, hedge accounting, and the impact of breaches of covenants and onerous contracts provisions.

In respect of audits, Accountancy Europe draws attention to the audit of going concern, the impact on the audit report of the war and the possibility of certain audit assignments not being continued. The particular impact on financial institutions is also discussed.

Data Protection for Owners in Multi-unit Developments

In apartment blocks, an owners' management company (OMC) will usually own the common areas and shared facilities. The OMC will bill each owner an annual services charge to cover maintenance and repair costs for the common areas and to insure the building structure etc. The OMC will usually be owned in common by all apartment owners and managed by volunteer directors, who typically delegate the day-to-day management to a property management agent.

OMCs process and transmit personal data in the exercise of their functions in relation to, for example, property title, financial management and debt collection. The Data Protection Commission has issued guidance for such entities on how to manage this personal data. The guidance looks at what data an OMC might maintain – and this can include CCTV images – the data maintained by the property agent and the personal data maintained in a service charge billing system. The guidance also looks at the personal data that a landlord is legally obliged to hand over to an OMC.

Company Law Changes

Sometimes the title of a piece of legislation might not tell the full story of the changes in law being made. About two-thirds of the 57-page Companies (Corporate Enforcement Authority) Act 2021 is concerned with the establishment of the Corporate Enforcement Authority, to replace, and perform the functions previously performed by, the Director of Corporate Enforcement. The remaining parts of the legislation make numerous and important changes to the Companies Act 2014, which include areas such as:

- how share premium can be used – s14,
- payments by subsidiaries in the acquisition of own shares by a parent – s15,
- share-for-undertaking transaction accounting clarified – s16,
- shares cancelled or retained as treasury shares – s17,
- how treasury shares are treated – s18,
- distribution definitions – s19,
- treasury shares – s20 and s21,
- allowing payment of commissions in PLCs in additional circumstances – s22,
- restrictions on transfer of shares – s23,
- share registration changes – s24,
- acquisition of own shares out of profits – s25,
- a secretary of a company must also be over 18 – s26,
- exemption on disclosing names of directors – s27,
- proxy rules – s28,
- removing the Institute of Incorporated Public Accountants from the list of professional bodies – s29,
- proxy rules for a CLG – s30,
- registration of creditors' resolutions in a creditors' voluntary liquidation – s31,
- qualifications for appointment as liquidator – s32,
- more frequent reporting by liquidators to the Companies Registration Office (CRO) – s33,
- more grounds for restricting a director – s34 and
- including PPS numbers on CRO filings – s35.

Audit Inspections of Larger Audit Firms

The Irish Auditing and Accounting Supervisory Authority monitors seven audit firms directly and comments annually on their quality assurance systems and procedures and on the outcome of their audit file reviews. The 2021 report identifies a number of issues that also have application in smaller firms. Audit files are graded from 1 to 4, with 1 being "good audit with no concerns" and 4 being "requires significant improvements".

Financial Reporting Enforcement

A total of 99 debt and equity quoted companies and banks and insurance companies are within the scope of direct supervision by the Irish Auditing and Accounting Supervisory Authority (IAASA) of their financial statement disclosures. The IAASA directly reviews their financial statements and can force improvements and changes in future years and even the withdrawal and replacement of current-year financial statements. The IAASA has published a snapshot of its IFRS enforcement activity for 2021. The snapshot shows what appears to be a distinct deterioration in outcomes, with 189 different matters raised with 43 issuers, resulting in 86 (2020: 82) undertaking to make improvements. Seven Irish findings were submitted to the European Securities and Markets Authority for inclusion in the European database of findings, which now constitutes a "precedence book" for IFRS financial reporting and can be accessed at this link.

A compendium of the IAASA's findings, both positive and negative, is available at this link. Matters addressed in the report include IAS 1: Presentation of Financial Statements, IAS 7: Statement of Cash Flows, IAS 8: Accounting Policies, Changes in Accounting Estimates and Errors, IAS 19: Employee Benefits, IAS 37: Provisions, Contingent Liabilities and Contingent Assets, IFRS 7: Financial Instruments: Disclosures, IFRS 8: Operating Segments, IFRS 13: Fair Value Measurement, and Guidelines on Alternative Performance Measures.

Reporting on Climate Change

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published a Reporting Climate Change information note. Users of financial reports are increasingly interested in knowing the impacts that climate-related matters have on an entity's financial performance, as well as understanding factors and initiatives that mitigate the effects of climate change. Some of the observations of the IAASA on this information need are:

- climate risk needs to be disclosed as a requirement of the existing accounting standards;
- the disclosures should be no less robust than other, more numerical disclosures;
- the disclosures should be company-specific and not generic;
- climate risk disclosures need to be considered for periods beyond one year, not just for the traditional one-year post-balance-sheet period;

- where no climate change disclosures are made, disclosure of why climate change will not affect the entity should be considered; and
- the financial statements need to be internally consistent with respect to forward-looking assumptions on both climate and non-climate matters.

Audit Quality Standards

ISQC 1 (International Standard on Quality Control) is the standard that applies to audit firms and, in summary, requires that a firm develop a quality control procedures manual and implement that manual in its practice. One of the first items asked for during audit monitoring is a copy of the firm's ISQC 1 manual. ACCA guidance on writing such a manual is available at this link.

However, ISQC 1 is being replaced by International Standard on Quality Management (ISQM) (Ireland) 1 and 2 and an amended ISA 220. The new standards are here. The standards are effective from 15 December 2022, giving audit practices plenty of time to apply them and replace their ISQC 1 manual with an ISQM manual.

Auditing and ISA 220

The International Auditing and Assurance Standards Board has released a First-time Implementation Guide for ISA 220: Quality Management for an Audit of Financial Statements. The guide will help auditors to understand the standard and properly implement its requirements as intended. ISA 220 was issued by the Irish Auditing and Accounting Supervisory Authority in December 2021 for implementation for audits of financial statements for periods commencing on or after 15 December 2022.

Fraud and Auditors

The Irish Auditing and Accounting Supervisory Authority issued a revised version of ISA (Ireland) 240, The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements. The new standard has been referred to as evolutionary rather than revolutionary in its proposed changes, but it will put an enhanced responsibility on auditors to use more robust fraud detection audit techniques, to perform "stand-back" reviews of the evidence and to be more challenging of management and innovative in their audit approach. The revised standard is effective for audits of financial statements for periods beginning on or after 15 December 2021.

ISA 240 has three appendices that will be of particular use to auditors. They include examples of fraud risk factors, possible audit procedures to detect fraud and examples of circumstances that indicate the possibility of fraud. The appendices serve as a useful fraud training guide for new audit staff, or a reminder to be alert to fraud for more experienced audit staff.

International Audit Developments

ISA 600 (Revised): Special Considerations – Audits of Group Financial Statements (Including the Work of Component Auditors) has been issued internationally and will be considered for adoption in Ireland in 2022. There has been an increasing incidence of referrals to Irish-resident auditors for the audit of Irish subsidiaries of UK groups. This has largely been the result of many UK-resident auditors relinquishing their Irish audit licences. The duties and responsibilities of component auditors under ISA 600 have therefore come into sharp focus for many small audit firms accepting such referrals, and these amendments will be of interest to such firms.

A revision of ISA 500: Audit Evidence, is also under way internationally, and any international amendment is likely to also be adopted in Ireland. The revisions will deal with the changes in the nature of the information now available to auditors, including the use of technology.

A frequent point made by some small and medium practice (SMP) auditors is that auditing standards are written with only large-company audits in mind and are therefore difficult and expensive to apply for a small company. The International Auditing and Assurance Standards Board is working on an auditing standard for audits of less complex entities. This is potentially not quite the panacea to the small-company audit issue that it at first seems, and many questions need to be answered before such a project would get wide support. Simply summarising the existing ISAs and removing the bits that do not apply to small companies anyway is not really going to save any time on small-company audits. The question of whether the new standard would count as "statutory audit" for the purposes of audit training also arises. If SMPs cannot train auditors because they use only the small-company audit standard, then they will not be able to attract new trainees.

Audit Quality: Issues Arising

A number of recurring issues for audit firms are arising during audit monitoring:

- Firms have purchased standard off-the-shelf ISQC 1 manuals from various sources and have adopted them, in some cases, without even reading them. Some of the standard ISQC 1 manuals detail a requirement for every regulated client to have a "hot file" review. This is not a requirement of the ISAs. However, it is a breach of ethical standards to not follow your own procedures manual. Different approaches to quality control for a regulated client are available within auditing standards, and these options should be listed in your ISQC 1 manual, not just an absolute requirement for a hot file review.

- Some ISQC 1 standard manuals have an absolute requirement to have a hot file review undertaken when the auditor has been in position for more than 10 years and does not have a second partner to rotate the audit to. A hot file review is not the only option available in auditing standards, where a consultation and review or, indeed, deciding to do no additional control procedures are also options if the client is lower risk.

- Some off-the-shelf audit engagement letters have a limit-of-liability clause. Although such clauses can be effective for non-statutory assignments such as tax and bookkeeping, they are unlawful in respect of audit work.

- Any company regulated by the Central Bank of Ireland, including the smallest insurance broker, is not entitled to use the Ethical Standard: Provisions Available for Audits of Smaller Entities (PAASE). Availing of the PAASE when the company is regulated is a breach of the Ethical Standards, and such breaches must be reported to your professional body at the time of the firm's audit certificate renewal (or reported to the Irish Auditing and Accounting Supervisory Authority for public-interest entity audits).

- One of the accounts production software suppliers automatically attaches a standard audit report to financial statements that uses incorrect wording for that audit report. Ensure that you are using the wording at this link. The error is in the wording of the going concern paragraph.

Small Companies Administrative Rescue Process

Revenue has added more information to its website in respect of the SCARP process. The pages include details on how to request Revenue to participate in a rescue plan. Revenue can opt out of any debt reduction agreement (i.e. demand that all Revenue debt be paid in full) under SCARP and has said that it will do so if the company has failed at any time to comply with a requirement relating to tax or has an open Revenue audit or intervention. A Revenue Guide for process advisers is also available.

Securities Market Risk Outlook Report

The Central Bank of Ireland has published its Securities Market Risk Outlook Report, where matters such as misconduct risk, sustainable finance, conflicts of interest and cyber-security issues are discussed.

FRS 102

If you, like me, keep a copy of FRS 102 on your desktop for easy access, then you need to file away your 2018 edition and replace it with the January 2022 edition. The other UK GAAP standards have also been updated and are at this link. These editions reflect the amendments made since the previous editions were issued in 2018, as well as changes in Irish company law, resulting in a single up-to-date reference point for each standard.

Anti-Money-Laundering Reporting Officer Enhanced CPD Training

A firm's AMLRO needs to undertake enhanced training. One source of such training is personal reading, and a useful resource in this respect is the Financial Action Task Force's Guidance for a Risk-Based Approach: Accounting Profession.

Legal Monitor

Caroline Austin
Partner, Tax Department, Matheson

Selected Acts Signed into Law 1 February–30 April 2022

No.	Title	Summary
No. 3	Redundancy Payments (Amendment) Act 2022	The purpose of the legislation is to amend the Redundancy Payments Act 1967 and to provide for an additional payment from the Social Insurance Fund for persons made redundant who had been laid off for a period of time due to Covid-19 restrictions and whose redundancy lump sum is reduced because of this lay-off period. This legislation was enacted on 31 March.
No. 5	Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022	This Act amends the Central Bank Act 1997 for the purpose of extending the Central Bank of Ireland authorisation requirements to persons carrying on hire-purchase, consumer-hire business, or providing credit indirectly and to persons carrying on business relating to hire-purchase, consumer-hire agreements, or indirect provision of credit. The Act provides that the Central Bank may be required to collect and publish information on credit agreements, hire-purchase, and consumer-hire agreements. Further, the legislation provides for a limit on the interest rate that consumers can be charged under hire-purchase and credit agreements. This legislation was enacted on 11 April 2022.

Selected Government Bills Initiated 1 February–30 April 2022

No.	Title	Summary
No. 17	Protected Disclosures (Amendment) Bill 2022	The purpose of this Bill is to give effect to the Whistleblowing Directive (Directive (EU) 2019/1937), amending the Protected Disclosures Act 2014 to provide for the establishment of an Office of the Protected Disclosures Commissioner. The legislation will expand the material scope of the Protected Disclosures Act 2014 with respect to relevant wrongdoings that may be reported, and will expand the personal scope of the Act to include:

No.	Title	Summary
		• volunteers; • shareholders; • persons belonging to the administrative, management or supervisory body of an undertaking; and • persons who have not yet begun their work relationship where a relevant wrongdoing has occurred during the recruitment process, etc. The Bill will also provide that public bodies and private sector undertakings, with 50 or more employees, and prescribed persons must establish formal procedures for workers to make protected disclosures. The protections for workers who have been penalised as a result of making a protected disclosure will be enhanced under the legislation by reversing the burden of proof in civil proceedings, providing for criminal penalties for such penalisation, and expanding the provision for interim relief to include types of penalisation other than dismissal. Initiated 9 February 2022.
No. 26	Finance (Covid-19 and Miscellaneous Provisions) Bill 2022	The purpose of this legislation is to give effect to a number of changes to the Covid-19 support schemes introduced during the pandemic, amending the Emergency Measures in the Public Interest (Covid-19) Act 2020, including an extension of the Employment Wage Subsidy Scheme, the Covid Restrictions Support Scheme and other schemes. The legislation also provides for a tax exemption for the “Pandemic Special Recognition Payment” made to frontline healthcare workers, inserting a new s192K into the Taxes Consolidation Act 1997. Initiated 4 March 2022.
No. 27	Consumer Credit (Amendment) Bill 2022	The purpose of this Bill is to amend the law in relation to high-cost credit providers by introducing a cap on the interest rate that providers can charge on money-lending loans. Initiated 7 March 2022.

No.	Title	Summary
No. 32	Bretton Woods Agreements (Amendment) Bill 2022	The purpose of this Bill is to provide for Ireland's participation in the International Monetary Fund's (IMF) New Arrangements to Borrow (NAB), per the NAB Decision adopted by the IMF Executive Board on 16 January 2020. The State will participate in the NAB decision, and future decisions, by means of a credit arrangement with the Fund, to be provided by the Central Bank of Ireland. Initiated 14 March 2022.
No. 38	Sick Leave Bill 2022	The purpose of this Bill is to provide for a statutory sick pay scheme for all employees. Under the legislation employees will be entitled to up to three statutory sick leave days per year, with an entitlement to sick leave pay in respect of each day. The scheme will be applied on a phased basis, with the number of sick leave days increasing to ten over the next four years. The Bill sets out that the number of sick leave days may be varied by the Minister, but not reduced to fewer than three, based on factors such as the economy, the labour market and the views of trade unions and relevant bodies. Initiated 30 March 2022.
No. 40	Insurance (Miscellaneous Provisions) Bill 2022	This Bill amends the Central Bank (National Claims Information Database) Act 2018 to allow the Central Bank of Ireland to collect data on deductions of any State supports made by insurers from claim settlements through the National Claims Information Database and introduces a requirement for insurers to inform consumers of any such deductions. The Bill also introduces a requirement for the Central Bank to prepare a report about measures that it has taken to address "price walking", as well as making a number of technical amendments to the Consumer Insurance Contracts Act 2019. Initiated 1 April 2022.

No.	Title	Summary
No. 44	Consumer Rights Bill 2022	The purpose of this Bill is to give effect to Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Directive 2019/771 on certain aspects concerning contracts for the sale of goods, and the main provisions of Directive 2019/2161 concerning better enforcement and modernisation of EU consumer protection rules. The legislation provides for rights and remedies in consumer contracts for sale of goods, supply of digital content and services, and supply of non-digital services and will also amend the Consumer Protection Act 2007, strengthening the enforcement powers of the Competition and Consumer Protection Commission. Initiated 22 April 2022.

Selected Statutory Instruments 1 February–30 April 2022

No.	Title	Summary
No. 46	European Union (Anti-Money Laundering: Central Mechanism for Information on Safe-Deposit Boxes and Bank and Payment Accounts) Regulations 2022	The purpose of these Regulations is to give further effect to Directive (EU) 2015/849 (AMLD4) as amended by Directive (EU) 2018/843 (AMLD5). The Regulations provide that the Central Bank of Ireland shall establish and maintain (1) a Central Database and (2) an information system, the Central Mechanism (to be known as the "Central Mechanism of Ownership of Bank and Payment Accounts and Safe-Deposit Boxes"), for the purposes of allowing credit institutions to provide information to the Bank, to enable the Bank to maintain the Databases, and to allow the Financial Intelligence Unit to search and retrieve information from the Databases. Under Regulations 4 and 5, credit institutions may be required to provide information in relation to accounts and safe-deposit boxes, including names, addresses, IBANs and lessee information in respect of safe-deposit boxes. In effect from 3 February 2022.

No.	Title	Summary
No. 74	Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 5) (Covid-19 Pandemic Unemployment Payment) Regulations 2022	These Regulations amend the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 to provide for the phased ending of Covid-19 Pandemic Unemployment Payments for those who became entitled to the payment as a result of the Government's decision of 3 December 2021 to restrict the operating hours of certain hospitality and entertainment venues. The Regulations specify 22 January as the date when applications for the payment cease. Payments to this group will cease on 25 March 2022, with those eligible for Jobseeker's Benefit transitioning to that payment, whereas 31 May 2022 is specified as the final date after which no further payments of the Covid-19 Pandemic Unemployment Payment will be made, regardless of individual circumstances. The Regulations also provide for a one month's deferral in the reduction of rates and transition of Covid-19 Pandemic Unemployment Payments for those who are still in payment.
No. 93	Financial Services and Pensions Ombudsman Act 2017 [Financial Services and Pensions Ombudsman Council] Financial Services Industry Levy Regulations 2022	These Regulations are made by the Financial Services and Pensions Ombudsman Council, providing that financial service providers will be liable to pay an annual levy for services provided by the Ombudsman to the financial services industry. The Regulations set out the calculations of the required levy for each financial service provider, including those for credit institutions, approved money-lenders, insurance undertakings and credit unions.
No. 106	Irish Human Rights and Equality Commission Act 2014 (Code of Practice on Sexual Harassment and Harassment at Work) Order 2022	This Order sets out the code of practice on sexual harassment and harassment for the purposes of the Irish Human Rights and Equality Commission Act 2014. The code provides employers, trade unions and other organisations with guidance on preventing harassment, adequate procedures for dealing with harassment and what constitutes employment-related harassment.

No.	Title	Summary
No. 107	Irish Human Rights and Equality Commission Act 2014 (Code of Practice on Equal Pay) Order 2022	This Order sets out the code of practice on equal pay for the purposes of the Irish Human Rights and Equality Commission Act 2014. The code sets out prohibited grounds of discrimination, defences to claims of discrimination, guidance for employers to identify and eliminate pay inequality, and means and forums for resolving pay disputes.
No. 124	Personal Injuries Assessment Board (Fees) (Amendment) Regulations 2022	These Regulations amend the Personal Injuries Assessment Board (Fees) Regulations 2004 (SI 251 of 2004) with respect to the fees charged for applications for assessment under s11 of the Personal Injuries Assessment Board Act 2003. Under these Regulations the existing charge is increased to €1,050.
No. 133	Finance Act 2021 (Section 62) (Commencement) Order 2022	This Order provides that s62 of the Finance Act 2021 on insurance levies modernisation will come into operation on 1 April 2022.
No. 149	Social Welfare Act 2021 (Section 14) (Commencement) Order 2022	This Order provides for the commencement of s14 of the Social Welfare Act 2021 from 7 April 2022. Section 14 provides for a €10 increase in the weekly income thresholds of Working Family Payment for all qualifying families.
No. 142	Finance Act 2020 (Section 16(1)) (Commencement) Order 2022	This Order specifies the date on which paras (b) and (c) of s16(1) of the Finance Act 2020 come into operation. These paragraphs amend the information that is to be retained by a chargeable person and provide a requirement that those responsible for the collection and return of encashment tax make automatic returns of this information to Revenue. The date specified is 6 April 2022.
No. 151	Planning and Development Act 2000 (Exempted Development) (Number 2) Regulations 2022	These Regulations amend the Planning and Development Regulations 2001 to provide an exemption for the Health Service Executive (HSE) for a temporary change of use of buildings, or parts of buildings, including schools, hotels and convention centres as public vaccination or public testing centres. This provides a temporary

No.	Title	Summary
		step-down exemption for the HSE for changes of use only following the cessation of the Planning and Development Act 2000 (s181) Regulations 2020 (SI 93 of 2020), which Regulations were commenced on 27 March 2020 to address the Covid-19 civil emergency. The exemption can be availed of by the HSE only to prevent or alleviate the risk to public health posed by the spread of an infectious disease. Temporary changes of use shall be discontinued after a period not exceeding 12 months, and the Regulations shall remain in effect only for two years after their commencement.
No. 165	Residential Tenancies (Amendment) Act 2021 (Section 7) (Commencement) Order 2022	This Order appoints 4 April 2022 as the date on which s7 of the Residential Tenancies (Amendment) Act 2021 shall come into operation. Section 7 amends s134 (Obligation to apply to register a tenancy) of the Residential Tenancies Acts 2004 to 2021 to provide that, subject to certain conditions, where a landlord applies to register a "further Part 4 tenancy" before the commencement date (4 April 2022), no annual registration fee shall apply for so long as it exists.
No. 174	Redundancy Payments (Amendment) Act 2022 (Commencement) Order 2022	This Order provides for the commencement, from 19 April 2022, of the Redundancy Payments (Amendment) Act 2022, other than s4. This Act amends the Redundancy Payments Act 1967 to provide a legislative basis for a "Covid-19 related lay-off payment", to be paid from the Social Insurance Fund.
No. 178	European Union (Restrictive Measures concerning Belarus) (No. 4) Regulations 2022	These Regulations provide for the enforcement of restrictive measures contained in Council Regulation (EC) No. 765/2006 as amended, regarding restrictive measures concerning Belarus. The Regulations provide that competent authorities of the State may issue directions for the purpose of giving full effect to the sanctions. The Regulations

No.	Title	Summary
		create offences for breach of the Council Regulations or for failure to comply with the directions of competent authorities of the State with regard to implementation of the sanctions and provides for appropriate penalties.
No. 177	European Union (Restrictive Measures concerning Ukraine) (No. 10) Regulations 2022	These Regulations give effect to Council Regulation (EU) No. 208/2014 of 5 March 2014 as amended, Council Regulation (EU) No. 269/2014 of 17 March 2014 as amended, Council Regulation (EU) No. 692/2014 of 23 June 2014 as amended, Council Regulation (EU) No. 833/2014 of 31 July 2014 as amended and Council Regulation (EU) 2022/263 of 23 February 2022.
No. 183	Affordable Housing Regulations 2022	These Regulations are made pursuant to the Affordable Housing Act 2021, setting out the conditions of eligibility for an affordable dwelling purchase arrangement under s10 of the Affordable Housing Act 2021.

Tax Appeals Commission Determinations

Tara Duggan
Tax Technical Writer, Irish Tax Institute

Determinations of the Tax Appeals Commission Published from 1 February to 30 April 2022

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 12TACD2022	PAYE	Appeal regarding income from contributory State pension with qualified adult payment and claim for PAYE credit for spouse s126 TCA 1997 s472 TCA 1997	Unknown
Determination – 13TACD2022	CGT	Appeal regarding relief from capital gains tax on the disposal of a principal private residence s604 TCA 1997 s552 TCA 1997	Unknown
Determination – 14TACD2022	VRT	Appeal regarding vehicle classification for a lower flat rate of VRT s130 Finance Act 1992 s132(3)(g) Finance Act 1992 EU Regulation 2018/858	Unknown
Determination – 15TACD2022	VRT	Appeal regarding vehicle classification for a lower flat rate of VRT s130 Finance Act 1992 s132(3) Finance Act 1992 EU Regulation 2018/858	Unknown

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 16TACD2022	Customs duties and VAT	Appeal regarding repayment of duty on import of second-hand motorcycle EU Commission Regulation No. R0886/18 European Commission TARIC database, commodity code 8711500000 s46(1)(a) VATCA 2010	No
Determination – 17TACD2022	Artists' Exemption	Appeal regarding artists' exemption (illustrated children's song book) s195 TCA 1997	Unknown
Determination – 18TACD2022 & Determination – 19TACD2022	Artists' Exemption	Appeal regarding artists' exemption (journal/ workbook) s195 TCA 1997	Unknown
Determination – 20TACD2022	VRT	Appeal regarding calculation of VRT based on the nitrogen oxide emissions levy s132 Finance Act 1992 (as amended) s50 Finance Act 2019	No
Determination – 21TACD2022	VRT	Appeal regarding transfer-of-residence relief in the context of VRT s134(1)(a) Finance Act 1992 as amended Statutory Instrument 59 of 1993 (Vehicle Registration Tax (Permanent Reliefs) Regulations 1993)	Unknown
Determination – 22TACD2022	Income Tax	Appeal regarding treatment of funding for a postdoctoral programme s112 TCA 1997 s193 TCA 1997	Unknown
Determination – 23TACD2022	VRT	Appeal regarding ownership of vehicle and payment of VRT s132 Finance Act 1992 (as amended) Vehicle Registration and Taxation Regulations 1992 (as amended)	Unknown

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 24TACD2022	Income Tax	Appeal regarding Home Renovation Incentive credit s447B TCA 1997	Unknown
Determination – 25TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 26TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period – incorrectly returned fees for work as a Commissioner for Oaths as taxable s865 TCA 1997	Unknown
Determination – 27TACD2022	Corporation Tax	Appeal regarding entitlement to manufacturing relief from corporation tax s448 TCA 1997	Unknown
Determination – 28TACD2022	PREM and VAT	Determination relating to certain preliminary issues advanced for the first time at the hearing of the two separate appellants. Preliminary ruling on the issue of double assessment and alternative assessment s959F TCA 1997	Unknown
Determination – 29TACD2022	Income Tax	Appeal regarding the relevant date for the purposes of the "material interest" test in s997A TCA 1997 s997A TCA 1997	Yes
Determination – 30TACD2022	CGT	Appeal regarding expenses claimed as incidental costs as per s552(2) TCA 1997 s552(2) TCA 1997	Unknown
Determination – 31TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 32TACD2022	VAT	Appeal regarding services (psychotherapy and counselling services) and liability to VAT at reduced rate of 13.5% Sch1 VATCA 2010 Sch3 VATCA 2010	Unknown

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 33TACD2022	VAT	Appeal regarding liability to VAT of activities (acupuncture, chiropractic and psychological services) under Sch1 VATCA 2010 and reduced VAT as per Sch3 VATCA 2010. Whether failure to exempt activities under domestic legislation is contrary to Council Directive 2006/112/EC and/or in breach of the principle of fiscal neutrality Council Directive 2006/112/EC Sch1 VATCA 2010 Sch3 VATCA 2010	Unknown
Determination – 34TACD2022	Artists' Exemption	Appeal regarding artist's exemption s195 TCA 1997	Unknown
Determination – 35TACD2022	Income Tax	Appeal regarding credit for tax deducted by the company from the Appellant's emoluments s997A TCA 1997 s997A TCA 1997	Unknown
Determination – 36TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 37TACD2022	Income Tax	Appeal regarding amendment of tax assessments (made pre-2013) to correct a factual mistake in the context of the four-year statutory limitation period s955 TCA 1997 s959AA TCA 1997	Unknown
Determination – 38TACD2022	Income Tax	Appeal regarding carry-back and offset of excess medical expenses incurred in 2015 against income tax due for the tax year 2011 s458(1) TCA 1997 s485(1) TCA 1997 s469 TCA 1997	Unknown

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 39TACD2022	VRT	Appeal regarding vehicle classification for a lower flat rate of VRT s130 Finance Act 1992 s132(3)(g) Finance Act 1992 EU Regulation 2018/858	Unknown
Determination – 40TACD2022	CAT	Appeal regarding a claim of agricultural relief in respect of gifts of agricultural property and where non-agricultural property comprising residential property was received on the same valuation date s89 CATCA 2003	No
Determination – 41TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 42TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 43TACD2022	VAT	Appeal regarding repayment in the context of the four-year statutory limitation period s99 VATCA 2010	Unknown
Determination – 44TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 45TACD2022	PAYE and USC	Appeal against a PAYE/USC Balancing Statement (P21) s1016 TCA 1997 s1017 TCA 1997	Unknown
Determination – 46TACD2022	VRT	Appeal regarding VRT chargeable in respect of CO2 emissions s130–144A Finance Act 1992	Unknown
Determination – 47TACD2022	VRT	Appeal regarding an exemption from VRT arising from transfer of normal residence s134 Finance Act 1992	Unknown

Case reference	Tax head/ topic as published by TAC	Key issues and legislative provisions considered	Case stated requested
Determination – 48TACD2022	Income Tax	Appeal regarding repayment in the context of the four-year statutory limitation period s865 TCA 1997	Unknown
Determination – 49TACD2022	CAT	Appeal regarding applicable valuation date for the purposes of CAT on an inheritance s30 CATCA 2003	Unknown
Determination – 50TACD2022	Income Tax – PAYE/USC	Appeal against a PAYE/USC Balancing Statement (P21) s1016 TCA 1997 s1017 TCA 1997	Unknown
Determination – 51TACD2022	Income Tax	Appeal of determination that income tax is payable on rent earned from property and against a refusal to allow an exemption from income tax in relation to an ex gratia severance payment s18 TCA 1997 s192A TCA 1997 s959AH TCA 1997	Yes
Determination – 52TACD2022	Corporation Tax	Appeal regarding a charge to corporation tax on a loan waiver from a member of the same corporate group s76A TCA 1997	No
Determination – 53TACD2022	Income Tax	Appeal regarding entitlement to trading deductions, unsupported by adequate information and/or documentation, relating to children's wages, mileage and subsistence, payments to non-PAYE workers, a loan from a family member, hire-purchase charges, interest on peer-to-peer loans, bank loan interest, bank charges, and wages paid to spouse. The Appellant also claimed certain capital allowances and industrial buildings allowance Part 41A TCA 1997 s268(1) TCA 1997 s81 TCA 1997 s886 TCA 1997	Yes

UK and Northern Ireland Update

Marie Farrell
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Introduction[1]

In 1789 Benjamin Franklin coined the famous quote "in this world, nothing is certain except death and taxes", and indeed it holds true to this day. However, in the intervening 233 years, the global landscape has changed – globalisation, international commerce and digitalisation have transformed how businesses operate, and although tax is certain, the details of the rules of taxation continue to evolve, change and adapt to a different world from the one that Franklin knew.

The ever-increasing pace of change has resulted in the introduction in the UK, and indeed in other jurisdictions, of complex tax legislation and reporting requirements, which are constantly being tweaked, amended and revised to ensure that they are fit for purpose. The volume of change presents a huge challenge to business – and, in particular, tax professionals – as they try to keep abreast in order to ensure that they provide high-quality and timely advice to their clients and have up-to-date knowledge so that correct and informed decisions are made based on accurate tax advice.

In this article recent changes to and developments in UK tax law and practice are examined and the key areas of interest, to include practical considerations, are highlighted.

Residential Property Development Tax

The new 4% tax will be charged on the profits of companies that undertake RPD activities. It applies to accounting periods ending on or after 1 April 2022 (with an apportionment for accounting periods that straddle this date). The tax will apply to profits above a £25m annual allowance and is aimed at large residential developers to help fund the cost of cladding remediation works. Thus, smaller businesses, which might technically fall within the regime, should fall below this threshold and have no RPD tax to pay.

Uncertain Tax Treatments

HMRC has published final guidance on new rules that will require large businesses to notify it where they have adopted an uncertain tax treatment in a tax return from 1 April 2022. Uncertain treatments will be defined by reference to two criteria:

1 See also article" UK 2022 Spring Statement and What Might Be Next for UK Tax" by Patrick Duggan in this issue.

- a provision has been made in the accounts for the uncertainty or
- the position taken by the business is contrary to HMRC's "known" interpretation, as stated in the public domain or in dealings with HMRC – this trigger does not apply where there is no known position.

The requirement to notify is subject to a £5m *de minimus* threshold (per tax, per year) and two exemptions – a general exemption based on advance disclosure to HMRC (which meets certain requirements) and an exemption from corporation tax notification for certain UK–UK group transactions. Businesses with a UK presence should consider now whether they have a notification obligation. A penalty may be payable if a business is obliged to notify an uncertainty and does not do so within the required timescale unless there is a reasonable excuse for the failure. The penalty starts at £5,000 and rises to £50,000 if there have been three or more penalties in relation to notification failure in a three-year period.

Coronavirus Job Retention Scheme: HMRC Nudge Campaign on Including Grants in Tax Returns

HMRC is issuing "nudge" letters to companies where it has been unable to reconcile the Coronavirus Job Retention Scheme (CJRS) grants paid to those disclosed by the company in its accounts, corporation tax computation and company tax return (CT600). These letters give recipients 30 days to review the relevant corporation tax returns and either:

- submit an amended return that includes any omitted CJRS grant income or
- confirm that all CJRS grant income has in fact been included.

Although a "nudge" letter is not an enquiry notice, employers should take them seriously and respond within the 30-day time limit. HMRC can still open a formal enquiry into a return, or into the underlying CJRS claims, should it have any further concerns.

UK National Insurance

Two changes to the National Insurance system were announced by the Chancellor in his Spring Statement. The first is an increase in the NIC threshold, the income level at which employees begin to pay National Insurance, by £3,000 to £12,570. This is a significant increase and should help reduce costs as well as simplifying the tax system, as it equalises the income tax and NIC thresholds. In his second NIC-related proposal the Chancellor announced that the employment allowance will increase further from April 2022, meaning that eligible employers will be able to reduce their employer NIC bills by up to £5,000 per year, representing an increase in the allowance of £1,000 from the previous year.

Tax Incentives for Business

A new Tax Plan was delivered by the Chancellor with an ambition to drive growth in the UK. With the corporation tax rate increasing to 25% from 1 April 2023 both the existing research and development (R&D) schemes and capital allowance regimes are being targeted to ensure that they are as attractive as possible. Further details on the measures are expected later in the year, but the key measures expected are as follows:

R&D

Increasing the rates of the existing R&D schemes as well as broadening the scope of the schemes to include the costs of pure mathematics research and data storage as qualifying expenditure will be considered.

Capital allowances

The super-deduction, which has been in place since April 2021, will end in March 2023. The Government has suggested new measures that are being considered to ensure that future investment in capital expenditure is further encouraged, to include:

- The annual investment allowance (AIA), which provides 100% relief on qualifying capital expenditure in the year of acquisition, will remain at the temporary level of £1m per year until 2023. The suggestion is that this could be permanently set at £500k (previously £200k) per year from April 2023.
- Writing-down allowances on main- and special-rate assets are currently 18% and 6%, respectively. It has been proposed that these could be increased to 20% and 8%.
- First-year allowances have been suggested on expenditure in excess of the AIA to allow a deduction of 40% and 13% on qualifying expenditure on main- and special-rate assets, respectively.

Business groups are expected to be consulted over the coming months, with the new measures selected to be announced in the Autumn Budget.

Energy-Saving Materials: 5% rate lowered to 0%

VAT on energy-saving materials (ESM) such as solar panels, heating pumps and roof insulation has been cut from 5% to 0% for five years to help people to become more energy-efficient. Due to the terms of the Northern Ireland Protocol, which means that EU VAT rules apply to supplies of goods in Northern Ireland, this change cannot specifically be applied to legislation in Northern Ireland, and thus care should be taken when advising businesses based in Northern Ireland on this issue.

However, the Northern Ireland Executive will receive a "Barnett share" of the value of this relief until it can be introduced UK-wide. Therefore, Northern Ireland households and consumers should ultimately be able to benefit from this reduction in the VAT rate.

HMRC v Fisher: Transfer of Assets Abroad Provisions

The *Fisher* case concerns the application of the transfer of assets abroad (TOAA) provisions in respect of the decision to move a betting business to Gibraltar in 2000 by means of the sale of the business by a UK close company to a Gibraltarian one. HMRC contended that the shareholders in the UK company, three members of the Fisher family, were taxable on all of the income arising to the Gibraltarian company under the TOAA rules, and the Fishers appealed against this.

The recent Court of Appeal judgment in the *Fisher* case provided several key findings on the TOAA rules, as follows:

- The TOAA code does not breach EU law.
- The court decided, by a majority, that the TOAA rules can catch “quasi-transferors”, such as minority shareholders who cause a company to effect a transfer.
- For the TOAA rules to apply, the taxpayer must have taken a positive step to bring something about and not just passively allowed it to happen.

When advising on offshore structures, it has always been necessary to carry out a painstaking analysis carefully applying the law to the facts. *Fisher* can be seen as a reminder of how important it is to carry out this analysis.

Some Practical Points

Capital gains tax on UK residential property

For UK residential properties sold on or after 27 October 2021, capital gains need to be reported to HMRC and CGT paid within 60 days of completion of a sale. Failure to do so may lead to penalties and interest charges. (For the period from 6 April 2020 to 26 October 2021, the requirement was to report the gain and pay the tax within 30 days of a sale).

Those who are required to report a capital gain within 60 days of a sale are also required to submit a self-assessment tax return for the year in which the sale occurred. Essentially, the initial payment is a payment on account, and the subsequent self-assessment return ensures that the correct amount of tax has been paid in the tax year.

Many sellers and their legal advisers are unaware of these rules, which has resulted in a number of them being subject to late filing penalties.

VAT grouping delays: updated HMRC guidance

Businesses are currently experiencing significant delays with HMRC’s processing of VAT grouping applications and amendments. It is likely that long delays will continue, but HMRC has published Revenue & Customs Brief 5/22 setting out what businesses should do while they are waiting for their application to be processed. This brief confirms that businesses should treat an application as provisionally accepted while waiting to hear from HMRC, as well as addressing what businesses should do if they had followed the previous version of the guidance. HMRC has also updated “Group and Divisional Registration” (VAT Notice 700/2) with further guidance on what to do while waiting for a response to a VAT grouping application (para. 2.17).

Making Tax Digital

Readers are reminded that Making Tax Digital (MTD) for VAT is mandatory from 1 April 2022 for VAT-registered businesses with turnover below the £85,000 VAT registration threshold. Businesses need to have signed up to MTD for their first VAT return on or after 1 April 2022. However, they may not be required to make their first submission via MTD until summer 2022 under the MTD for VAT changes from April 2022.

Lauren Clabby
Director, Tax, KPMG

Preparing for Pay and File 2022

Introduction

On 30 December 2021 *The Guardian* reported: "on the brink of a new year, the world faces a daunting array of challenges: the resurgent Covid-19 pandemic, the climate emergency, the struggle between democracy and authoritarianism, humanitarian crises, mass migration, and trans-national terrorism…All in all, for most people on Earth – and a handful in space – 2022 will be another year of living dangerously". Unfortunately, to date this would appear to be an accurate prediction.

One thing, of course, that remains stable is our role as tax advisers in the annual personal tax filing process. As has been customary since the introduction of ROS, Revenue has announced an extension for ROS return filing – it will be 16 November 2022. For many of us the next few months will, as usual, be focused around this date. As well as highlighting pre-existing aspects that can be challenging, this article outlines developments necessitated by the ever-changing world challenges that should be considered by practitioners before the personal tax compliance season.

Revenue eBriefs: Overview

During 2021 and to date in 2022, Revenue published a significant number of eBriefs that are relevant to the preparation of the 2021 Form 11.

Revenue eBrief No. 088/22: ROS deadline extension

On 12 April 2022 Revenue announced the customary filing deadline extension for self-assessed taxpayers and those liable to capital acquisitions tax (CAT) who use ROS. The due date is extended to **Wednesday, 16 November 2022**, for those who file their 2021 Form 11 return **and** make the appropriate payment through ROS for:

- preliminary tax for 2022 and
- income tax balance due for 2021.

For beneficiaries who received gifts or inheritances with valuation dates in the year ended 31 August 2022 and who file a CAT return and make the appropriate payment through ROS, the due date is also extended to 16 November 2022.

To qualify for the extension, taxpayers must both pay and file through ROS. Where only one of these actions is completed through ROS, the extension does not apply, and the required date to submit both returns and payments is 31 October 2022.

Revenue eBrief No. 002/21: Stock relief

Tax and Duty Manual (TDM) Part 23-02-02 sets out guidance on a tax deduction for farmers for increases in stock values (“stock relief”) and is provided for by s666 of the Taxes Consolidation Act 1997 (TCA 1997). The manual has been updated as follows:

- An example showing how to calculate the amount of stock relief due for an accounting period is included.
- The meaning of “trading stock” and the type of items that may be included in the stock valuation is explained.
- A new section entitled ”Potential abuse of relief” is added.

Stock relief is equal to 25% of the amount by which the value of farm trading stock at the end of an accounting period exceeds the value of farm trading stock at the beginning of the accounting period. The relief is given in the form of a deductible trading expense.

The example given of what would be considered to be abuse of the relief is the artificial inflation of the value of the stock at the end of the accounting period by acquiring stock shortly before that date without a genuine intention of using it in the farming trade and disposing of it shortly afterwards back to the person who sold it.

Revenue eBrief Nos 004/21 and 225/21: Covid-19 benefit-in-kind measures

In December 2020 Revenue issued updated guidance in respect of certain Covid-19 measures relating to benefits-in-kind (BIK). It confirmed that some of the concessionary measures introduced in March 2020 would be retained but others would cease to apply after 31 December 2020.

The December 2020 guidance issued at a time when public health restrictions began to ease and businesses reopen, but subsequently Level 5 public health restrictions were reintroduced and employees were again advised to work from home unless their work was categorised as being an essential service.

Accordingly, the following BIK measures originally outlined in eBrief 232/20 continued into 2021 pending the lifting of the Level 5 restrictions:

- BIK on provision of Covid-19 testing,
- BIK on facilitation of flu vaccination,
- BIK on employer-provided vehicles,
- BIK on use of company cars by employees in the motor industry,
- BIK on payment of taxi fares by an employer,
- small-benefit exemption and
- BIK on employer-provided accommodation.

Subsequently, eBrief 225/21 summarised the position in respect of all measures retained for the 2021 year of assessment as follows:

- Transborder workers' relief: Where employees are required to work from home in Ireland due to Covid-19, such days spent at home in Ireland will not preclude the individual from being entitled to claim transborder workers' relief, provided all other conditions are met. This concession currently applies up to 31 March 2022. See section 11 of Tax and Duty Manual (TDM) Part 34-00-06 for further information.
- BIK on provision of Covid-19 testing and facilitation of flu vaccination: The provision of Covid-19 testing on an employee or the provision of a testing kit to the employee is not a taxable BIK. This measure is provided for on a statutory basis by Finance Act 2021. See section 16 of TDM Part 05-01-01l for further information.
- BIK on employer-provided vehicles and use of company cars by employees in the motor industry: The BIK rules are modified to provide for different scenarios that may arise. If the employer takes back the car or the private use is prohibited, no BIK arises. Otherwise, the amount of business mileage incurred in January 2020 may be used as a base for the purpose of calculating the BIK. 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 applies in the usual manner. See sections 8 and 9 of TDM Part 05-01-01b for further information.
- BIK on payment of taxi fares by an employer: Payment for a taxi by an employer is not considered to be a taxable benefit where it is for the purpose of transportation to or from home and the workplace due to health and safety concerns relating to Covid-19. This measure will be subject to further review by 30 June 2022. See section 28 of TDM Part 05-01-01l and section 4.5 of TDM Part 05-01-06 for further information.
- Small-benefit exemption: The measure (of allowing more than one voucher to be given to an employee) was retained; however, the cumulative value of the vouchers cannot exceed €500. See section 3 of TDM Part 05-01-01e for further information.
- BIK on employer-provided accommodation: An employee may be provided with temporary accommodation by their employer to mitigate potential transmission risks. This measure was retained for 2021 and 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 TDM Part 05-01-01c for further information.

Revenue eBrief No. 011/21: Permanent health benefit schemes

Tax and Duty Manual Part 15-01-10, "Relief for Contributions to Permanent Health Benefit Schemes and Tax Treatment of Benefits Received under Permanent Health Benefit Schemes", has been updated to clarify the difference between permanent health benefit schemes and employee protection insurance. The former means a scheme, contract, policy or other arrangement approved by the Revenue Commissioners that provides for periodic payments to an individual in the event of loss or diminution of income as a consequence of ill-health. The latter refers to a policy taken out by an employer to insure itself against the possibility that it will have to continue to pay all or part of an employee's salary while they are on sick leave and is not permanent health insurance for the purposes of tax relief in accordance with s471 TCA 1997.

Revenue eBrief No. 015/21: Foster care-related payments

Tax and Duty Manual Part 07-01-31, "Tax Treatment of Foster Care Related Payments", has been updated to reflect changes made in Finance Act 2020. The Act provides an exemption from income tax for payments made by or on behalf of the Health Service Executive to a carer in respect of the Home-Sharing Host Allowance.

Revenue eBrief 030/21: Capital gains tax revised entrepreneur relief

Tax and Duty Manual Part 19-06-02b has been updated to reflect an amendment made to entrepreneur relief by s24 of the Finance Act 2020. The requirement for an individual to have owned at least 5% of the ordinary share capital is amended so that the shares can qualify for relief if they were held for a continuous period of three years at any time before their disposal. The amendment applies to disposals of chargeable business assets made on or after 1 January 2021.

Revenue eBrief No. 035/21: Income from scholarships

Tax and Duty Manual Part 07-01-26, "Income from Scholarships", has been amended to include updates to:

- section 3: "Fellowships",
- section 4: "Student declaration form",
- section 5: a new section, "Students on extended leave", and
- section 6: "Students from overseas".

Section 193 TCA 1997 provides that income arising from a scholarship is exempt from income tax. It is also exempt from USC and PRSI.

Revenue eBrief No. 054/22: Annual average exchange rates and Lloyds sterling conversion rates

This eBrief outlines the 2021 average exchange rates that can be used, if appropriate, to convert income denoted in the most common foreign currencies to euro.

Revenue eBrief No. 052/21: Certain benefits payable under the Social Welfare Acts

Tax and Duty Manual Part 05-05-37, "Tax Treatment of Certain Benefits Payable under the Social Welfare Acts", lists the social welfare benefits that are not taxable.

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

Revenue eBrief No. 057/21: Dependent relative tax credit

Tax and Duty Manual Part 15-01-27, "Dependent Relative Tax Credit", has been updated as follows:

- to reflect the change made to the Dependent Relative Tax Credit by Finance Act 2020 – the tax credit available increased from €70 to €245 in respect of the year of assessment 2021 and subsequent years;
- to clarify who is or is not a dependent relative; and
- to provide details on how to apply for the credit.

In broad terms a dependent relative is a relative of the taxpayer or their spouse/civil partner who is incapacitated by virtue of old age or infirmity or is widowed, whose income does not exceed the "specified amount" (€15,740 for 2021) and who is maintained at the taxpayer's own expense. It does not extend to a child under the age of 18 unless that minor child is a carer for the claimant and lives with the claimant.

Revenue eBrief No. 074/21: Relief for investment in corporate trades

Tax and Duty Manual Part 16-00-02 contains the general guidance on the Employment Investment Incentive (EII), Start-Up Relief for Entrepreneurs (SURE) and the Start-up Capital Incentive (SCI). This manual has been updated to provide guidance on temporary measures available to companies that may have availed of SURE and for which the ability to meet the employment conditions for the relief may be impacted as a result of Covid-19.

Revenue eBrief No. 083/21: Cessation of a trade or profession or change in accounting date – review of preceding year

Tax and Duty Manual Part 04-03-05, "Cessation of a Trade or Profession or Change in Accounting Date – Review of Preceding Year", has been updated to include examples demonstrating the approach to be adopted when a revision of a preceding year is required due to a permanent cessation of a trade or profession.

Where a trade or profession is treated as ceasing permanently and the taxpayer has been charged for the tax year preceding the year of cessation on the basis of the profits of the 12 months ending in that year, the profits of that year must be recalculated on an actual (calendar-year) basis. If that yields a higher taxable amount, an adjustment is required. Similar provisions apply in a year where there is a change in accounting date.

Revenue eBrief No. 105/21: SARP

Tax and Duty Manual Part 34-00-10, "Special Assignee Relief Programme (SARP)", has been updated to include details of the Covid-19 concession (published on the Covid-19 hub of Revenue's website) and to include a link to the annual SARP reports.

Revenue confirmed that it will continue to apply the SARP legislation strictly, offering no flexibility for employees who inadvertently breached (due to Covid-19) any of the conditions required to claim SARP.

Revenue eBrief No. 116/21: High-income individuals' restriction

Tax and Duty Manual Part 15-02a-05, "High-Income Individuals' Restriction for Tax Year 2010 Onwards", has been updated to remove references to reliefs that were subject to the restriction ("specified reliefs") but are no longer operative. A list of reliefs deleted by Finance Act 2020 is included in the manual at Appendix 3. Examples are patent royalty income, profits or gains from stallion fees, relief for investment in films and BES relief.

The high-income individuals' restriction is discussed in greater detail below.

Revenue eBrief No. 136/21: Payments on termination of an office or employment or removal from an office or employment

Tax and Duty Manual Part 05-05-19, "Payments on Termination of an Office or Employment or Removal from an Office or Employment", has been updated:

- to provide additional clarification regarding the tax treatment of "fire and rehire" scenarios and
- to include details of the Covid-19-related concessionary measure regarding retraining costs paid as part of a termination.

A redundancy will generally not be regarded as taking place where there is a "fire and rehire" agreement in place at the time of the termination or an expectation or understanding of either party that an offer of rehire will be made at some point in the future. Any lump-sum payment made in such circumstances will be chargeable to tax in accordance with s123 TCA 1997 and will not qualify for reliefs available in accordance with s201 or Schedule 3 TCA 1997.

Revenue eBrief No. 145/21: Time limits for making enquiries and making or amending assessments

Tax and Duty Manual Part 41A-05-04, "Full Self-Assessment: Time Limits for Making Enquiries and Raising Assessments", is amended as follows:

- to clarify the circumstances where assessments can be amended and
- to confirm that assessments can be made or amended outside the four-year timeframe on conclusion of a mutual agreement procedure, as provided for in s959AA(2A) TCA 1997.

Revenue can carry out enquiries into a return at any point up to the end of the fourth year after the return was filed (not the year in which the return was due to be filed). This does not extend to cases where Revenue has reasonable grounds for believing that any form of fraud or neglect has been committed – there is no time limit in such cases.

Revenue eBrief No. 153/21: Tax relief for health expenses

Tax and Duty Manual Part 15-01-12, "Health Expenses: Qualifying Expenses", has been updated to include additional examples, at section 5, illustrating how tax relief for nursing home care is given. Relief in respect of qualifying nursing home expenditure is given as a deduction from total income and is therefore allowed at an individual's marginal rate of tax. This does not extend to amounts covered by the Fair Deal Scheme.

Revenue eBrief No. 158/21: Self-assessment – early filing and filing on ROS

Chargeable persons are required to self-assess when filing their tax return, except for individuals who file a paper return on or before 31 August in the year after the year of assessment ("early filers"). A benefit of using ROS is that it will generate a calculation of the self-assessment based on the inputs and updates on the ROS return. ROS filers can accept the Revenue calculation of the self-assessment that results from the information input on the ROS return or can input their own self-assessment if they disagree with the Revenue calculation on ROS.

Revenue eBrief Nos 164/21 and 038/22: Exchange-traded funds

The following updates have been made to set out more clearly the taxation of investors in exchange-traded funds (ETFs) and exchange-traded commodities (ETCs):

- TDM 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.
- TDM 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 TDM.
- TDM Part 27-01a-03, "Exchange Traded Funds", has been updated to direct users to the above-mentioned TDMs rather than providing separate guidance on the taxation of investments in ETFs and ETCs.
- TDM Part 27-01a-03 was further updated in 2022 to confirm the interaction of the eight-year "deemed disposal rule" with updated guidance published on 1 September 2021, where applicable, which takes effect from 1 January 2022.

Prior Revenue guidance confirmed that the taxation of income and gains from investments in ETFs domiciled in the USA, the EEA or an OECD Member State (other than the USA) with which Ireland had a double taxation treaty would follow the tax treatment that applies to shares/equities generally. This guidance has been revoked, and investments must be reviewed to determine whether this treatment is appropriate going forward based on the structure, background etc. of the particular investment. This topic is discussed in greater detail below.

Revenue eBrief No. 167/21: Provisions relating to residence of individuals

Tax and Duty Manual Part 34-00-01, "Provisions Relating to Residence of Individuals", outlines the force majeure Covid-19 concessionary measures. These measures did not extend into 2021.

Revenue eBrief No. 177/21: Tax exemption and marginal relief

Tax and Duty Manual Part 07-01-18, "Tax Exemption and Marginal Relief", explains the operation of the relief whereby an individual aged 65 or over is exempt from income tax if their total income is less than the relevant exemption limit, which for 2021 is €18,000 (or €36,000 in the case of a married couple/civil partnership).

Revenue eBrief No. 186/21: Allowances and reliefs for individuals over 65 and individuals caring for those over 65

The examples contained in Tax and Duty Manual Part 15-01-26, "Allowances and Reliefs for Individuals over 65 and Individuals Caring for Those over 65", have been refreshed and updated. Examples of allowances or reliefs that may apply are the age tax credit, the dependent relative tax credits, the home carer credit, deeds of covenant and tax relief for employing a person to take care of an incapacitated individual.

Revenue eBrief No. 189/21: Receipts tracker in myAccount and ROS

Tax and Duty Manual Part 38-06-06, "Receipts Tracker in myAccount and ROS", has been updated.

- Amendments have been made throughout to reflect the deactivation of the Revenue Receipt Tracker App (RRTA) and to update screenshots.
- Paragraph 5.2 has been updated with information on the details that will be required when claiming the health and nursing home expenses tax credit in real time from 2021.
- Paragraph 5.3 has been updated with additional information on uploading images to the system, as well as information about maximum file size and accepted formats.

The Receipts Tracker is particularly important for those claiming under the **Stay and Spend scheme**. This allowed a tax credit of up to 20% for taxpayers who spent a minimum of €25 on accommodation, food or non-alcoholic drinks between October 2020 and April 2021, with a maximum refund of €125 per taxpayer or €250 per jointly assessed couple.

Likewise, it can be used for those claiming **remote working relief**. The maximum relief allowable is:

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

Revenue eBrief No. 202/21: Incapacitated child tax credit

Tax and Duty Manual Part 15-01-05, "Incapacitated Child Tax Credit", has been updated to include:

- consideration of the child's capacity for independent living and
- instructions on how to claim the relief.

A child under the age of 18 shall be regarded as permanently incapacitated by reason of mental or physical infirmity only if the infirmity is such that there would be a reasonable expectation that, if the child were over the age of 18, the child would be incapacitated from maintaining themselves. In determining whether this is the case, it is necessary to consider the extent to which the child has the capacity for independent living based on their health condition or disability, or will have the capacity for independent living when over 18.

Revenue eBrief No. 223/21: Home carer tax credit

The examples throughout Tax and Duty Manual Part 15-01-29, "Home Carer Tax Credit", have been updated, largely to reflect the credit available in the current year of assessment. If a home carer's income exceeds the upper limit in a year (€10,400 in 2021), the tax credit will still be due for that year provided that:

- the other conditions for claiming the tax credit are met and
- the tax credit was granted in the immediately preceding tax year.

In such circumstances the tax credit is restricted to the amount granted for the immediately preceding year.

Revenue eBrief No. 230/21: Relief for certain income from leasing of farm land

Tax and Duty Manual Part 23-01-23, "Relief for Certain Income from Leasing of Farm Land", has been updated to confirm that "lease", "lessee", "lessor" and "rent" have the same meanings as in Chapter 8 of Part 4 of 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).

Section 664 TCA 1997 exempts from income tax certain income arising from leasing farm land. The amounts vary depending on when the lease was entered into and its duration.

Revenue eBrief No. 004/22: Pre-letting expenditure in respect of vacant residential premises

Tax and Duty Manual Part 04-08-11, dealing with pre-letting expenditure in respect of vacant residential premises, has been updated to reflect that Finance Act 2021 has extended until 31 December 2024 the period during which qualifying pre-letting expenditure (incurred in the 12 months before the date on which the property is first let as a residential premises) is allowable as a deduction.

Revenue eBrief No. 090/22: Tax treatment of Ukrainian citizens who work remotely in the State for Ukrainian employers

Ukrainian citizens have come to the State because of the war in their country. Although not relevant for 2021 Form 11 purposes, it is a very topical development. This eBrief outlines Revenue's treatment of the tax position of Ukrainians who continue to be employed by their Ukrainian employer while performing the duties of their employment remotely in Ireland.

Irrespective of the tax residence position of the employee or the employer, income from a non-Irish employment attributable to the performance in Ireland of the duties of that employment is chargeable in Ireland to income tax and USC and is within the scope of the PAYE system of deduction of income tax at source. The requirements are outlined in detail in TDM Part 42-04-65, "Employee Payroll Deductions in Relation to Non-Irish Employments Exercised in the State".

However, by way of concession, Revenue will treat:

- these Irish-based employees of Ukrainian employers as not being liable to Irish income tax and USC on Ukrainian employment income that is attributable to the performance of duties in Ireland **and**
- the Ukrainian employers as not being required to operate the PAYE system on such employment income.

The concession applies solely to employment income that is paid to the Irish-based employees by their Ukrainian employer.

The concessionary treatment will apply for the tax year 2022 where:

- the employee would have performed his/her duties of employment in Ukraine but for the war there **and**
- the employee remains subject to Ukrainian income tax on his/her employment income for the year.

As respects any individual or relevant entity that avails of the concessional treatment set out above, any documents or other evidence – such as a record with the individual's date of arrival in Ireland showing that it was due to the war in Ukraine that the individual came to Ireland and performed their work or duties here – should be kept.

Main Changes to the Form 11

Personal details

When filing a tax return using ROS, taxpayers are now required by Revenue to confirm the reason why they are a chargeable person and are therefore filling a Form 11. (The following screenshots are from TDM Part 38-01-04F, "Income Tax Return Form 2021: ROS Form 11".)

Tickbox option	Additional information
Trading income (no PAYE income)	Income from a business, trade, profession or vocation. PAYE income is from an employment or occupational pension where your employer or pension provider deducts Income Tax (IT), Pay Related Social Insurance (PRSI) and Universal Social Charge (USC), as applicable.
PAYE Income, and other non-PAYE income greater than €5,000 (net)	PAYE income is from an employment where your employer deducts Income Tax (IT), Pay Related Social Insurance (PRSI) and Universal Social Charge (USC). Non-PAYE income greater than €5,000 from all sources after deducting capital allowances, expenses and losses carried forward.
PAYE Income, and other non-PAYE income greater than €30,000 (gross)	PAYE income is from an employment were your employer deducts Income Tax (IT), Pay Related Social Insurance (PRSI) and Universal Social Charge (USC). Gross non-PAYE income greater than €30,000 from all sources is the total profits or gains for a year of assessment before deducting capital allowances and losses
Proprietary Director	A "proprietary director" is a director who is the beneficial owner of the company, or is able, either directly or indirectly, to control, more than 15% of its the ordinary share capital.
Opened a Foreign Bank account in the tax year	Where a person who is resident in the State opens a bank account outside the State, or causes a bank account to be opened when that person is beneficially entitled to the sums in the account, that person is a chargeable person for that year of assessment.
Share options granted	A share option is a right that your employer grants you to acquire shares in the company. You are considered a 'chargeable person' for the year in which you exercise, assign, or release a share option.
Foreign Income only	Foreign income chargeable to tax in the Republic of Ireland, i.e. a foreign pension.
Rental Income only	Income from renting out a property, or from another source that qualifies as rental income. This includes but is not limited to the renting out of a house, flat, apartment, office, business premises or farmland.
Other non-PAYE income only (dividends, deposit interest, etc)	Other non-PAYE Income not covered above including dividends, deposit interest, settlements, covenants, estate income, maintenance payments, investment undertakings, Irish Real Estate Funds and untaxed income.
None of the above but you wish to file a Form 11	Please note that you may no longer be a chargeable person for self-assessment and may be able to cease your Income Tax registration.

Public Sector Information reproduced from https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-38/38-01-04f.pdf – Accessed on 14 June 2022.

Succession farm partnerships

There are additional questions to enable a filer to provide information on relief claims for the prior three-year period. If there is an entry in the 2021 field, there must be an entry in each of the 2020 and 2019 fields.


Relief for partner in Registered Farm Partnerships under S. 667C used in 2021 € 25000
You cannot claim more than €20,000 over a three-year period.
Relief for partner in Registered Farm Partnerships under S. 667C used in 2020 € 0
Relief for partner in Registered Farm Partnerships under S. 667C used in 2019 € 0

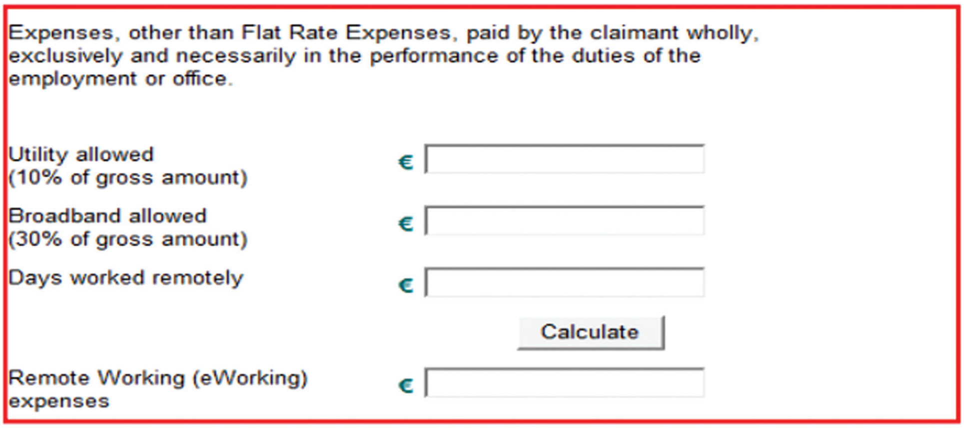
Public Sector Information reproduced from https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-38/38-01-04f.pdf – Accessed on 14 June 2022.

Capital allowances 2021: Farm safety equipment

The 2021 Form 11 will be updated in mid-year to include additional questions to provide for the claiming of capital allowances under s285D TCA 1997 in respect of farm safety equipment.

PAYE/BIK/pensions: Allowable deductions incurred in employment

Additional questions are included to assist filers in calculating claims for expenses due in respect of remote working, including a requirement for filers to input the number of days worked from home.


Expenses, other than Flat Rate Expenses, paid by the claimant wholly, exclusively and necessarily in the performance of the duties of the employment or office.

Utility allowed (10% of gross amount) €

Broadband allowed (30% of gross amount) €

Days worked remotely €

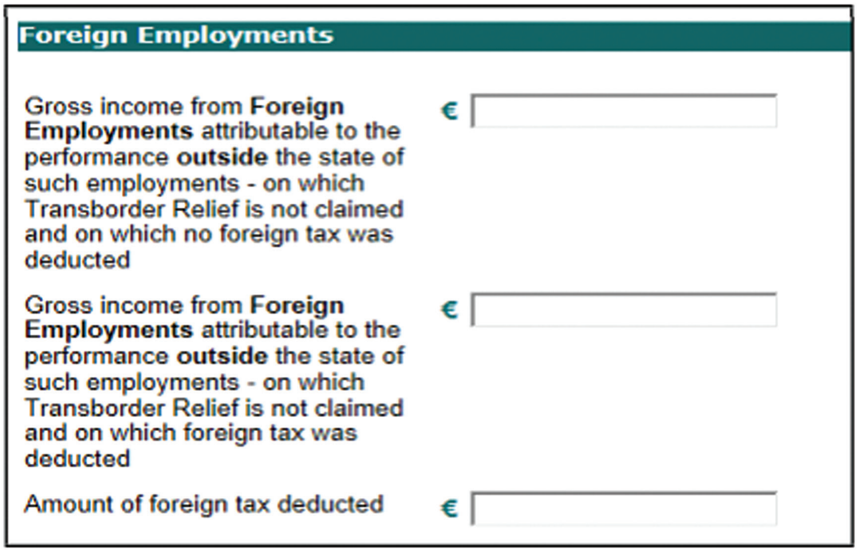
Calculate

Remote Working (eWorking) expenses €

Public Sector Information reproduced from https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-38/38-01-04f.pdf – Accessed on 14 June 2022.

Foreign income: Foreign employments

An additional question is included in the Foreign Employments sub-panel, to enable a filer to declare income from foreign employments and whether foreign tax was deducted.


Foreign Employments

Gross income from **Foreign Employments** attributable to the performance **outside** the state of such employments - on which Transborder Relief is not claimed and on which no foreign tax was deducted €

Gross income from **Foreign Employments** attributable to the performance **outside** the state of such employments - on which Transborder Relief is not claimed and on which foreign tax was deducted €

Amount of foreign tax deducted €

Public Sector Information reproduced from https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-38/38-01-04f.pdf – Accessed on 14 June 2022

Foreign bank accounts

Where a filer has opened more than 20 foreign bank accounts or invested in more than 20 foreign life policies, offshore funds or other offshore products, an additional question is presented after the 20th entry to ask the filer to enter the total amount of money deposited in the remaining bank accounts/foreign life policies/offshore funds or other offshore products.


If you open **more than twenty foreign bank accounts**, enter the total amount of money deposited on opening those remaining accounts €

Public Sector Information reproduced from https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-38/38-01-04f.pdf – Accessed on 14 June 2022.

Widowed parent tax credit

Credit was previously claimed in the Personal Details panel, however it has moved to the Personal Tax Credits panel in the 2021 Form 11.

Stay and Spend credit

A copy of the receipt for any qualifying expenditure incurred must be submitted in support of any claim. The easiest way to submit receipts is using the Revenue Receipts Tracker in ROS and myAccount. Filers are required to complete the three fields requested for each expenditure claim: restaurant or business name, date of expense and net amount.

Capital gains tax: Gains/losses/net chargeable gains

Additional questions are included in relation to “unused losses for carry-forward” to enable a filer to show losses carried forward from the current year (2021) and losses from years before 2021.

- Q1 – “Current Year Loss(es) from prior year(s) for carry forward to 2022”.
- Q2 – “Unused Loss(es) from prior year(s) for carry forward to 2022”.

The Administrative Basics

Preliminary tax

Preliminary tax for 2021 should be equal to:

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

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

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

Taxation of married couples/civil partners

Joint assessment is the default method of assessing married couples/civil partners. The deadline for claiming separate assessment for 2021 income tax purposes was 31 March 2021. Such a claim cannot be backdated and continues into future years until it is withdrawn. The spouse or civil partner who made the initial claim for separate assessment must be the person to withdraw it, and again a 31 March deadline in the year in question applies.

Self-correction

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

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

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

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

Local property tax

Failure by the taxpayer to file a local property tax (LPT) return and/or pay the LPT liability by the tax return deadline deems the tax return to be late, and therefore the late-filing surcharge applies **automatically**. Revenue has clarified that this surcharge will not exceed the amount of LPT due where the LPT return is subsequently filed and the payment due is paid or a payment arrangement is entered into. Taxpayers should also be mindful that outstanding LPT returns and liabilities are taken into account for tax clearance purposes.

LPT is particularly topical for the upcoming compliance season in light of the requirement to file updated LPT returns/valuations by November 2021. Revenue has advised that it is in contact with taxpayers who have not submitted returns, but it is likely that because of this additional return requirement in 2021 there will be a higher level of non-compliance for LPT purposes in the coming months than for the past few years.

Debt warehousing

The debt warehousing scheme has been extended until 30 April 2022 for those businesses that were already eligible for warehousing and had a valid claim in the period from 1 January 2022 to 30 April 2022 under a Government Covid-19 support scheme. Currently, interest will not apply to debt warehoused by those businesses until 1 May 2023, with interest at a rate of 3% applying for a certain period thereafter. For other businesses the interest-free period expires on 31 December 2022.

Finance Act 2021 allows proprietary directors to claim a credit for the PAYE payable on their emoluments when filing their tax return where that PAYE has been warehoused by their company.

Tax returns must be up to date by 30 April 2022 to avail of debt warehousing.

The complexities

Domicile levy

For 2021 the domicile levy of €200,000 and the filing of a Form DL1 apply where an individual:

- is Irish domiciled – the requirement to be an Irish citizen does not apply for 2012 and subsequent years,
- has worldwide income for 2021 in excess of €1m,
- holds Irish property valued at in excess of €5m on 31 December 2021 and
- has an Irish tax liability for 2021 of less than €200,000.

The scope of the domicile levy is wider than anticipated when it was introduced by Finance Act 2010. Initially, it was thought to apply only to individuals who are not Irish tax resident, but although it was introduced to target such taxpayers, the underlying legislation does not limit the charge in this way. Accordingly, it can apply to all taxpayers who otherwise satisfy the criteria. Tax practitioners should also be mindful that Revenue does not consider that USC comprises part of a taxpayer's Irish tax liability for the purpose of determining whether the €200,000 threshold has been exceeded. This view has been upheld by the Tax Appeals Commissioners. Where the €200,000 levy is payable for 2021, it may be offset by income tax (not USC) paid for 2021.

High-income earner restriction

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

Finance Act 2020 deleted a number of specified reliefs from Schedule 26B TCA 1997 (see eBrief No. 116/21 summarised above).

Property relief

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

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

Investment portfolios

The area that possibly presents the greatest difficulty for a tax adviser when preparing a tax return is determining the status of different assets held in an investment portfolio. The popularity of collective investment vehicles has soared in recent years, and where such vehicles are domiciled outside Ireland, they are typically considered to be "offshore funds" as defined under Irish law. As most practitioners know, such a classification is not necessarily favourable for a taxpayer. Revenue's TDM Part 27-02-01 includes very useful decision trees to assist in determining the nature of foreign investments that have the appearance of possibly being offshore funds. Key points to remember when reviewing portfolios are:

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

- The death of the holder of an EU/EEA/OECD-regulated fund triggers an exit charge. The units of the fund are deemed to have been disposed of and immediately reacquired by the deceased for market-value consideration (this is often overlooked and is particularly detrimental where the fund is bequeathed to a spouse and it was assumed that no tax would arise).
- Loss relief is not available in respect of losses arising from an EU/EEA/OECD-regulated fund.
- The remittance basis does not apply to gains arising from regulated funds within the EU/EEA/OECD.
- As regards ETFs, see discussion above – eBrief Nos 164/21 and 038/22.

Guidance on the appropriate tax treatment of investments is ever evolving, and tax advisers should review the guidance regularly. As mentioned above, certain ETFs that previously were not thought to fall into the regime outlined above may now do so following updated Revenue guidance published in September 2021.

Foreign bank accounts

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

Foreign authority reporting

As tax advisers will be well aware, clients with foreign assets are coming to Revenue's attention as a consequence of the sharing of information in relation to foreign assets reported for example via FATCA/CRS may be shared by or with Revenue under exchange of information with foreign authorities.

Conclusion

The Covid-19 pandemic added a great deal of complexity to our role as tax advisers when preparing 2020 tax returns. This additional complexity remains a feature of 2021 tax returns, and this no doubt will be the case when it comes to 2022 returns (only to be replaced then by new world challenges). Coupled with a tendency for clients' financial affairs becoming more complex and, in many cases, globalised, this makes our role as tax professionals ever more demanding. We certainly need to keep abreast of evolving tax rules, but a phrase coined by Maxime Lagacé comes to mind too – "The wise do things slowly".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Key Considerations for 2021 Corporation Tax Compliance Cycle

Introduction

As we make our way towards the biggest corporation tax deadline of the year in September, we take time to focus once more on some of the key considerations for advisers when preparing corporation tax returns, along with some of the key changes to be aware of compared to last year.

The impact of international tax reform continues to see our corporation tax code evolve and update. Although this article is focused on the changes to the corporation tax returns for accounting periods ending in 2021, we are already aware of items such as interest limitation rules, anti-reverse hybrid rules and the revised tax treatment of non-resident corporate landlords, which will have a major impact on the corporation tax returns for accounting periods ending in 2022. We also await the final decision on the timing of the implementation of the 15% effective corporation tax rate for large multinationals.

Hopefully, the later part of 2021 will have seen many companies that were affected by Covid-19 regain some level of strength in their financial results, but there may well still be losses arising for some companies, which need to be either surrendered to the prior year or carried forward against future trading profits. Many sets of 2021 accounts will continue to reflect the Government supports that were provided during the pandemic, such as CRSS and EWSS,[1] and many companies will also have been availing of debt warehousing during 2021. We hope that companies that found themselves requiring these supports will have a much more favourable outcome in 2022 and that the provision of these supports will have helped the businesses' survival.

We set out below some of the key practical items for tax advisers to be aware of when preparing the 2021 corporation tax returns and start by focusing on the changes to the Form CT1 from the prior year.

Changes to Form CT1

The Form CT1 for accounting periods ending in 2021 has seen a host of changes compared to the return for accounting periods ending in 2020.

Table 1: Changes to 2021 Form CT1.

Item	Change
Non-cooperative jurisdictions	A question has been added asking taxpayers to indicate whether they have paid any dividends, royalties or interest to a person resident in a jurisdiction considered non-cooperative by the collective EU Member States.
Deferral of exit tax	The text in relation to the annual statement required to be filed by taxpayers electing to defer exit tax under s629(2) TCA 1997 has been updated.
Unclaimed excess capital allowances	A field has been added to the capital allowances section of the trading results panel in relation to excess capital allowances on plant and machinery not claimed in the year.
s400 losses	A field has been added to the trading losses section requesting details of any losses obtained in the year under s400 TCA 1997.
Extracts from accounts	A host of changes have been made to the extracts from accounts, which are required to be filed by non-iXBRL filers. Some fields have been made mandatory, and more detailed fields have been introduced. A full list of these changes is given in Revenue's Tax and Duty Manual Part 38-02-01F.
Irish rental income	The residential rent and commercial rent sections have both been updated to include an additional notes section. This is intended to allow taxpayers to provide additional information in relation to the expenses claimed in the year if they wish.
Distributions from companies resident in the State	Revenue now requires taxpayers to disclose the tax reference numbers of companies from which they receive distributions where those companies or REITs are associated companies. The Form CT1 allows up to ten tax reference numbers to be entered.

1 Covered in detail by Paul Nestor in "Finance Act 2020: Overview of Covid-19-Related Measures", *Irish Tax Review*, 34/2 (2021).

Item	Change
Restriction of capital losses	A field has been added to allow details to be provided on capital losses restricted under s555 TCA 1997.
Close company surcharge	Where a taxpayer makes a joint election under s434(3A)(a) TCA 1997, Revenue now requires the details of the distribution and the tax reference number of the other company to be disclosed on the Form CT1. There is an option to add more companies to this field. Given the potential implications of an incorrect election under this section, this is an extremely important change to be aware of.
Distributions to connected persons	Similar to the new field above requesting tax reference numbers for the purposes of the s434(3A)(a) election, a field has been added requesting details of distributions made to connected persons (both companies and individuals).

We will now look at some other key practical considerations for advisers when preparing the 2021 corporation tax returns.

Directors' Loans

Although some directors may have been injecting funds into their businesses over the last two years to weather the storm of the Covid-19 pandemic, others will find themselves in a situation where they owe money to the company. Tax advisers will be aware that there are generally two main tax considerations arising from overdrawn directors' current accounts: a temporary income tax liability for the company at an effective rate of 25% of the balance and a potential benefit-in-kind (BIK) for the director on any interest-free element.

Under a long-standing Revenue concession, companies can avoid the temporary income tax charge in respect of the overdrawn loan account provided that the monies owed are repaid before the filing of the corporation tax return. With this in mind, advisers should take the opportunity to identify potential overdrawn loan accounts before the corporation tax filing deadline to ensure that there is sufficient time to discuss with their clients the potential methods to repay the loan.

Although the repayment of the loan would not entirely remove the requirement to operate BIK on the interest-free element, it would reduce the amount of BIK payable if the loan could be addressed before the filing deadline.

Close Company Surcharge

Although the close company surcharges payable under s440 and s441 TCA 1997 form part of a company's corporation tax liability and are therefore payable with the filing of the corporation tax return for the year, it is vital that each company's own circumstances are reviewed before the tax return filing deadline to determine whether the surcharges can be avoided.

The surcharges can be avoided if a sufficient distribution is made by the company to its shareholders within 18 months of the end of the accounting period in which the income arose. For companies with investment income or professional services income arising in the year ended 31 December 2020, this distribution would need to be made by 30 June 2022 to avoid a surcharge in the corporation tax return for the year ended 31 December 2021.

The surcharges are also not payable where the company that earned the income does not have sufficient distributable reserves to make a distribution to its shareholders.

Advisers should take the time to review these surcharges with their clients to determine whether a distribution should be made or the company can avoid the surcharge without paying a dividend due to its reserve position.

Transfer Pricing Requirements

The removal of Ireland's exemption from transfer pricing documentation requirements for SMEs remains on the sidelines pending a ministerial commencement order. However, the post-Brexit expansion of large businesses into Ireland may give rise to a greater number of companies that exceed the SME exemption thresholds.

Where companies cannot avail of the current SME exemption, transfer pricing documentation must be prepared in the form of a local file, a master file or both, depending on the circumstances. The required documentation must be prepared no later than the deadline for submission of the corporation tax return for the year and must be available to Revenue within 30 days of a written request.

As a reminder, the Form CT1 for accounting periods ending in 2020 introduced a new question asking companies whether they qualify for the SME exemption and whether they are required to prepare a local file or a master file. Companies should ensure that these fields are filled out accurately on the corporation tax return for 2021 and that the required documentation is retained on file in the event that Revenue requests it.

Preliminary Tax

Although the majority of companies with December year-ends will not need to consider their preliminary tax obligations for 2022 until November, those with corporation tax liabilities exceeding €200,000 for the year ended 31 December 2021 will need to pay their first instalment of preliminary tax by 23 June.

It is important that advisers engage with their clients before this payment deadline to ensure that any companies that could potentially exceed the €200,000 threshold are identified and the necessary preliminary tax payments made in advance of the payment deadline.

Similarly, a wider variety of companies may have based their preliminary tax payments for 2021 on the estimated 2021 corporation tax liabilities in light of the uncertainty surrounding the reopening of the economy after Covid-19 restrictions. With this in mind, it will be important to identify companies that based their payments on estimates and that may now need to make top-up preliminary tax payments as early as possible to reduce potential interest charges on the underpayment of preliminary tax.

iXBRL

By Revenue concession, financial statements must be submitted to Revenue in iXBRL format no later than three months after the due date for the filing of the Form CT1 for an accounting period unless the company can avail of the exemption under the long-standing turnover, asset and employee thresholds.

Although Revenue took a pragmatic approach to the late filing of iXBRL accounts during the period of Covid-19 restrictions, even after the reintroduction of the late filing surcharge, this leniency is unlikely to remain. It will be important for companies to ensure that iXBRL accounts are filed in a timely manner going forward to avoid potential surcharges and/or loss restrictions due to late filing.

Claims and Elections

As with every compliance cycle, it is important for companies to make any claims or elections due in their corporation tax returns in line with the relevant deadlines. These deadlines do not always align with the corporation tax filing deadline:

- Capital allowances under s291A TCA 1997 (specified intangible assets) must be claimed within 12 months of the end of the accounting period in which the expenditure is incurred. If the asset is not in use at that point, a written notice should be given to Revenue to avail of its concession in that regard.

- Research and development (R&D) tax credit claims must be made within 12 months of the end of the accounting period in which the qualifying R&D expenditure is incurred.
- The joint election under s434 TCA 1997 should be made, where relevant, in respect of dividends that are to be disregarded for close company surcharge purposes. The additional reporting requirements in respect of this election as set out above should also be borne in mind.
- The election under s452 TCA 1997 should also be made, where required, to ensure that interest paid to non-resident entities is not treated as a distribution.

Other Considerations

Some more points to bear in mind when completing the corporation tax returns for 2021 are:

- The additional foreign tax credit in relation to foreign dividends under Schedule 24 TCA 1997 no longer applies to dividends received from UK companies post-Brexit. Irish companies receiving dividends from UK-resident companies will now be restricted to claiming double taxation relief based on the UK effective rate rather than the UK nominal rate.
- Similarly, companies should be reminded that the dividend withholding tax exemptions that were based on EU Directives no longer apply to dividends payable to UK-resident companies. These companies will now need to rely on the exemptions available under Irish domestic legislation and ensure that the necessary exemption declarations are in place.
- Although it is generally more a focus for individuals, companies holding residential property should be reminded that the 2022 local property tax (LPT) return and valuation is due for submission. LPT returns have been filed automatically for the last few years, but failure to file the 2022 LPT return before the filing of the 2021 corporation tax return may result in an LPT surcharge being applied to the corporation tax liability for the year.
- The period for relief from tax for certain start-up companies under s486C TCA 1997 was extended from three years to five years in Finance Act 2021. This extension applies to companies with qualifying trades that commenced on or after 1 January 2018.


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Capital Taxes Compliance Considerations

Introduction

As part of our role as practitioners, it is essential that we constantly monitor the reporting, payment and filing deadlines in respect of capital taxes to ensure that we do not miss a fundamental date, which could disturb families inheritance preparations which may have been put in place. With the introduction of the new Revenue Code of Practice, which became effective from 1 May 2022, it is of even greater importance that tax compliance filings are completed and filed correctly. It is therefore imperative that details contained in the tax filings as part of the compliance process are correct from the outset. This article provides commentary on some of the issues that we should be mindful of when considering compliance issues related to capital gains tax, chargeable gains for corporation tax purposes and capital acquisitions tax.

Key Dates for Filing and Payment Requirements

Capital gains tax and capital acquisitions tax for individuals

For the 2021 tax year, the income tax and CGT return filing deadline is 31 October 2022.

However, Revenue has announced that the deadline has been extended to 16 November 2022 provided that the taxpayer both files the 2021 tax return and pays any balance of tax through Revenue Online Service (ROS). If only one action is completed, the deadline remains 31 October 2022.

Although the payment of any 2021 CGT should have occurred before now, it is important that the 2021 capital disposals and acquisitions are included in the 2021 tax return. The acquisition of chargeable assets – whether by purchase, gift, inheritance etc. – should be included in the return for the relevant period. This can be an area that taxpayers overlook to provide details on, but it is vital that such details are included in the return to ensure that taxpayers meet their obligations for the return to be a full and true return.

The first instalment of 2022 CGT will be due by 15 December 2022 for the period 1 January 2022 to 30 November 2022. The second payment, representing tax due on December 2022 capital gains, will be due by 31 January 2023.

For CAT, the filing and payment deadline for any potential tax liability related to valuation dates between 1 September 2021 and 31 August 2022 is 31 October 2022, or the extended deadline of 16 November 2022 if filing and paying via ROS.

Chargeable gains for companies

Details of chargeable gains for companies are included on the CT1 corporation tax return. The deadline for filing the return is generally the 23rd day of the ninth month after year-end, subject to certain exceptions. The deadline for filing a return for a company that has entered liquidation is three months after the appointment of a liquidator.

Preliminary Tax Considerations

Payment of tax in respect of chargeable gains is generally linked to the corporation tax liabilities due by "small companies" and those with short accounting periods. For a "small company", preliminary tax (incorporating both corporation tax and tax on chargeable gains) is generally paid no later than the 23rd day of the 11th month of an accounting period, subject to specific exceptions.

For larger companies, preliminary tax is payable in two instalments. The first instalment is payable within six months of the start of the accounting period but no later than the 23rd of that month. The second instalment is normally due by the 23rd day of the 11th month of the accounting period, again subject to certain exceptions.

A small company for this purpose is one whose corporation tax liability for the prior year, or whose expected liability for the current year for newly incorporated companies, does not exceed €200,000. A large company is one whose corporation tax liability for the prior year, or current year for newly incorporated companies, exceeds €200,000. The €200,000 threshold is by reference to a 12-month accounting period and is reduced proportionately for shorter accounting periods.

Penalties and interest for late filing/ incorrect returns for individuals and companies

Although a CGT liability or a tax liability on chargeable gains may have been discharged already, it is important that the details to be included in the relevant tax return are not overlooked, as to do so could result in late filing surcharges. Failure to submit a correct return (i.e. CAT, CGT, CT) on time may result in the following surcharges:

- 5% of the amount of tax (subject to a maximum of €12,695) where the return is submitted before the expiry of two months after the specified date and
- 10% of the amount of tax (subject to a maximum of €63,485) where the return is not submitted within two months after the specified date.

A surcharge may be imposed for CGT and chargeable gains purposes for non-compliance with local property tax (LPT) requirements, and as most agents are not automatically noted as agents for LPT, this surcharge can result in unexpected time costs to resolve.

Where tax in respect of CGT, CAT and chargeable gains is not paid by the requisite dates, interest on late payment of tax may be imposed at a rate of 0.0219% per day – which works out at approximately 8% per annum.

Consideration should also be given to the fact that there is a four-year time limit on applying to Revenue for tax refunds if an amendment is required in respect of a previous filing.

Relevant tax forms

The form that should be completed and filed with Revenue depends on the category of taxpayer making the disposal:

- Form CG1: where a taxpayer is usually not chargeable but for the disposal,
- Form CT1: a company,
- Form 1: a trust or an estate,
- Form 12: employees, pension recipients and non-proprietary directors who have less than €5,000 of non-PAYE income and
- Form 11: an individual who is a "chargeable person" for the purposes of income tax self-assessment.

Capital Gains Tax

The fundamental rules for CGT, whether for an individual or a company, stem from the same pieces of legislation. It is therefore useful to review the basic rules that can be relevant when looking at CGT issues.

Section 542 TCA 1997 sets out the rules for determining the time at which an acquisition and a disposal of an asset take place. For a disposal under contract, the time of disposal and acquisition is normally the time when the contract is made, which for securities would generally be the trade date. However, in certain cases where the contract is subject to a condition, the time of disposal and acquisition is when the condition is satisfied. Cash flow issues may arise if a contract is entered into and time of disposal is in the latter part of the year, (assuming there are no conditions yet to be satisfied), and the closing and receiving of the proceeds do not occur until after the CGT becomes payable.

Under s532 TCA 1997 any currency other than euro is an asset for the purposes of CGT. Consequently, an allowable loss or chargeable gain can arise on the buying and selling of foreign currency otherwise than in the course of a trade. The gain or loss is computed by reference to the corresponding euro value of the purchase price and the sale proceeds of the foreign currency bought or sold. This provision applies to both individuals and corporates.

The date of disposal and acquisition is important in determining both the exchange rate that could apply and when the CGT would become payable.

With more clients investing in either the traditional stockbrokers' firms or the online platforms, it is imperative that good share histories are maintained. We have seen clients holding a sole portfolio account and also hold a joint account with their spouse that have had similar securities acquired or even using more than one platform to acquire securities. At first glance it may appear that a loss or gain arose in one portfolio; however, when you are preparing the computation, remember that the oldest shares are treated as being sold first under s580 TCA 1997 FIFO (first in, first out) rules regardless of how they were acquired.

The one exception to the above is that if the disposal occurs within four weeks of acquisition, then s581 TCA 1997 rules come into account. Losses arising on shares bought and sold within a four-week period cannot be offset against other gains, and a loss can be deducted only from a gain made on a subsequent disposal of the same class of shares acquired within the four weeks.

For any clients that use UK investment firms to manage their portfolios, it is important to remember that the UK's HMRC does not use

FIFO rules for shares. The portfolio report may note an s104 holding, which generally means that the holding figure and cost is the average cost over a number of acquisitions of the same holding. You will need to go back to the UK stockbroker and get the actual transaction report showing the various acquisitions and disposals to be able to prepare the Irish CGT return under our FIFO rules.

Rates of CGT/tax on chargeable gains

The general rate of CGT for the majority of gains (for both individuals and corporates) is 33%. However, there are other rates for specific types of gains:

- 40% for gains from foreign life policies and foreign investment products,
- 15% for gains from venture capital funds for individuals and partnerships,
- 12.5% for gains from venture capital funds for companies and
- 10% for certain gains to which entrepreneur relief may apply.

Relief for certain disposals of land or buildings

Don't forget s604A TCA 1997 – also known as the seven-year relief – a relief for both individuals and companies from CGT where a property is acquired between 7 December 2011 and 31 December 2014 and is held for at least four years and up to seven continuous years. This relief still applies and should be included in a practitioner's checklist before finalising a computation to ensure that it is not overlooked.

CG50 clearance

Certain disposals require a CGT clearance certificate (CG50A) to be in place before a disposal to avoid the purchaser's withholding 15% of the consideration and paying the amount withheld to Revenue. A CG50A is required for a sale exceeding €500,000 for commercial assets or €1m for residential property.

The original process of applying for a CG50A was paper-based. Revenue has introduced a system for online application for the CG50A through ROS (TDM Part 42-03-01a eCG50 – Guide for Applicants).

Capital losses incurred

Capital losses in respect of individuals

Section 31 TCA 1997 notes the order in which CGT shall be charged on the total amount of chargeable gains after deducting any allowable losses accruing to that person in that year of assessment, and then you can deduct any allowable losses carried forward.

It is important that current-year losses are included and claimed in the current year. Where allowable losses may not be deducted from any chargeable gains in the year, they can be carried forward to the following year. Capital losses generally cannot be carried back to a prior year. It is vital that the losses forward are noted on the return to ensure that they are not missed when a chargeable gain arises in the future.

Under s1028(3) TCA 1997 married couples and civil partners who are living together can transfer their losses: if one spouse has a loss that they cannot use, it can be utilised against gains of the other spouse. This is generally positive; however, as it is automatic for jointly assessed couples, if one spouse was claiming relief such as entrepreneur relief, the loss could be unintentionally used against a gain that will be taxed at 10% rather than carried forward by the other spouse to be offset against a future gain taxed at 33%. The legislation does allow for either spouse to make an application that the automatic transfer would not apply. However, this application must be made before 1 April in the year following that year of assessment.

Special provisions for capital losses following a death

Losses can only be carried forward. However, losses incurred in the year of death that are not fully utilised against gains in that year can be carried back and offset against any gains of the previous three years.

Negligible-value loss

Section 538 TCA 1997 provides for the occasion of the complete destruction or extinction of an asset. A negligible-value loss arises when the value of an asset has become negligible, and it is treated as if it has been sold and immediately reacquired at the current specified value, i.e. reduced or possibly nil value.

Revenue in its Tax and Duty Manual, Part 19-01-09, which was updated in August 2021, notes that on a strict interpretation a loss arising on a deemed disposal under s538(2) TCA 1997 is allowable only in the year of claim. However, it notes that in practice a claim made within 12 months of the end of the year of assessment or accounting period for which relief is sought will be admitted, provided that the asset was of negligible value in the year of assessment or accounting period concerned.

It is important to remember that for a negligible-value loss claim to be included in an individual's CGT calculations for a year, a claim must be made in writing to the Inspector of Taxes. The inclusion in a tax return is not sufficient for a claim. If the Inspector is satisfied that the value of an asset has become negligible, the loss relief claim will be allowed.

Tax relief in respect of capital losses incurred by companies

Chargeable gains and losses arising on the disposal of assets are generally calculated for companies in the same manner as for individuals. If a company incurs a capital loss, that loss may be offset against capital gains.

An Irish-resident company is liable to corporation tax, rather than CGT, on any disposals of assets realised, wherever those assets are situated. The general principles regarding loss relief in terms of capital losses and gains from a corporate perspective are:

- The disposal of a chargeable asset may give rise to an allowable loss rather than a gain, and the company may wish to use this loss against chargeable gains that are subject to corporation tax. Excess losses are carried forward for offset against chargeable gains of the following periods.
- It may be possible for a company to offset trading losses against chargeable gains of the company in a particular tax period as a reduction from total profits.

An exception to this general provision is in relation to disposals of development land. A disposal of development land is chargeable to CGT as opposed to corporation tax. The implications are that development land gains are not regarded as profits of the company, and this can impact the particular loss relief available, payment dates, indexation calculations etc. In addition, the CGT payment dates for individuals apply also to companies in respect of capital gains tax calculated on development land gains. The capital gains tax payable does not form part of a company's corporation tax liability and is excluded from the general requirements relating to payment of preliminary corporation tax by companies.

CGT reliefs that are specific to individuals and not available to companies

Revised entrepreneur relief

Under s597AA TCA 1997 revised entrepreneur relief provides a CGT rate of 10% for gains on the disposal of qualifying business assets. There are a number of conditions, including that the business assets must have been held for a continuous period of three years in a qualifying business. The taxpayer must have been a director or employee of the qualifying company, where they spent no less than 50% of their time in the service of the company in a managerial or technical capacity. There is a lifetime limit of €1m since 1 January 2016 on the gains that relief can be claimed on. Any gain above €1m is taxed at the 33% CGT rate.

Certain other reliefs may result in no CGT being payable, but there is still an obligation to report the relief on the tax return, as outlined below.

Principal private residence relief

Although an individual may be exempt from CGT if they dispose of a property that they occupied as their only or main residence for the entire period of ownership and meet the various other conditions, they should include details of the consideration in the CGT section of the tax return if they are a chargeable person.

Transfer of a site from a parent to a child

The transfer of land to a child to build a house on can be exempt from CGT if the conditions are met. To apply for the relief, the deemed market value of the site must be included as consideration in the CGT section of the tax return.

Farm restructuring relief

The purpose of farm restructuring is to make farms more efficient by selling, buying or exchanging parcels of land to bring them closer together. If the conditions are met to claim the relief, a farm restructuring relief claim form must be completed and the box in the CGT section of the tax return ticked.

Retirement relief

An individual who is 55 or older may be able to claim retirement relief if they dispose of their business or farming assets either to a third party or within their family after determining that they and the company meet the various conditions, including period of ownership, qualifying business and working director. Panel L of the Form 11 notes that you need to enter the consideration for both s599 and s598 TCA 1997 even though relief under s598 automatically applies.

Issues specific to chargeable gains for companies

Interest charged to capital

Unlike the position for an individual, it may be possible to deduct loan interest charges in a company's computation of corporation tax on chargeable gains. This applies for interest that was not deducted as an expense under income tax and is allowable where:

- a company incurs capital expenditure on the construction of a building, structure or works where that expenditure qualifies as part of the base cost, including enhancement expenditure; and
- the company charged all or part of the interest on that borrowed money up to the date of disposal to capital.

Holding-company exemption

Section 626B TCA 1997 provides that, in certain circumstances, gains from the disposal of shareholdings by "parent companies" are exempt from tax. There are a number of conditions and provisions that must be satisfied by the investor company and the investee company for the exemption to apply. The specific detail relating to the conditions of the relief is outside the scope of this article. However, it is worth pointing out that details of the exemption being claimed are required to be reported on the CT1 corporation tax return. These details are not contained in the CGT section of the CT1 but must instead be reported in the "Companies Details" section of the form. The details to be included are:

- indication whether the company is claiming an exemption under s626B,
- the date of the disposal,
- the amount of the gain to which the exemption applied and
- the amount of any loss incurred on an s626B transaction.

Exit tax

Sections 627–629C TCA 1997 impose an exit tax at a general rate of 12.5% (as opposed to the normal 33% CGT rate) on companies that cease to be Irish tax resident or that transfer assets abroad. This tax is payable with the company's corporation tax liability for the period. Consideration should be given to the existence of an anti-avoidance provision that may impose a 33% exit tax rate where an exit forms part of a transaction to actually dispose of an asset and the purpose of the exit is to obtain the lower, 12.5% tax rate on the gain.

In broad terms, where the exit tax provisions apply, unrealised capital gains may be taxed where companies change residence or transfer assets offshore without an actual disposal by deeming a disposal to have occurred. There are detailed provisions on the operation of the exit tax, which should be carefully reviewed where there is a change of corporate residence or a transfer of assets to an offshore jurisdiction. However, when it comes to the compliance issues regarding exit tax, we should remember that details relating to the tax should be included in the corporation tax return that is being filed by the company. Those details are to be included in the Capital Gains panels in the CT1 and should include:

- chargeable gain liable to 12.5% exit tax,
- chargeable gain liable to 33% exit tax and
- amount of relevant exit tax being deferred.

Capital Acquisitions Tax

As you will be aware, a beneficiary receiving a gift/inheritance may have a tax liability if thresholds are exceeded. There are three group thresholds, and it is the relationship that the beneficiary has with the disponer that determines which group threshold applies.

A beneficiary must file a self-assessment CAT IT38 return if the taxable value of the gift or inheritance exceeds 80% of the relevant group threshold. A taxpayer must include all other taxable gifts or inheritances taken from any source within the same group threshold on or after 5 December 1991. Any taxable value over the threshold will be liable to CAT, which is currently 33%.

There are two dates that are important for CAT. The first is the date of the gift or the inheritance, as this determines the group threshold that will apply to the benefit and the rate of tax. The second is the valuation date, which determines the date of filing and paying any liability and is relevant to the farmer test for agricultural relief and the definition of "relevant business property" for business relief.

Valuation date

Section 30 CATCA 2003 sets out the rules to determine the valuation date for both gifts and inheritances. For taxable gifts the valuation date is generally the date of the gift. For inheritances it will depend on a number of items, and there can be a different valuation dates.

Section 30(4) CATCA 2003, which is relevant for most inheritances, determines the valuation date in the case of the administration of an estate. The valuation date in these circumstances is the earliest of the following:

- the date on which a personal representative is entitled to retain assets for the benefit of a successor,
- the date on which an asset is retained or
- the date of delivery of assets, payment etc. to the successor.

Filing and payment date

Where the valuation date arises between 1 September 2021 and 31 August 2022, the pay and file deadline would be 31 October 2022; again, this can be extended to 16 November 2022 where full pay and file online obligations are met. There are three other payment options available for discharging CAT, as follows.

Statutory instalments

A beneficiary who takes either

- an absolute interest in:
  - immoveable property,
  - agricultural property consisting of land, buildings and farm machinery
  - or relevant business property; or
- a limited interest in any property

can opt under s54 CATCA 2003 for statutory instalments, whereby the tax is paid by a maximum of 60 equal monthly instalments. The first payment is due and payable on 31 October immediately following the valuation date, and it is important that interest is paid with each instalment.

It is vital to be aware that if an inheritance or a gift contains both personal and real property, the instalment arrangement can apply only to the real property.

Non-statutory instalments

This is granted on a concessionary basis in exceptional circumstances, where the tax liability cannot be paid without causing excessive hardship.

Registration of the debt as a voluntary judgment mortgage

Payment of the tax may be postponed in exceptional circumstances, on a concessional basis. This may be allowed where payment of the tax would cause excessive hardship for a beneficiary, such as requiring them to sell their home to pay the tax, and where payment of instalments would not be a practical alternative. Postponing payment is subject to an agreement by the parties concerned to the registration of the debt as a voluntary judgment mortgage on the property.

It is important to remember that interest will continue to accrue on the registered amount.

CAT returns

The Statement of Affairs (Probate) Form SA.2 is now filed online, with the details of the beneficiaries, their PPS numbers and the value of the benefits taken. This allows Revenue to know who should be filing a Form IT38. Practitioners should not assume that the prior benefit noted for each beneficiary in an SA.2 is accurate or up to date. Good practice for advisers who are not completing the SA.2 but have been requested to complete all IT38s for an estate is to have the beneficiaries directly confirm their prior-benefit status.

An individual who has been informed that they are required to file an IT38 return but does not actually have a requirement to file a return in respect of the relevant 12-month period must notify Revenue that a return is not due in writing or via MyEnquiries and note the reason.

A paper tax return (IT38S) is allowed only in the following circumstances:

- where no relief/exemption/credit is claimed, apart from the small gift exemption;
- where the benefit taken is an absolute interest without conditions or restrictions;
- where the property included in the return was taken from only one disponer and is not part of a larger benefit or series of benefits taken by the beneficiary on the same day.

If a taxpayer has to file either a Form 11 or a Form 12, they need to tick the box that they have received a gift or an inheritance in the year. This information does not satisfy a requirement to file a Form IT38.

Similar to CGT, there are certain reliefs that require a CAT return to be filed for the relief to be claimed; the main two are outlined below.

Agricultural property relief

If a gift or inheritance consists of agricultural property situated in an EU Member State or in the United Kingdom, the market value of the gift or inheritance can be reduced by 90% if certain conditions are met. This is a valuable relief that in certain circumstances can facilitate the transfer of farm land and farming property between generations. Agricultural relief could also apply to a gift or inheritance of cash where the cash is used to purchase agricultural land within two years of the date of the gift or inheritance.

Business property relief

If a gift or inheritance consists of certain business assets (including certain shares in family companies), the market value of the business assets can be reduced by 90% if, again, certain conditions are met. This relief can facilitate the transfer of a family business to the next generation. It can also be used in conjunction with retirement relief if conditions are met.

Failure to deliver a return on time will result in a surcharge being automatically imposed on the computation through ROS before the return is submitted, so being even a few minutes late could result in a 5% penalty.

CAT/CGT Offset

Where the disponer is liable to CGT on the transfer of an asset by way of a gift and the beneficiary is subject to CAT on the same event, a credit for the CGT paid can be claimed against the CAT liability.

A clawback of this credit may arise if the property is sold by the beneficiary within two years.

Conclusion

The above points highlight some of the compliance issues relating to capital taxes that practitioners and taxpayers should be mindful of. These topics are not exhaustive, and other issues can arise. With various deadlines and compliance requirements for the filing and payment of taxes, we should be attentive to the different dates and reporting requirements. Clients failing to meet the reporting and payment requirements can be exposed to significant penalties and interest charges.

Key Deadlines

	Period	Due Date
2021 tax return	1 January 2021 to 31 December 2021	31 October/16 November 2022
2022 CGT payment	1 January 2022 to 30 November 2022	15 December 2022
2022 CGT payment	1 December 2022 to 31 December 2022	31 January 2023
CT1 corporation tax return	Accounting year end – Example account y/e 31 December 2021	23rd day of the ninth month after year-end 23 September 2022
Small companies CT/chargeable gains payment *	Preliminary tax Balance of tax payable	23rd day of the 11th month in the accounting year 23rd day of the 9th month after year-end
Large companies CT/chargeable gains payment *	Preliminary tax – initial payment Preliminary tax – top-up payment Balance of tax payable	23rd day of the 6th month in the accounting year 23rd day of the 11th month in the accounting year 23rd day of the 9th month after year-end
CAT tax return & payment	1 September 2021 to 31 August 2022	31 October/16 November 2022

*general rules for CT


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Relevant VAT Compliance Issues 2022

> "There are decades where nothing happens; and there are weeks where decades happen" – Vladimir Ilyich Lenin

Introduction

It may not have been mere weeks, but it is fair to say that the evolution of the VAT world has been significant in recent years. Since 2006, we have seen the current EU VAT Directive take effect, the EU VAT package implemented in 2010 and the introduction of the Mini One Stop Shop ("MOSS") in 2015. Not only that, the EU Quick Fixes were subsequently introduced in 2020, followed by the new One-Stop Shop ("OSS") in July 2021, and the EU definitive system is due to be implemented from 1 July 2022.

We are also seeing a global trend of increased digital tax administration. Tax authorities are becoming much more sophisticated in how they deal with taxpayers and are mandating automated VAT compliance procedures in many countries: for example, the introduction of Making Tax Digital in the UK, SAF-T reporting requirements (currently implemented in Austria, the Czech Republic, France, Lithuania, Luxembourg, Norway, Poland and Portugal) and e-invoicing in Italy. Accordingly, it is imperative that taxpayers evolve and transform their internal indirect tax processes to mirror those of tax authorities, at the very least. To the extent possible, taxpayers should automate their end-to-end indirect tax processes to manage risk and increase efficiencies.

Although Ireland has not yet adopted any significant digital administration requirements, Revenue is using more sophisticated, automated, review and reconciliation tools. There are also several changes to reporting requirements that taxpayers need to be aware of. Accordingly, from a process and controls perspective, taxpayers need to understand and mirror Revenue capabilities, where possible, in order to proactively manage VAT compliance requirements and, in turn, mitigate risks. This article sets out topical areas across the indirect tax compliance landscape and highlights recent changes to reporting requirements in Ireland.

Statistical Returns

Intrastat

Although Irish VAT returns are less complex to prepare than their EU counterparts, there are other statistical returns that should be cross-referenced to the VAT returns. Specifically, Intrastat Arrivals and Intrastat Dispatches returns should be submitted monthly where movements of goods in and out of Ireland within the EU exceed the annual thresholds of €500,000 and €635,000, respectively. There are therefore two months' worth of Intrastat returns that should correspond to the E1 and E2 boxes of the periodic VAT return, which reflect the net amounts of any EU supplies of goods for a business.

Revenue introduced two additional mandatory requirements in respect to Intrastat reporting effective from 1 January 2022. Taxpayers are now required to report (a) the country of origin and (b) the VAT number of the counter-party. This further testifies to the need for taxpayers to ensure that their internal ERP (enterprise resource planning) system is adequately configured so that the correct information is being captured and in a timely manner. Such changes can potentially be more difficult to implement in the hybrid working world that many businesses are continuing to navigate through.

Due to the Northern Ireland (NI) Protocol and the continuation of the free movement of goods between NI and the Republic of Ireland (ROI) on the back of Brexit, movements of goods across the Irish border should continue to be reported on Intrastat returns. To differentiate between Great Britain and NI, all NI VAT numbers are now prefaced with XI instead of GB. Such VAT numbers can continue to be verified on the EU VIES site, which will support the zero rating of cross-border supplies of goods.

Quite often, the most difficult piece of information for taxpayers to obtain for inclusion on Intrastat returns is the correct commodity code. Commodity codes can be verified on the TARIC database; however, the issue that taxpayers usually face is the relevant commodity codes being omitted from taxpayers' ERP systems. In addition, specific reports for Intrastat purposes are not being utilised by taxpayers when preparing these statistical returns. Instead, the VAT return reports are used as a basis for identifying the EU cross-border supplies, and the relative Intrastat information, such as the net weights and commodity codes, are manually input. This tedious process is not only time-consuming but also open to human error, which could in some instances trigger an audit or query from tax authorities.

Additionally, although it may be possible for a taxpayer to obtain the correct commodity code from within the organisation for Intrastat Dispatches reporting, it can be more difficult to obtain codes from suppliers for the purposes of Intrastat Arrivals reporting. This is primarily due to suppliers not consistently quoting commodity codes on their invoices or, alternatively, not having breached the relative Intrastat threshold and therefore not being aware of the correct commodity code to use.

VIES

Where supplies of goods or services are being made from Ireland to other EU Member States, VIES returns will also be required; this is a statistical return that denotes the net value of supplies made by taxpayers to business customers in the EU. In contrast to Intrastat reporting, the VIES registration obligation threshold is nil, and there is an automatic requirement to submit VIES returns once any supplies from Ireland to the EU are made. Suppliers of services can opt to file quarterly returns where their annual EU supplies are less than €50,000per annum. However, once this threshold is exceeded, monthly VIES returns are required.

VIES returns also require an indication of whether the supplies are related to services ("S") or are subject to triangulation ("T") measures as the "middleman" party to such transactions. Similarly, VIES returns should be cross-referenced to the periodic VAT 3 return E1 and ES1 boxes, as applicable. However, unlike supplies of goods, supplies of services to NI from ROI are not reportable on VIES returns.

It is worth noting that both Intrastat and VIES returns are required to be submitted once the threshold has been breached, even where there are no transactions to report in a given period.

As tax authorities are becoming more advanced in terms of their systems and operations, mismatches between Intrastat Dispatches and related Intrastat Arrivals or VIES returns can be more readily identified. Queries raised in respect of Intrastat mismatches are usually triggered by another EU tax authority, for which a valid response or correction must be submitted. Notwithstanding this, we have experienced little to no penalties being imposed by Irish Revenue or VIMA (VIES, Intrastat, Mutual Assistance) for late submission, non-submission or incorrect submission of Intrastat returns. Subject to historical returns being brought up to date and accurately submitted, VIMA is generally satisfied that the taxpayer's obligations have been met.

Postponed VAT Accounting "PVA"

PVA for imports of goods to Ireland was implemented on 1 January 2021, and as a result, additional reporting boxes on the periodic VAT and ARTD returns were introduced. Although the introduction of PVA coincided with Brexit, it is not specific to UK companies, i.e. it can be applied to imports to Ireland from any non-EU country. Taxpayers should note that operating PVA on imports is not mandatory. However, PVA removes the burden of physically paying VAT at the point of importation to release the goods into free circulation and therefore has a positive cash-flow effect.

If a taxpayer was registered for VAT purposes in Ireland on 31 December 2020, PVA could be applied automatically where instruction was given by the taxpayer to its customs brokers. Any new VAT registrations submitted to Revenue thereafter require a formal application to request permission to apply PVA. Before being permitted to import goods in Ireland (whether by applying PVA or otherwise), a taxpayer will require a valid EORI (Economic Operators' Registration and Identification) number. For taxpayers who are established in the EU, the relevant EU Member State EORI can be linked with their Irish VAT registration to facilitate imports to Ireland. However, if the taxpayer does not have an establishment in the EU, it may need to establish a company in an EU Member State to obtain a valid EORI number. Note that an XI EORI number will suffice as a valid EU EORI number.

Once a taxpayer has linked a valid EORI number to its Irish VAT registration, there can still be some difficulty in obtaining accurate data and reports from Revenue for reporting PVA. Where a taxpayer operates a mixture of PVA and physically paying VAT at the point of import, this adds another layer of complexity in determining the correct amount to report for PVA.

Once taxpayers have correctly identified the transactions on which PVA was implemented in the relevant period, the net value of the imports should be included in the new box PA1 on the VAT 3 return. The related VAT amount should be self-accounted for in Box T1, and a simultaneous deduction can be taken in Box T2, in line with the taxpayer's entitlement to deduct VAT (where engaged in taxable activities). Furthermore, three additional boxes (PA2, PA3 and PA4) are required to be completed on the Annual Return of Trading Details (ARTD), which ultimately should tie back to the PVA amounts as reported in the individual VAT returns for the given financial year.

As there is a risk of penalties where a taxpayer does not report the self-accounting on PVA in the correct VAT period, it is vital that taxpayers have a reliable data source that they can use to report PVA transactions accurately. In this regard, the importance of having an end-to-end automated process for VAT reporting cannot be overestimated.

One-Stop Shop Scheme

July 2021 saw the introduction of the new (optional) OSS scheme, replacing the MOSS scheme that had been in situ since 2015. The new scheme builds on the existing legislative framework established by MOSS, whereby a taxable person has the option to register and account for VAT in one Member State of Identification (MSI) in respect of all of its supplies to non-taxable persons (B2C). The OSS scheme also saw the extension of the scope of services, from originally encompassing only telecommunications, broadcasting and electronic services (TBE) to all now including all services supplied B2C within the EU. Furthermore, the extended scheme also encompasses intra-Community distance sales of goods (with a new threshold of €10,000 in each EU Member State), which significantly increases the scope of the scheme for taxpayers.

From a practical perspective, the OSS scheme would appear to simplify and reduce taxpayers' indirect tax obligations, in that only one quarterly return is due in the MSI, as opposed to multiple VAT registrations and therefore VAT returns due in each EU country to which a taxpayer makes B2C supplies. Moreover, annual returns are not a necessity when operating the OSS, which undoubtedly is a welcome change for taxpayers that opt in to the scheme.

The scheme is not without its considerations, however, and taxpayers need to ensure that the extended scope of the scheme is being correctly captured in their ERP systems and, in turn, their OSS returns. VAT rate changes in all relevant EU countries to which B2C supplies are being made should be continuously monitored and updated in the taxpayer's ERP system. In this regard, many EU Member States introduced temporary VAT rate reductions/reliefs to support certain sectors impacted by the Covid-19 pandemic; therefore taxpayers can be faced with altering their ERP systems at short notice, which is not always a straightforward task.

Taxpayers should therefore take a cautious approach when considering opting in to the scheme and ensure that a full VAT review/health check is carried out before implementing same.

Import One-Stop Shop

The IOSS scheme, also introduced on 1 July 2021, allows suppliers and electronic interfaces selling imported goods to buyers in the EU to collect, declare and pay the VAT to the tax authorities, instead of the buyer's having to pay the VAT at the point of import to the EU. Before 1 July 2021, imports of goods to the EU with a value of less than €22 were not liable to VAT. From 1 July 2021, VAT became chargeable on all imports to the EU.

Any suppliers selling goods from a non-EU country to customers in the EU can register for the IOSS scheme provided the goods (excluding goods subject to excise duty) are dispatched by or on behalf of the supplier from outside of the EU at the time they are supplied and the intrinsic value of the consignment does not exceed €150. Like the OSS scheme, suppliers have the option to register for IOSS in one EU Member State (MSI), rather than having to register for VAT purposes in multiple EU countries, and therefore report and remit the VAT through one return. It is also an advantage for consumers, as the scheme facilitates the payment of the import VAT due at the point of sale and avoids further tax or customs charges at the point of delivery of the goods.

Although the initial registration for IOSS on ROS is relatively straightforward, if the taxpayer is a non-EU-established entity, it will need to appoint an EU-established intermediary to fulfil its VAT obligations under IOSS. There appear to be limited intermediaries who are offering such services, and therefore it is not a straightforward scheme to operate for non-EU entities.

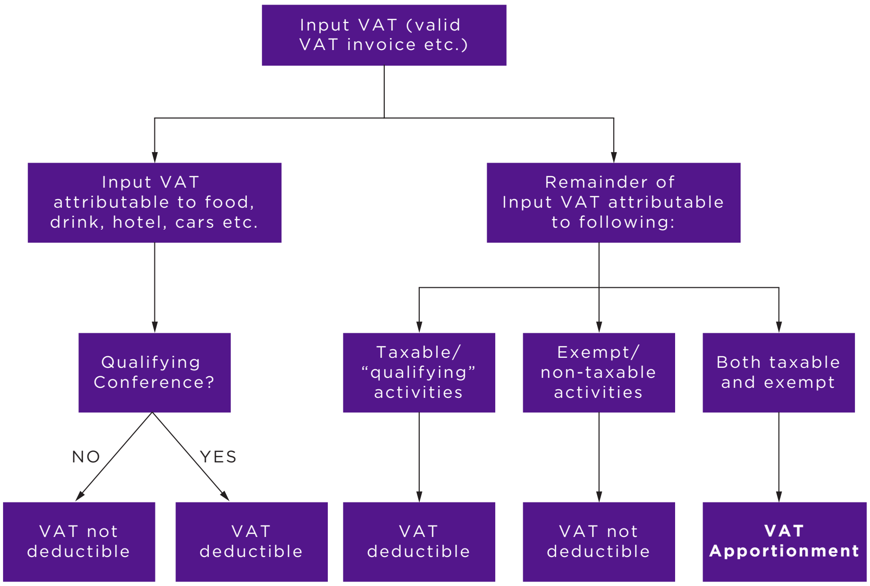
Notwithstanding this, there is a clear benefit for taxpayers who choose to operate IOSS provided their internal processes and controls can meet the following requirements:

- show/display the amount of VAT to be paid by the buyer in the EU, at the latest when the ordering process is finalised;
- ensure the collection of VAT from the buyer on the supply of all eligible goods with a final destination in an EU Member State;
- make sure that eligible goods are shipped in consignments not exceeding the €150 threshold;
- to the extent possible, show on the invoice the price paid by the buyer in euro;
- submit an electronic monthly VAT return via the IOSS portal of the Member State where you are identified for IOSS;
- make a monthly payment of the VAT declared in the VAT return to the Member State where the taxpayer is identified for IOSS; and
- keep records of all eligible IOSS sales and/or sales facilitated for 10 years.

Internal Controls

All of the above changes in VAT reporting requirements should not only be implemented in taxpayers' ERP systems but also be documented where taxpayers are operating manual processes. In such circumstances it can be useful to have decision trees for processes such as input VAT deductibility, booking invoices by accounts payable and raising invoices by accounts receivable from a VAT perspective. Such documentation should specify how to differentiate between the VAT treatment of domestic, EU and non-EU transactions and indicate the respective tax codes in the ERP system. This should minimise tedious line-by-line analysis of VAT reports after the fact, where manual corrections to errors in the data may be required. See outlined below a sample decision tree for input VAT deductibility:

Input VAT Decision Tree



It is best practice for taxpayers to have standard operating procedures (SOPs) documenting the entire, end-to-end process for preparing and submitting VAT returns, Intrastat returns, VIES returns, ARTDs etc. These documents can be lengthy and perhaps time-consuming to prepare, but ideally they should contain screenshots of each step in the process, from extracting the data from the ERP system to the final submission of the returns on ROS.

To future-proof your business against the ever-changing landscape of indirect taxes, it is vital to understand the importance of stringent processes and controls around indirect tax reporting requirements. When audited by tax authorities, it is common that internal control procedure documents are requested at the outset. Accordingly, internal controls not only provide for risk management and mitigation but also put the taxpayer on good standing in the event of an audit.

With all of the changes to indirect tax reporting coming down the tracks, taxpayers should prepare now ensuring stronger processes and controls are in place and devote greater focus and resources to managing their VAT processes. Most certainly, any loss of VAT deductibility is a real cost to a taxpayer and any undue risk can influence decision making and so it is more imperative than ever to keep ahead of the evolving landscape of VAT. As a final note, although VAT is generally not the driving force for business decisions, it should always be taken into consideration, as well as the impact that indirect tax reporting requirements can have on a business overall.

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Interest Limitation Rules: Key Issues for SMEs

Introduction

The interest limitation rules (ILR), transposed into law in Finance Act 2021, introduce provisions 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).[1]

Notwithstanding the *de minimus* threshold exemption in law, the application of the ILR takes no account of income or profit thresholds for the relevant entity (whether a company or an interest group); accordingly, the ILR may apply to a variety of small and medium-sized enterprises. Given the complexity of the ILR and the varying forms of tax relief available in law, the impact of the provisions contained in Part 35B TCA 1997 can vary depending on the individual fact pattern and debt levels of an SME. Such

1 For further discussion of the new interest limitation rules, their scope and application, see my article "Interest Limitation Rules: Key Provisions and Areas To Watch", *Irish Tax Review*, 35/1 (2022).

factors, in turn, can be largely dependent on where in the business lifecycle the company or group finds itself. Although the considerations noted below are generally those expected to be encountered at each stage of an SME lifecycle, the true impact of the ILR cannot be ascertained without considering all of the relevant facts and circumstances.

Early-stage SMEs

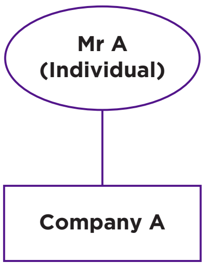
In the early stages of business growth a structure commonly encountered in the context of SMEs is that of the owner-managed company (for example, a single company held by a single individual or by a small number of shareholders). In certain cases the shareholders may have opted to interpose a holding company to hold the shares in the entity carrying on the business activity (whether that be engaging in a trade, renting property etc.). A number of key considerations arise with respect to such structures. The first is the extent to which the net borrowing costs of the relevant entity exceed the *de minimus* of €3m. The ILR does not apply where the exceeding borrowing costs of an entity are below the threshold of €3m; a key point to note with respect to this limit is that it is not to be regarded as an "ILR-free" amount and instead has a "cliff-edge" effect. Therefore, to the extent that the exceeding borrowing costs are €3,000,001+, the ILR is applicable to the relevant entity. For SMEs in capital-intensive businesses, consideration therefore needs to be given to the level of debt taken on through either shareholder loans or third-party financing and the impact of the ILR on the tax-effectiveness of such debt. The potential impact of the ILR also requires SMEs in the early stage of their growth journey to weigh up all of their options in terms of raising capital and to consider whether to take on a balance of debt and equity (for example, through the issuance of shares).

Another pertinent consideration for the SME in its early growth stage is whether the calculation of the ILR is likely to be impacted by the existence of the "single company worldwide group". 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.

This definition of a single company worldwide group could, in practice, refer 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. The definition can also apply in the context of owner-managed companies or a single company held by a small number of shareholders (for instance, a close company with no other sister companies or consolidated into a parent company), most commonly encountered in the SME space.

Take, for example, this structure, which may be common to a number of businesses in the early stage of their growth cycle:



Company A is owned by the shareholder in question (Mr A). Mr A holds 100% of the share capital of the company. Company A has drawn down third-party bank debt in the period and has interest expenses on same.

Company A cannot avail of the standalone entity exemption previously mentioned as Mr A is treated as being an "associated enterprise". As the company is in the early stages of development, it does not currently have a parent company or sister companies and is not part of a "worldwide group" as defined. The company is, however, treated as a “single company worldwide group”. This treatment does not impact the calculation of the relevant profits, exceeding borrowing costs or EBITDA for Company A. However, the single company worldwide group treatment comes into play in considering the equity ratio rule. Readers will recall that where the relevant entity is a member of a single company worldwide group and the relevant entity’s ratio of equity over total assets is greater than, equal to or not less than 2 percentage points lower than the single company worldwide group’s ratio of equity over assets, the equity ratio rule may be availed of to allow full relief for net borrowing costs.

For the purposes of the example, the company has equity of 60 and assets of 100. The ratio of equity over assets for Company A (expressed as a percentage) is 60%. This is the same as the ratio of equity over assets for the single company worldwide group. Accordingly, the equity ratio rule is available, and Company A may fully deduct its exceeding borrowing costs.

The outcome is modified, however, where the debt in question on which interest arises is with respect to a loan owed to an associated enterprise. Readers will recall that where such debt exists, the amount of equity for the purpose of the ratio is to be increased by the amount owed to associated enterprises. If we take the example, Mr A as shareholder has advanced a loan of 20 to Company A on which he receives yearly interest. The company has equity of 60 and assets of 100 to give an equity-to-assets ratio of 60%. In calculating the single company worldwide group ratio, the amount in respect of “equity” must be increased by the debt owed by Company A to Mr A (to the extent that this debt gives rise to deductible interest equivalent for the company).

The amount in respect of equity for the single company worldwide group is therefore now 80 (60 + 20 owed to Mr A). The equity ratio for the single company worldwide group is therefore 80 / 100 = 80%, compared to the relevant entity (single company) ratio of 60%. As the ratio of 60% is not equal to or greater, or not less than 2 percentage points lower than the single company worldwide group ratio of 80%, the equity ratio rule cannot be availed of.

The provisions pertaining to the equity ratio rule and its interaction with the single company worldwide group provide for a layer of anti-avoidance in the context of a single company worldwide group. Specifically, where arrangements are entered into and it is reasonable to consider that the main purpose, or one of the main purposes, is the avoidance of an increase in “E”, s835AAI(2) TCA 1997 shall nevertheless apply as if the arrangement had not been entered into.

The existence of a single company worldwide group is also of relevance in applying the group ratio rule, previously addressed in this article. Readers will recall that where a relevant entity is a member of a single company worldwide group, the group exceeding borrowing costs and group EBITDA for the purposes of the group ratio rule are to be calculated as normal based on the financial statements of the relevant entity but adjusted to disregard transactions with associated enterprises.

Take the example of Mr A, who holds 100% of the shares in Company A. We have established already that Mr A, as shareholder, would be treated as an “associated enterprise”. Transactions between Company A and Mr A must be disregarded in calculating the group exceeding borrowing costs and group EBITDA. For example, if Mr A had advanced a loan to Company A or takes a salary from the company, both transactions must be disregarded in assessing the exceeding borrowing costs and the EBITDA of the group.

Specific anti-avoidance provisions exist in s835AAG(3) TCA 1997 such that any arrangement entered into is to be ignored where it is reasonable to consider that the main purpose, or one of the main purposes, of the arrangement was to avoid the modification noted above.

Where shareholders are also directors in such companies, the issue of director loans and interest payable on same (s437 TCA 1997) will be familiar to taxpayers and their advisers. The ILR and the impact of the single company worldwide group rules mean that further consideration needs to be given to loans and other transactions between shareholders. So although loans from shareholders (who may also be directors) remain a valid form of raising finance to fund initial business activity and growth for SMEs, they raise a few more areas to be checked **before** advancing that money – in short, think before you borrow.

Mid-lifecycle SMEs

As we move into the later stages of an SMEs growth cycle, a likely focus will be placed on increasing growth and the decisions to be made on how to fund such expansion. In addition, we may see the introduction of holding companies interposed into group structures and a greater proliferation of legal entities to hold different trades or business units. Understanding how the ILR operates in an interest group context becomes important not only for SMEs but for all affected taxpayers.

Section 835AAL(3) TCA 1997 provides that where an amount is required to be calculated in respect of an interest group for the purposes of Part 35D, it shall comprise the results of all of the members of the interest group. It is my understanding that in calculating amounts in respect of an interest group, taxpayers may be given the option either to aggregate all of the results of the individual members or to engage in a consolidation of the results such that transactions between group members are removed. We may see further clarification on this matter from Revenue in due course.

In terms of applying the ILR to an interest group, the question arises of how to identify key elements of the calculation such as relevant profit, deductible interest equivalent or EBITDA as a whole. One approach could, in theory, look to aggregate all revenues, expenses and profits from each interest group member and extrapolate relevant profits and other elements from same. However, this author would suggest that such an approach could, in theory, set certain interest expenses **properly** incurred by **one** company against revenues of **another** company (for example, setting trading interest against passive or rental income) and in so doing inadvertently give greater flexibility for such expenses than would otherwise be permitted under existing legislation (i.e. s81 TCA 1997 or other provisions, as appropriate).

The worked example in Appendix 1 provides a brief overview of the ILR as it applies to an interest group, from an aggregation perspective.

The equity ratio rule in s835AAI TCA 1997 shall apply to an interest group subject to a modification in s835AAL(13) TCA 1997. For the purpose of identifying the ratio of equity over assets for the relevant entity, such an amount is to be calculated as if the results of the interest group were consolidated for accounting purposes (i.e. as if each interest group member had a common ultimate parent resident in the State).

As SMEs expand and grow, a key consideration with respect to the ILR is the manner in which they can engage in refinancing and the treatment of historical loan balances that a company or group may have been paying interest on in the past. Readers will recall that in calculating the amount of any exceeding borrowing cost or interest spare capacity (the former being subject to the ILR, where applicable), amounts in respect of legacy debt are to be excluded. The deductible interest equivalent (DIE) in respect of legacy debt is the lower of:

- the DIE that arises on the legacy debt in the accounting period and
- the DIE that would have arisen on the legacy debt in accordance with the terms of the legacy debt as they stood on 17 June 2016.

Where a refinancing occurs whereby the debt remains in force but the interest rate fluctuates to accommodate changing transfer pricing benchmarking – or, for example, to take into account the revised transfer pricing guidelines adopted in Finance Act 2020 – one would expect that such fluctuations should not alter the ability for pre-17 June 2016 debt to be seen as legacy in nature. However, in instances where a refinancing occurs and the legacy debt is essentially replaced by a new form of debt, an SME might find itself in the unenviable situation of now having debt within the scope of the ILR, as the DIE arising on the legacy debt is now nil.

The definition of legacy debt also recognises that the terms of a debt may include provision for an amount of principal not yet drawn down. For example, a loan advanced from Company A to Company B may make provision for a total credit facility of up to €150m to be drawn down at various stages of a project or as required by Company B. Although a portion of the loan may be drawn down before 17 June 2016 and thus is attracting an interest expense for Company B, the question arises of the principal not yet drawn down and whether this is to be treated as "legacy debt".

The definition of legacy debt for the purposes of the ILR notes that, in such instances, such principal is considered an agreed term of the debt only to the extent that the lender is legally obliged to make available such amounts on the happening of certain "milestones". Milestones refer to a predetermined deliverable or project phase defined in the terms of the debt but does not include a call by the borrower for the draw-down. SMEs in need of future financing may have drawn down loans in the past on a revolving credit basis – so caution needs to be exercised here to make sure that the relatively stringent terms of the legacy debt exclusion are adhered to.

Exit Planning and Treatment of a Company Leaving an Interest Group

Disallowable amounts and total spare capacity which arise in a particular year may be carried forward for use in later accounting periods. Disallowable amounts may be carried forward as a "deemed borrowing cost" indefinitely, while total spare capacity may be carried forward for 60 months.

In terms of carrying disallowable amounts and total spare capacity into later years, s835AAL(11) clarifies that for the purposes of applying s835AAD or s835AAE (being the carry-forward of disallowable amounts and total spare capacity, respectively) to an interest group, a reference in those sections to a relevant entity should be construed as a reference to a member of an interest group. The effect of this wording is that an interest group does not carry forward disallowable amounts and/or spare capacity but, rather, it is the individual members that carry such attributes.

As an SME moves towards the end of its growth cycle, we may see the company or the group considering its next move – should it divest of some businesses or move to a different market, or should it exit the market entirely? As the definition of an SME can span a number of industries, it is difficult to identify with any real precision the exact issues that will be faced in the context of the ILR. However, we can make some general observations with respect to how the ILR interacts with topics such as divesting of a business, exiting an interest group and the full transfer of a trade.

With respect to the transfer of a trade, readers will be aware that the transfer of a trade from one company to another constitutes the discontinuance of that trade in one company and its commencement in another. However, where the conditions of s400(5)(a) TCA 1997 are met, the transferor's trade and the successor's trade are not deemed to have ceased or commenced for the purposes of balancing allowances or charges and trading losses. Therefore the successor is deemed to step into the shoes of the transferor. Section 31(2)(a) Finance Act 2021 amends s400 TCA 1997 by inserting a new sub-section (7A), which provides that, in the context of a transfer of the trade, the predecessor shall not be entitled to relief for either disallowable amounts or total spare capacity carried forward; instead, the successor will be entitled to such relief and steps into the shoes of the predecessor company.

In addition, s31(2)(b) FA 2021 amends s401 TCA 1997. Section 401 TCA 1997 disallows the carry-forward of trading losses where:

- within three years, there has been both a change in the ownership of the company and a major change in the nature of the trade; or
- at any time, the scale of activities of the trade carried on has become small or negligible.

Section 31(2)(b) FA 2021 amends s401(2) TCA 1997 to provide that where either of the conditions above is met, no relief may be given in respect of total spare capacity arising in an accounting period before the change of ownership in respect of accounting periods after the change of ownership. A similar restriction is not affected for disallowable amounts carried into later years as deemed borrowing costs – the suggestion here being that whereas spare capacity may not be taken "outside" of the interest group, disallowable amounts may, in fact, remain with the company exiting the group.

Practical Considerations for SMEs

Aside from the calculation of the ILR itself, a key practical consideration for SMEs arising from these new rules is the additional compliance burden that we can expect to see on companies and interest groups. Reporting requirements arise under s835AAF TCA 1997, requiring a company to make a return in the form to be specified by Revenue. The return is to be made by the specified return due date for the accounting period. For accounting periods ending on 31 December 2022, therefore, the required reporting must be completed on or before the due date for the filing of the Form CT1 (i.e. 23 September 2023).

In the context of an interest group, s835AAM TCA 1997 provides for specific reporting requirements. In particular, 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.

Where a taxpayer (whether an Irish-tax-resident company or an Irish branch) is a member of an interest group, it is still subject to reporting requirements pursuant to s835AAF TCA 1997. Therefore, although information is required to be disclosed by the reporting company under s835AAM TCA 1997, a number of reporting obligations remain for the members of the interest group.

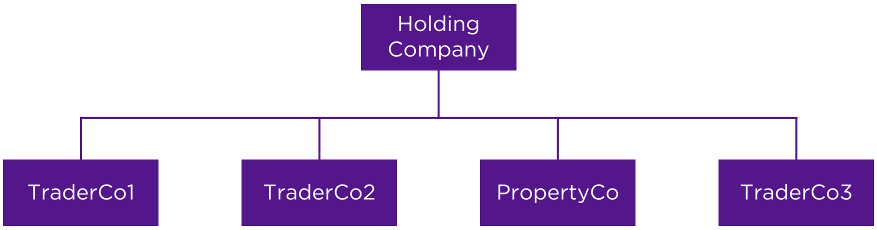
A final practical point is with respect to upcoming preliminary tax payment deadlines for "large" and "non-large" companies. In particular, a concern raised during the stakeholder consultation process centred on the mechanism by which companies would calculate and pay preliminary corporation tax before the accounting year-end in situations where the ILR would likely result in an increased tax liability. The concern identified by stakeholders was that the impact of the ILR may not be fully known until after year-end, resulting in some taxpayers being treated as underpaying their preliminary tax. Amendments in Finance Act 2021 take this into account and provide for a top-up payment of preliminary tax to be made in such instances for both "large" and "small" preliminary taxpayers. SMEs in both the "small" and the "large" preliminary tax category will therefore need to factor in additional time to recalculate their estimated corporation tax liability after the application of the ILR. For accounting year-ends of 31 December 2022, for example, taxpayers can expect to have a deadline of 23 June 2023 to make a top-up preliminary tax payment. The key message for SMEs in this regard is to be prepared in terms of resources and to allow sufficient lead-in time to meet this additional deadline.

Appendix 1: ILR and Interest Groups Worked Example

Key assumptions

- It is assumed that s247(4G) TCA 1997 is not at issue in this scenario.
- Capital allowances and/or balancing charges are ignored for the purposes of the calculation.
- It is assumed that there are no amounts in respect of legacy debt.
- It is assumed that none of the entities were engaged in a qualifying long-term infrastructure project.
- The group structure assumes that Holding Company holds 100% of the shares in the other entities: TraderCo1, TraderCo2, PropertyCo and TraderCo3. Holding Company is the ultimate consolidated parent of the group.
- It is assumed that all entities are Irish tax resident.
- All workings assume that there are no amounts in respect of value-based relief (under either s243B or s396B TCA 1997) being claimed.
- All values are in euro, with positive (income) amounts shown as a negative.
- Readers should note that, in the ordinary course of events, the group would consider the equity and group ratio rules and the applicability of each. For the purposes of this example, both group rules are assumed not to apply.

Group structure



Financial statements

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company
Operating (profit)/loss	(10,000,000)	(10,000,000)	—	(10,000,000)	—
Interest income – passive	—	—	—	—	(6,000,000)
Rental profits before interest	—	—	(10,000,000)	(10,000,000)	—
Trade interest payable – other debt	4,000,000	5,000,000	—	4,000,000	—
Interest paid – s247	—	—	—	—	10,000,000
s97 interest payable – legacy debt	—	—	—	—	—
s97 interest payable	—	—	4,000,000	6,000,000	—
Accounting (profit)/loss	(6,000,000)	(5,000,000)	(6,000,000)	(10,000,000)	**4,000,000**

Initial tax computation (before application of the ILR)

Trading income (Case I)

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company
(Profit)/loss per financial statements	(6,000,000)	(5,000,000)	(6,000,000)	(10,000,000)	4,000,000
Adjust for interest income	–	–	–	–	6,000,000
Adjust for rental profits before interest	–	–	10,000,000	10,000,000	–
Interest paid – s247	–	–	–	–	(6,000,000)
s97 interest payable	–	–	(4,000,000)	(6,000,000)	–
s247 interest as group relief	–	–	–	–	(4,000,000)
Case I taxable (profit)/loss	**(6,000,000)**	**(5,000,000)**	**–**	**(6,000,000)**	**–**

Passive income (Case III/IV/V)

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company
Case III taxable (profit)	–	–	–	–	–
Case V taxable (profit)	–	–	(6,000,000)	(4,000,000)	–
s247 as group relief	–	–	4,000,000	–	–
Passive income	–	–	**(2,000,000)**	**(4,000,000)**	–

Calculation of relevant profit

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company
Taxable Case I (profit)	(6,000,000)	(5,000,000)	–	(6,000,000)	–
Taxable Case III (profit)	–	–	–	–	–
Taxable Case V (profit)	–	–	(2,000,000)	(4,000,000)	–

The profits subject to tax at a rate higher than 12.5% (i.e. the Case V taxable profit in both PropertyCo and TraderCo3) must be value based.

The relevant profit for the interest group is therefore:

TraderCo1	(6,000,000)
TraderCo2	(5,000,000)
PropertyCo	(4,000,000[a])
TraderCo3	(14,000,000[b])
Holding Company	–
Total	**(29,000,000)**

[a] €2m x (25%/12.5%).

[b] €6m Case I taxable profits not subject to value basing, plus €8m in respect of Case V income (€4m x 25%/12.5%).

Identification of the net interest equivalent

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company	Total
Deductible interest equivalent – 12.5%	4,000,000	5,000,000	—	4,000,000	—	13,000,000
Deductible interest equivalent – 25% (grossed up per s835AZ(2))	—	—	16,000,000[a]	12,000,000[b]	12,000,000[c]	40,000,000
Total (DIE)	**4,000,000**	**5,000,000**	**16,000,000**	**16,000,000**	**12,000,000**	**53,000,000**

[a] Equal to s97 interest in PropertyCo of €4m, plus the s247 interest claimed as group relief of €4m. The total of €8m must be value based to give the €16m DIE amount.

[b] €6m s97 interest which is value based to give a total of €12m (€4m + €8m).

[c] €6m s247 interest relief value based to give €12m (€6m x 25%/12.5%).

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company	Total
Taxable interest (income) – 12.5%	—	—	—	—	—	—
Taxable interest (income) – 25% (grossed up per s835AZ(2))	—	—	—	—	(12,000,000)[a]	(12,000,000)
Total	**—**	**—**	**—**	**—**	**(12,000,000)**	**(12,000,000)**

[a] Interest income of €6m x 25%/12.5%.

	TraderCo1	TraderCo 2	PropertyCo	TraderCo3	Holding Company	Total
Net interest equivalent[a] Exceeding borrowing costs/ (interest spare capacity)	4,000,000	5,000,000	16,000,000	16,000,000	—	41,000,000

[a] DIE less TIE.

The exceeding borrowing costs for the interest group are therefore calculated to be €41m.

EBITDA

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company	Total
Relevant profit	6,000,000	5,000,000	4,000,000	14,000,000	—	29,000,000
Relevant loss						
+ Net interest equivalent	4,000,000	5,000,000	16,000,000	16,000,000	—	41,000,000
+ Foreign tax						—
+ Capital allowances	—	—	—	—	—	—
+ Non-finance element of finance lease	—	—	—	—	—	—
– IE ded Allow[a]	—	—	—	—	—	—
– Capital charges – balancing charge	—	—	—	—	—	—
+ IE ded charge[b]	—	—	—	—	—	—
+ Deductible interest on legacy debt	—	—	—	—	—	—
EBITDA	10,000,000	10,000,000	20,000,000	30,000,000	—	70,000,000

[a] The amount of DIE referable to allowances in respect of capital expenditure under Parts 9, 24 and 29.
[b] The amount of DIE referable to charges in respect of capital expenditure under Parts 9, 24 and 29.

Disallowable/allowable amount

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company	Total
Exceeding borrowing costs (grossed up – see above)	4,000,000	5,000,000	16,000,000	16,000,000	—	41,000,000
Interest spare capacity – see above	—	—	—	—	—	
EBITDA – see above	10,000,000	10,000,000	20,000,000	30,000,000	—	70,000,000
EBITDA limit	30%	30%	30%	30%	30%	

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company	Total
Allowable amount (EBITDA x 30%)	21,000,000[a]					
Disallowable amount[b] – exceeding borrowing costs less allowable amount	1,509,434[c]	1,886,792[d]	6,037,736[e]	6,037,736[f]	4,528,302[g]	20,000,000

[a] The allowable amount is calculated for the interest group as a whole based on the total EBITDA for the group at 30%.

[b] The disallowable amount is apportioned to each of the group members based on the apportionment formula contained in s835AAL(6) TCA 1997, but interest group members may opt to reallocate disallowable amounts as required to other members.

[c] €20m x (€4m/€53m).

[d] €20m x (€5m/€53m).

[e] €20m x (€16m/€53m).

[f] €20m x (€16m/€53m).

[g] €20m x (€12m/€53m).

The disallowable amount is allocated to the members of the group on a pro rata basis – however, it is open to the group to apportion disallowable amounts elsewhere in the group as the need arises. In this situation, let us assume that TraderCo1 has significant R&D credits that it expects to be available in the year in question to absorb any corporation tax charge arising. Therefore, to preserve interest relief in other group members, it is possible for TraderCo1 to take on more of the disallowable amount, once the amount allocated does not exceed the DIE for TraderCo1 for that accounting period (s835AAL(8) TCA 1997 refers), equal to €4m. Equally, let us assume that Holding Company is not expected to have significant income for the foreseeable future; as this company will not have sufficient income to set carried-forward disallowable amounts (deemed borrowing costs) against in future years, the view has been taken that it would be preferable for Holding Company to obtain the benefit of full relief for exceeding borrowing costs in the year and for disallowable amounts to be borne by other interest group members. To this end, an election is made to reallocate the total disallowable amount of €20m in the following way:

- TraderCo1 – €4,000,000,
- TraderCo2 – €5,000,000 and
- TraderCo3 – €11,000,000.

Revised computation (post-ILR)

	TraderCo1	TraderCo2	PropertyCo	TraderCo3	Holding Company
Case I (profit)/loss	(10,000,000)	(10,000,000)	–	(10,000,000)	
Trade interest payable	4,000,000	5,000,000	–	4,000,000	
Adjustment per s835AAC(3)	(4,000,000)	(5,000,000)		(4,000,000)	
Taxable Case I (income)/loss	**(10,000,000)**	**(10,000,000)**	**–**	**(10,000,000)**	**–**
Case V income	–	–	(10,000,000)	(10,000,000)	
s97 interest	–	–	4,000,000	6,000,000	
Adjustment per s835AAC(4)	–	–	–	(3,500,000)[a]	
Taxable Case V	**–**	**–**	**(6,000,000)**	**(7,500,000)**	**–**
Case III income	–	–	–	–	(6,000,000)
s247 interest	–	–	–	–	6,000,000
Adjustment per s835AAC(4)	–	–	–	–	–
Taxable Case III	**–**	**–**	**–**	**–**	**–**
Tax at 12.5%	1,250,000	1,250,000		1,250,000	
Tax at 25%			1,500,000	1,875,000	–
Tax after ILR	**1,250,000**	**1,250,000**	**1,500,000**	**3,125,000**	**–**

[a] A disallowable amount of €11m has been allocated to TraderCo3. €4m of this disallowable amount is treated as an adjustment to trading interest for Case I purposes. The remainder of the disallowable amount of €7m is to be set against the Case V profits in TraderCo3 and must be reduced by the following fraction – 12.5%/25% per s835AAC(5) TCA 1997 – to give an adjustment of €3.5m.

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UK 2022 Spring Statement and What Might Be Next for UK Tax

Introduction

On 23 March 2022 the UK Chancellor delivered his 2022 Spring Statement. The UK Government's tendency in recent years has been towards the Spring Statement being "light" on tax policy matters, with any significant announcements or reforms being reserved for the main UK Budget event in the rebranded guise of the Autumn Statement. However, as in spring 2020 and 2021, some immediate economic fine-tuning reforms needed to be addressed. Unsurprisingly, Rishi Sunak promised a fuller course of tax incentives to be announced this autumn.

The primary objective behind the 2022 Spring Statement seems to have been to bolster confidence in the UK economy against the inflationary headwinds of higher prices for fuel, energy and goods. This objective was delivered against a backdrop of war in Europe and the cumulative impact on food prices, making the cost-of-living crisis and continued economic growth priority UK political agenda items.

Therefore, as expected, there were measures in the Spring Statement to deal with the immediate impact of cost-of-living pressures, including an immediate one-year cut in the fuel duty rate of 5p from 6pm on 23 March 2022 and a rise in the National Insurance Contributions (NIC) starting threshold to match the income tax personal allowance from July 2022.

It was also confirmed that the 1.25% NIC/Health and Social Care Levy rise would be introduced as planned from April 2022 (although the forthcoming rise in the NIC starting threshold will provide some compensation for low- to middle-income earners). There was some lobbying to attempt to convince the Chancellor to defer the 1.25% NIC rise by one year to help deal with the immediacy of the cost-of-living crisis, but the Chancellor decided to push ahead with this measure. This was presumably to avoid this becoming an annual debate and risk mounting political pressure to reverse a controversial tax-raising policy decision that had already attracted significant negative press.

It should be noted that there were other announcements in the 2022 UK Spring Statement and further tax matters that came into force in the UK in April 2022 that are not specifically referenced in this article. Readers are therefore encouraged to visit the websites of Her Majesty's Revenue and Customs (HMRC) and the UK Treasury for a more detailed understanding of all relevant recent UK tax developments.

A Look Back to Some Other Trailed Measures that Came into Force on 1 April 2022

Finance Bill 2021–22 was published on 4 November 2021 following the Budget on 27 October 2021. Finance Bill 2022 received Royal Assent on 25 February 2022 and became Finance Act 2022. It was considered to "substantively enacted" for UK GAAP and IFRS tax accounting purposes on 2 February 2022 after the third reading of the draft Finance Bill 2022 in the House of Commons.

Qualifying asset holding company regime

The new UK qualifying asset holding company (QAHC) regime is intended to increase the competitiveness of the UK as a holding company location for investment funds and institutional investors. Finance Act 2022 introduced from 1 April 2022 a regime for the taxation of QAHCs and certain payments that QAHCs may make.

The legislation included in Finance Act 2022 reflects changes to clarify various aspects of the regime, as well as several changes to points of detail that should be carefully reviewed by anyone considering setting up a QAHC. However, the overall framework of the regime and the key benefits available to a QAHC remain broadly as expected, and its introduction is a very welcome development.

Investors in a QAHC are essentially intended to get a similar tax outcome to that from investing directly in the underlying assets of the QAHC. A QAHC will be taxed on profits relating to the activities it performs.

Over the life of a QAHC, it will need to:

- make an initial entry notification before the company can enter the QAHC regime and
- make a separate annual QAHC information return.

To enter the QAHC regime, a company must meet certain eligibility criteria, broadly summarised as:

- be a UK-tax-resident company;
- meet the ownership condition;
- meet the activity condition;
- meet the investment strategy condition;
- not be a UK real estate investment trust (REIT);
- not have any equity securities listed on a recognised exchange or publicly traded or marketed; and
- have made the initial entry notification.

Many of these conditions are generally straight forward, but the detail surrounding the ownership and activity conditions means that these are much more complex to satisfy. For example, no more than 30% of a QAHC may be owned by investors that are not diversely held funds or certain institutional investors. In addition, a QAHC is expected to hold and manage investments. The QAHC cannot carry on a trading activity except to the extent that it is ancillary to the underlying investment business of the company and not to a substantial extent (typically, the threshold for substantial is considered to be 20% in UK tax).

There is a requirement to notify HMRC of any breaches of the QAHC eligibility criteria.

The UK QAHC regime is new, the legislation is complex and there are several technical issues still under consideration; thus the QAHC regime merits a whole article devoted solely to this area of UK taxation.

UK tonnage tax regime

In the Autumn Budget 2021 the Government announced a package of measures to reform the UK tonnage tax regime from April 2022, with the aim of helping the UK shipping industry to grow and remain competitive globally. Finance Act 2022 amends the tonnage tax legislation (set out in Schedule 22 of Finance Act 2000) to introduce a number of these measures. These are intended to simplify the administrative requirements of the regime and increase the flexibility of the operation of the regime after the UK's departure from the EU. Details of the key amendments are set out below.

Tonnage tax elections

The legislation introduced the following additional flexibility to the procedure for making formal elections into and out of the tonnage tax regime:

- The period in which an election into the regime can be made may be extended provided an officer of HMRC gives consent after considering whether there was a reasonable excuse for the failure to make an election within the defined time limits and any further delay.
- The minimum period for which any new election into tonnage tax made after 1 April 2022 can remain in place will be reduced from ten to eight years.
- The concept of a bridging renewal election will be introduced to permit an officer of HMRC to consent to the renewal of an expired election, where a renewal election has not been submitted prior to the expiry of a previous election. This will be subject to the previous election's expiring, rather than ceasing to be in force for another reason, and no events occurring in the interim period that would have brought a continuing election to an end. In addition, consent must be requested without delay once it is identified that the previous election has expired, and the group's/company's conduct in relation to tonnage tax must not have involved at any time tax avoidance as its main purpose (or one of its main purposes).

Flagging of vessels

The legislation defining a "qualifying" ship for the purposes of the tonnage tax regime will be amended to remove the requirement to consider whether a vessel is flagged in an EU Member State, meaning that vessels in the regime may be flagged under any territory. However, the operators of the ships are still required to be strategically and commercially managed in the UK, as this is a key requirement for being eligible for the UK tonnage tax regime.

The upshot of these changes is that UK shipping operators should be reviewing their current profile to consider whether it may be beneficial to submit a formal tax election into the UK tonnage tax regime if they have a reasonable excuse for submitting a late election. It will, of course, remain to be seen how the additional discretionary powers given to HMRC to allow late elections are applied in practice.

Other amendments to UK tonnage tax regime

Other amendments to the UK tonnage tax regime removed specific references to EU Member States and simplified one of the tests before bringing in certain dividends and other distributions from overseas shipping companies received by the relevant company as relevant shipping profits for the purposes of the UK tonnage tax regime. These dividends and other distributions are, in any event, subject to a (slightly qualified) "foreign distributions exemption" in Part 9A of the Corporation Tax Act 2009.

Specific requirements have been added that can require returns to be made to confirm compliance with safety, environmental and working conditions on qualifying ships for UK tonnage tax purposes.

Public Interest Business Protection tax

The Government has announced a new, temporary "public interest business protection tax" that is potentially applicable to energy retailers for 12 months from 28 January 2022 to 27 January 2023. The tax is intended to prevent utility companies (with the potential for the rules to be expanded to other "public interest businesses") taking steps to monetise large in-the-money hedging commodity contracts, thereby realising a significant gain that is distributed to shareholders but leaves the newly unhedged company in financial difficulties. In such a case there is a risk that customers are transferred under the "supplier of last resort" mechanism, with increased cost to the Government and/or customers.

The tax is levied at a rate of 75% and is applied to the value of the hedging contract (less 10%). It should apply only where the relevant hedging assets held by the person and any connected person exceed £100m. The expectation is that this tax is not likely to raise material revenue as it is intended to have a deterrent behavioural effect. Where the tax is levied and remains unpaid, there is joint and several liability for holding companies and 5%-plus shareholders.

VAT Rates on Energy

The Government had previously announced that it would be reversing a ruling by the Court of Justice of the European Union (as the UK is no longer bound by the CJEU) that had restricted VAT relief on energy-saving materials (ESMs).

The Spring Statement announced that wind and water turbines will be added to the list of ESMs. In addition, a time-limited 0% rate of VAT on the installation of certain types of energy-saving materials, such as solar panels and thermal installation, became effective from April 2022 and will last for five years. However, the zero rate of VAT will apply only in Great Britain. In Northern Ireland (which continues to follow EU rules for goods under the Northern Ireland Protocol) the list of qualifying goods and the rate of VAT on installations will remain unchanged. In the interim, the Northern Ireland Executive will receive a "Barnett share" of the value of the relief until such time as it might be introduced UK-wide.

Green Reliefs for Business Rates

A year earlier than previously planned, the Spring Statement announced that these measures would be accelerated, and thus they took effect from April 2022. The measures support the decarbonisation of non-domestic buildings and include targeted business rates exemptions in England for eligible plant and machinery used in on-site renewable energy generation and storage and a 100% relief for eligible low-carbon heat networks with their own rates bill. The devolved administrations will receive Barnett consequential funding in the usual way.

Other Measures that Came into Force, Outside of the Spring Statement

Income tax

The freezing of UK individual personal allowances and the higher rate threshold took effect on 1 April 2022, and this is currently expected to last until April 2026.

VAT rate for the hospitality and tourism sectors

The rate of VAT for the UK hospitality and tourism sectors increased back to the standard 20% rate from 1 April 2022.

Residential property developer tax

The RPDT regime is in force from 1 April 2022 and applies to the profits of UK residential property development activities. RPDT is administratively aligned with the corporation tax regime and may be regarded as being effectively a corporation tax "surcharge" on the trading profits of UK residential property developers. The rate of RPDT has been set at 4%, higher than was originally trailed as fewer companies are expected to be within the regime than originally anticipated. This is required to help the Treasury to raise the targeted amount of revenue over the lifetime of the regime.

Payment dates for RPDT have been aligned with corporation tax payment deadlines, including for large groups. This includes qualifying companies that fall within the "super-QIPs" regime, whereby all corporation tax payments are required to be made before the end of the accounting period.

Standalone companies and groups will have an "allowance" available at the start of the accounting period to reduce their liability to RPDT – this has now been confirmed as £25m p.a. of RPD taxable profits.

The administrative arrangements for the allocation of the allowance between group companies subject to RPDT are similar to those for the corporate interest restriction (CIR) allowance, i.e. the requirement to elect a nominated company and the preparation and submission of an allowance allocation statement. If a nominated company is not appointed, the allowance will be evenly split between all group entities subject to corporation tax. This approach is designed to encourage taxpayers to self-appoint a nominated company.

RPDT taxable profits

RPDT taxable profits are to be prepared in accordance with existing corporation tax rules, with the following key amendments:

- Only those profits and losses relating to RPD activities are to be brought into account.
- No loan relationship debits or credits are taken into account (which includes the fair-value movement of derivative contracts).
- No allowances may be claimed in respect of capital expenditure.
- No claims may be made under loss relief, group relief or carried forward losses for non-RPD tax losses.

The exclusion of interest expenses from the calculation of taxable profits is likely to have a significant adverse impact on the amount of RPDT payable by affected companies and on the number of groups impacted by the new rules, especially where the developer is highly geared. The knock-on effects of this new regime may push up the selling price of residential units in an already heated UK residential property market.

RPDT loss relief

The legislation makes provision for claiming relief for losses arising from RPD activities carried on in prior periods against current-period RPD profits. A form of group relief has also been brought in for members of a group that are subject to RPDT for current-period and brought-forward RPD losses. However, these reliefs are subject to a number of restrictions that can defer the utilisation of brought-forward RPD losses against RPD profits in later periods. These include a restriction on access to brought-forward RPD losses in the group to 50% of the RPD profits assessable in any accounting period.

In line with the existing general UK corporation tax rules, current-year RPD group relief claims for current-period RPD losses are not restricted.

Freeports and Plastic Packaging Tax

In my article after the 2021 UK Autumn Statement ("Relevant UK Budget and Finance Act 2021 Measures: Sowing the Seeds for Reform?", *Irish Tax Review*, 34/3 (2021)), I set out headline comments on the 0% NIC benefits associated with freeport sites and on the new UK plastic packaging tax (PPT), which both came into force on 1 April 2022.

The 0% NIC rate for workers who spend at least 60% of their working time at a freeport site can be applied on earnings of up to £25,000 a year from April 2022 for the first three years of employment. The earnings that qualify for freeports NIC relief will not be subject to the 1.25% uplift in NIC/Health and Social Care Levy. Any earnings in excess of £25,000 will, of course, be subject to employer's NIC and the Health and Social Care Levy.

What Could Lie Ahead?

To assist the process of looking forwards, the Chancellor set out his Tax Plan, and his anticipated timeline is as follows.

July 2022

The annual National Insurance Primary Threshold and Lower Profits Limit will be aligned with the income tax personal allowance, making the first £12,570 of earnings tax-free. The National Insurance Contributions (Increase of Thresholds) Bill received Royal Assent on 31 March 2022, and the legislation is now in place covering this change and the changes to Class 2 NIC payments.

April 2023

Taxes on business investment will be cut by reforming capital allowances and R&D tax reliefs. This is expected to be set out in the UK 2022 Autumn Statement.

Capital allowances

The 25% UK corporation tax rate (for larger companies) applies from 1 April 2023. The corporation tax rate comes with an associated rise in the rate of diverted profits tax to 31%.

The capital allowances "super-deduction" of up to 130% of the cost incurred on new plant and machinery is expected to end on this date (subject to further incentives being announced on this in the autumn to stimulate investment).

The Spring Statement provided illustrations of the types of changes that the UK Government could make to the capital allowances regime. It is possible that the Government will choose to make a combination of these suggested changes:

- increase the permanent level of the annual investment allowance (AIA) – for example, to £500,000;
- increase writing-down allowances for main- and special-rate assets from their current levels of 18% and 6% to 20% and 8%;
- introduce a first-year allowance for main- and special-rate assets where firms can deduct, for example, 40% and 13% in the first year, with the remaining expenditure written down at standard writing-down allowances;
- introduce an additional first-year allowance to bring the overall amount that can be claimed to greater than 100% of the initial cost – perhaps as an additional capital allowance of 20% in the first year, on top of standard writing-down allowances on 100% of the initial cost across the first and subsequent years; and
- introduce "full expensing" to allow businesses to write off the costs of qualifying investment in the period in which the capital expenditure is incurred.

The changes being considered relate to capital expenditure on general plant and machinery. However, the UK Government could also consider changes to other allowances, such as the structures and buildings allowance, or new reliefs targeted at specific investments, such as the current enhanced capital allowances for designated freeport areas.

R&D tax reliefs

The UK Government made three new announcements related to R&D reliefs:

- It intends to allow pure maths research to be within scope of the reliefs.
- As part of the Government's commitment to include data and cloud computing costs within the relief, all cloud storage will be brought into the scope of the reliefs.
- The Government will continue with its proposal to focus support more towards innovation in the UK but will allow for some narrow exemptions where it is in some way unavoidable for the R&D activity to be undertaken overseas. Allowing overseas costs in limited circumstances to support companies that have no option but to undertake R&D overseas will be welcomed by those industries that would have been affected by the removal of overseas R&D costs (as announced in November 2021). The Government will legislate so that expenditure on overseas R&D activities can still qualify where there are:
    - material factors such as geography, environment, population or other conditions that are not present in the UK and are required for the research, meaning that expenditure must be incurred outside of the UK – for example, deep ocean research; or
    - regulatory or other legal requirements that activities must take place outside of the UK – for example, clinical trials.

Details will be set out in draft legislation to be published in the summer before these measures come into effect in April 2023.

The UK Government will also consider making further announcements in the Autumn Budget to "ensure that the UK's R&D tax reliefs are as effective as possible and...deliver the best possible value for taxpayers". These could include increasing the generosity of the R&D expenditure credit (RDEC) to attract and boost R&D investment in the UK.

April 2024

Income tax

Cutting the basic rate of UK income tax from 20% to 19% has been announced, subject to the Chancellor's fiscal principles being met. The change will be implemented in a future Finance Bill. A three-year transition period would then apply for gift aid relief to maintain the effective income tax basic rate relief at 20% until April 2027.

The reduction in the basic rate for non-savings/non-dividend income will not apply for Scottish taxpayers because the power to set these rates is devolved to the Scottish Government. Instead, the Scottish Government will receive additional funding to use as it chooses.

This would also be anticipated to automatically impact the rate of tax withheld on interest and royalties where no tax treaty relief applies and the rate of tax paid by overseas corporates subject to income tax.

Employment taxes

As trailed by the Chancellor in his recent lecture, the Government will consider whether further intervention is needed to encourage employers to offer the high-quality employee training that the UK needs. This will include examining whether the current tax system – including the operation of the apprenticeship levy – is doing enough to incentivise businesses to invest in the right kinds of training.

You may recall that the UK Government launched a review of the enterprise management incentive (EMI) scheme in 2020 to ensure that it continued to provide the necessary support for high-growth companies and to examine whether more companies should be able to access the scheme. The Government has announced that it believes that the EMI scheme remains effective and appropriately targeted. However, based on stakeholder feedback, the Government will extend the scope of the review to consider the UK company share option plan (CSOP), to determine whether CSOP should be reformed to support companies as they grow beyond the scope of support offered by the EMI scheme.

There may thus be further announcements in these areas in the UK 2022 Autumn Statement.

The Tax Plan notes that the Government will continue to consider reform to tax reliefs and allowances more generally ahead of 2024, which is, of course, to be expected.

There are also likely to be significant formal announcements in the Autumn Statement connected with the UK's implementation of the "income inclusion rule", which is expected to come into force from 1 April 2023. The undertaxed profits rules are expected to come into force in the UK 12 months later, on 1 April 2024, and will likely feature in the 2023 Autumn Statement.

The macroeconomic outlook in the run-up to the Autumn Statement will, no doubt, be critical to whether the Chancellor is able to stick rigidly to his Tax Plan; further crises and economic uncertainties may continue to unfold to beset his plans.


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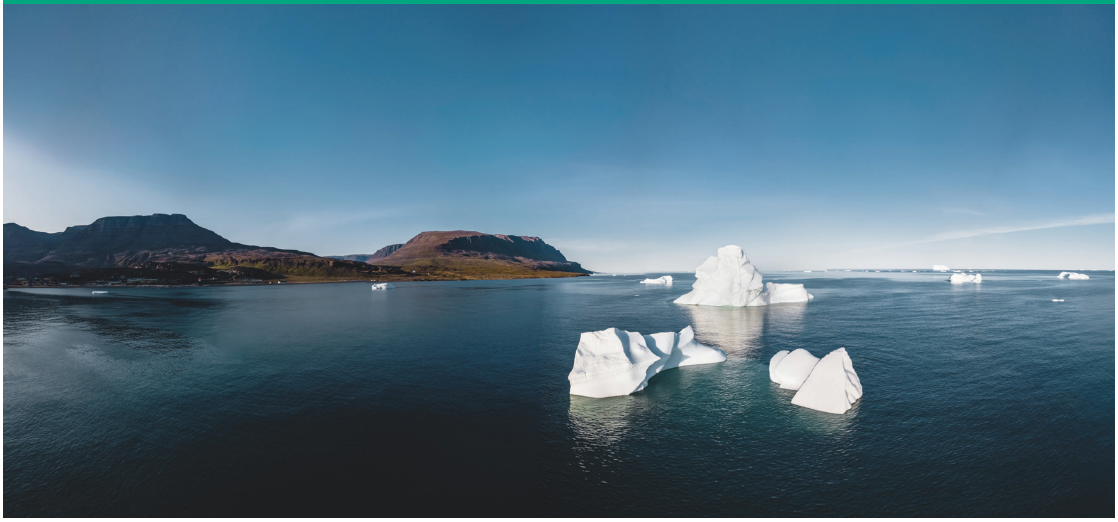
The Role of Tax in Combating Climate Change



Introduction

According to the most recent Intergovernmental Panel on Climate Change (IPCC) report (see https://www.ipcc.ch/report/ar6/wg3/), human-induced climate change has resulted in far-reaching adverse impacts and substantial damage to nature and people. The increasing frequency of climate/weather extremes such as the Australian and Californian wildfires has devastated the lives of local inhabitants along with the surrounding ecosystems, settlements and infrastructure. The UN Secretary-General, AntÓnio Guterres, recently stated that "we are firmly on track toward an unliveable world" unless urgent action is taken by governments to decarbonise their economies. In fact, global carbon emissions must peak by 2025 in order for us to have a liveable future.

Therefore, the desire to "green" the Irish economy and combat climate change has never been more important. Energy prices in the domestic market have been increasing dramatically due to the price hikes for fossil fuels on wholesale markets and the lack of Irish renewable energy output. In addition, the war in Ukraine is forcing countries to look elsewhere for their oil and gas supplies. This market disruption is raising concerns that the prices of oil and gas, which have been surging at the sharpest rate in over three decades, could be forced even higher.

This is therefore a very important time for the Government to continue to invest in – and, where necessary, seek new – measures that support the "greening" of the economy and thus reduce reliance on fossil fuels. Tax is going to be very much at the forefront of this and a key lever to both encourage green investment in Ireland and mitigate the risks of climate change.

The Role of Tax in Combating Climate Change

Government and EU targets

The Climate Action and Low Carbon Development (Amendment) Act 2021 commits Ireland to reducing emissions by 51% compared to 2018 levels by 2030 and to a legally binding target of net-zero emissions by no later than 2050. The Act also strengthens the Climate Change Advisory Council's role and empowers it to combat climate change based on the most up-to-date climate science. The response by Ireland and our 2030 targets are aligned with the European Union's objective to reduce greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels and to attain climate neutrality within the EU by 2050.

The National Development Plan, published in 2021, describes how Ireland can transition to a carbon-neutral and climate-resilient society and meet its legal obligations. The measures that the Government is contemplating and that are outlined in the National Development Plan include:

- Deliver 80% of Ireland's electricity needs from a mix of onshore and offshore renewable sources.
- Invest in grid infrastructure, interconnection and storage.
- Construct new charging infrastructure for electric vehicles to support the target of having almost 1m electric vehicles on the road by 2030.
- Invest in retrofitting 500,000 houses to meet a Building Energy Rating of B2/cost-optimal or carbon equivalent and install 600,000 heat pumps, of which 400,000 will be to existing homes.
- Grow the collective spend by State-owned enterprises on energy-related projects to more than €16bn for the period from 2021 to the end of 2030.
- Achieve a target of 5GW of installed offshore wind generation by 2030.
- Grow the Climate Action Fund, which is predicted to accrue to at least €500m by 2027.
- Provide funding for energy research to accelerate the diversification away from fossil fuels and move to alternative sources such as wind, wave, biofuel, biogas, solar and hydrogen.

Irish commitments from COP26

World leaders met in Glasgow last November for the 2021 United Nations Climate Change Conference, more commonly referred to as COP26, to revisit climate pledges that were made under the 2015 Paris Agreement. During the conference, Ireland signed up to a number of commitments and international agreements. These included:

- Joining the Beyond Oil & Gas Alliance to lead the transition away from global oil and gas production.
- Empowering citizens to get involved in a transition that is fair, equal and just.
- Aiding global efforts to limit the temperature rise to 1.5°C by becoming a signatory to the High Ambition Coalition.
- Agreeing to commit at least €10m for the Climate Adaptation Fund between now and the end of 2022.
- Being involved in the Climate and Clean Air Coalition Ministerial, which will expedite action to lower short-lived climate pollutants.

COP26 puts an onus on each country to deliver on its climate commitments to avoid dangerous warming and to ensure that the world can keep the global temperature rise to within 1.5°C.

To support Ireland's ambitions, the Government recently introduced the "Carbon Budget" to reduce greenhouse gas emissions and help decarbonise our economy. This budget outlines the total amount of emissions that are allowed to be emitted in Ireland over a period of five years. At the start of April 2022, Ireland's first Carbon Budget was approved by the Dáil. The first Carbon Budget cycle, which ends in 2025, provides for a maximum of 295 million tonnes (Mt) of emissions to be produced. The limit will decrease to 200Mt between 2026 and 2030, with a further decrease to 151Mt between 2031 and 2035.

Budget 2022

Ireland has a challenging road ahead to meet its environmental goals for 2030 and beyond. One of the key levers available to the Government to demonstrate its commitment to climate action is tax policy. Tax incentives to encourage "green" behaviour are now being introduced, such as accelerated capital allowances and reliefs for electric/hybrid vehicles, while levies and environmental taxes are being introduced to discourage undesirable behaviour.

Budget 2022 introduced a number of measures seeking to deliver on our legal obligations for 2030 and assist in achieving the measures outlined in the National Development Plan. An increase of 19% was allocated under the Budget to the Department of the Environment, Climate and Communications, reinforcing the Government's prioritisation of and commitment to meeting its 2030 obligations. Other measures introduced in Budget 2022 were:

- €251m to enhance connectivity and communications, including to progress the roll-out of the National Broadband Plan.
- €368m for "energy transformation", which involves supporting residential and community retrofits.
- €152m to support "just transition", build capacity across agencies to enhance Ireland's response to climate change and finance vital research into climate change.
- €98m to support the transition to a "circular economy".

The Budget also increased carbon tax by €7.50 per tonne to €41 per tonne, the tax receipts from which will support more than 22,000 home energy upgrades. Vehicle registration tax for vehicles that are the most polluting was increased, and the relief of €5,000 available for the purchase of electric vehicles was extended until the end of 2023. The accelerated capital allowance scheme was also extended to cover hydrogen-powered vehicles and refuelling equipment, whereas equipment that is directly operated by fossil fuels will not qualify for the scheme anymore.

Another, perhaps less obvious, climate change measure introduced in the Taxes Consolidation Act s835AZ was the interest limitation rule exemption relating to debt connected with long-term public infrastructure projects. The interest limitation rules operate to deny a deduction in respect of interest expenses in excess of 30% of a taxpayer's EBITDA. For the purposes of this exemption, long-term infrastructure projects are defined as projects that "provide, upgrade, operate or maintain a large scale asset". Furthermore, a large-scale asset includes:

> *"an installation generating energy from renewable sources (within the meaning of the European Union (Renewable Energy) Regulations (S.I. No. 365 of 2020)), which is regulated, either solely or jointly with another party, by the Commission for the Regulation of Utilities...that has a minimum expected life span of 10 years".* (s835AY (1))

Overall, this exemption can be viewed as a positive step in assisting key infrastructure projects announced as part of the Government's National Development Plan and the expansion of Ireland's renewable energy production capacity.

Expect this trend to continue, as future Budgets will allocate resources and funding to the green transition and put Ireland on a trajectory towards achieving its ambitious targets.

How Other Countries Compare in Using Tax to Tackle Climate Change

	Ireland	United Kingdom	Norway
Carbon tax (€ per tonne) as of 1 April 2021	€33.50 (€41 from 1 May 2022)	c. €21.23	c. €58.59
Reliefs for electric vehicles	*BIK* A rate of 0% applies to fully electric vehicles with an original market value (OMV) of up to €50,000. Where the OMV is greater than €50,000, a rate of 30% should apply. However, a reduction is available at this higher rate where business mileage in excess of 24,000km is incurred. From 2023 the BIK treatment on electric vehicles will change. The OMV reduction decreases to €35k in 2023, €20k in 2024 and €10k in 2025. *Grants* A grant of up to €5,000 is available from the Sustainable Energy Authority of Ireland in respect of the private acquisition of qualifying new battery electric vehicles (BEVs). Electric vehicles listed at less than €14,000 will not qualify for the grant. *VRT* VRT relief of up to €5,000 is available for electric vehicles that have an open-market selling price of up to €40,000. A reduced level of relief is available for those with an open-market selling price of between €40,000 and €50,000.	*BIK* A rate of 1% applies to fully electric vehicles. A 22% rate is available for "green hybrids". Petrol/diesel cars producing CO_2 emissions of 100g/km are subject to a higher rate of 24%. From there, bands increase in 1% increments to 37%. *Grants* A grant of up to £1,500 is available for the purchase of certain models of plug-in cars and vans. Up to 31 March 2022, homeowners could claim a maximum grant of £350 for installing a home charging point. *VAT rates* A rate of 5% applies to electric vehicle charging at home. The rate increases to 20% when such charging takes place at public charge points.	*BIK* A rate of 24% applies to new fully electric vehicles at a listed price of up to NOK329,600 (c. €33,000). Where the listed price is greater (c. €33,000), a rate of 20% should apply. *Insurance* Individuals who own an electric vehicle are not required to pay annual road traffic insurance tax. *VAT rates* Electric vehicles are not subject to purchase tax or VAT. *Company car tax* A reduction of 50% in company car tax is available in respect of fully electric vehicles.

	Ireland	United Kingdom	Norway
Accelerated capital allowances for companies	Accelerated capital allowances of 100% are available on capital expenditure incurred by companies on “energy-efficient equipment”. These can be claimed for the year in which the equipment is first used for the purposes of the trade. Energy-efficient equipment includes: • electric motors and drives, • ICT, • lighting, • building energy management systems, • heating and electricity provision and • electric and alternative-fuel vehicles.	Accelerated capital allowances of 130% are available on capital expenditure incurred by companies on electric charging points. Accelerated capital allowances of 100% are also available on capital expenditure incurred on by companies on: • “energy-saving” plant and machinery, • low-CO_2 -emission cars, • natural gas/ hydrogen refuelling infrastructure and • environmentally friendly plant and machinery. These allowances can be claimed for the year in which the equipment is first used for the purposes of the trade.	Up to 31 December 2021, accelerated capital allowances of 20% were available in respect of the main assets in wind-power plants. These allowances were eventually phased out as the approval scheme for the Norwegian electricity certificate systems expired.
Other measures	*Capital allowances on grid connection cost* The Tax Appeals Commission (TAC) recently published a determination 94TACD2021 stating that grid connection costs in a power station can qualify for capital allowances. Although this is specific to such costs in a power station rather than a renewables development	*Corporation Tax deduction* A corporation tax deduction is available for businesses that incur capital expenditure on certain makes of electric vehicles (i.e. with zero CO_2 emissions) and electric vans.	

	Ireland	United Kingdom	Norway
	(e.g. wind farm or solar farm) setting, the principal use of the grid connection in the two types of facilities is similar (i.e. to distribute the electricity produced to the national grid). Consideration will be required of the wider application of this determination, such as to grid connection costs incurred in renewable energy projects.	*Excise duty* Fully electric cars are exempt from vehicle excise duty. *London congestion charges* These charges do not apply to electric vehicles, whereas a daily charge of £15 applies to non-electric vehicles.	

Source: https://taxfoundation.org/carbon-taxes-in-europe-2021

Ireland's Decarbonisation Journey and the Tax Practitioner

Overall, Ireland's decarbonisation journey will have major implications for society, the economy and organisations. The efforts needed to meet the ambitious domestic, and EU, 2030 targets will require contributions not only from the Government but also from all members of society, including individuals, households and businesses. Taxation can, and will, play a positive and active role in achieving these objectives, by encouraging a switch to cleaner energy, more sustainable industry and greener habits. Therefore it is important that tax practitioners remain aware of and alert to the role that taxation is going to play in this journey to decarbonise Ireland.

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Post-Brexit: Practical Business and Direct Tax Issues to Consider

Introduction

Brexit brought some unprecedented changes to how groups conduct business and their supply chains. The UK is the only sovereign country to have left the EU, of which it had been a Member State (of the Union and its predecessor – the European Communities) since 1 January 1973. At one point the prospect of the UK's ever leaving was unimaginable, but after *circa* 18 months we have now seen the practical impacts of Brexit. The purpose of this article is to highlight some of the business direct tax impacts that we have come across based on client experiences.

By way of background, previous *Irish Tax Review* articles (see Aidan Meagher and Claire Fitzgerald, "Brexit: Potential Direct Tax Effects in Ireland", *Irish Tax Review*, 30/3 (2017)) highlighted selected tax provisions that could be impacted by Brexit. Recent Finance Acts have sought to address the Brexit impact by containing a number of helpful amendments to Irish tax legislation that extend certain reliefs and benefits to UK-tax-resident companies, including:

- the extension of the definition of a "group" under s616 TCA 1997, which now defines a "relevant Member State" as being "deemed to include the United Kingdom";
- s130(2B) TCA 1997 continuing to ensure that certain interest paid to UK-tax-resident companies is not recharacterised as a distribution, due to the inclusion of "interest...paid to a company which is a resident of a Member State...or the United Kingdom",
- the extension of the definition of "relevant Member State" for the purposes of s410 TCA 1997 (i.e. group payments) to include the UK; and
- the extension of the definition of "relevant Member State" for the purposes of surrendering relief under s411 TCA 1997 and all associated sections in Chapter 5 of Part 12 to include the UK.

Although these very important measures remain available in a business direct tax context to groups with UK companies in their ownership chain, other legislative provisions were not amended (e.g. the Mergers Directive as transposed by Part 21 TCA 1997 and the deferral of exit tax under s629 TCA 1997). This has resulted in certain EU groups with UK companies in their ownership chain encountering some practical issues and challenges since the UK's official exit from the EU on 1 January 2021, the impact of which often depends on the provisions of double taxation treaties between an individual EU Member State and the UK.

Let's consider some of the headline reliefs that are no longer available to UK-tax-resident companies as a result of Brexit.

Overview of Unavailable Reliefs

Additional foreign tax credit ("AFTC") –

Subject to certain conditions, AFTC provides for an additional credit for tax on foreign dividends received. The credit is applicable to certain dividends paid directly out of the profits of companies resident in EU/EEA treaty-partner countries. Credit is also available for tax paid in third-country jurisdictions if those profits are paid to Ireland via an EU/EEA treaty-partner resident company.

Ironically, originating from cases initiated in the UK, with effect from 1 January 2021 AFTC will no longer be available to Irish companies in respect of dividends received from shares in UK-tax-resident companies. Unlike the other helpful amendments noted above, Irish tax legislation does not extend para. 9I of Schedule 24 TCA 1997 to include "the United Kingdom". For Schedule 24 TCA 1997 purposes, all parts are limited to "a Member State of the European Communities, or...an EEA State...".

Therefore, profit repatriation from the UK to Ireland can come at a cost in some cases. It is critical for corporate groups with a UK-resident entity in the structure to manage appropriately and ensure that cash is repatriated tax-efficiently from that UK entity to Ireland. This is discussed in further detail below.

Parent–Subsidiary Directive

Provided the relevant conditions are satisfied, the Parent–Subsidiary Directive provides a very useful exemption from dividend withholding tax (DWT) without the added administrative requirement of ensuring that the appropriate declarations are in place in advance (as is the case under Irish domestic legislation). Similar to AFTC above, this Directive is limited to a "Member State of the European Communities". Although not necessarily critical (due to exemptions under Irish domestic legislation), this limits the exemption options available to Irish companies making a distribution to a UK-tax-resident company. Corporate groups should ensure that the appropriate declarations are in place and provided to the Irish company before making a distribution. This is discussed in further detail below.

Interest and Royalties Directive

Another Directive that aids intra-EU trade, the Interest and Royalties Directive, also provides a useful exemption from withholding taxes for payments made between associated companies. This Directive is designed to remove withholding tax obligations on cross-border interest and royalty payments within a group of companies. Similar to the Parent–Subsidiary Directive, the benefits of the Interest and Royalties Directive are granted only to companies that are subject to corporate tax in the EU, tax resident in an EU Member State and of a type listed in the annex to the Directive. As the United Kingdom is not included, this Directive is no longer available post-Brexit. Please see below for further consideration of the treaty and domestic law provisions.

Deferral of exit tax

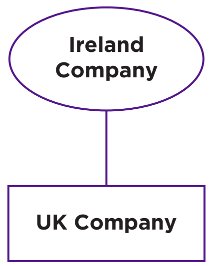
As a result of the internationally agreed measures under the EU's Anti-Tax-Avoidance Directive (ATAD), Finance Act 2018 replaced the existing exit tax provisions with a new exit tax regime (s629 TCA 1997) in Ireland, which is wider reaching.

Of relevance is the fact that Finance Act 2018 also introduced an option to defer the payment of that exit tax over six annual payments. However, that deferral option is available only to countries that are a "relevant territory", defined as a "Member State (other than the State) or a third country which is a party to the EEA Agreement that has concluded an agreement with the State or the European Union equivalent to the mutual assistance provided for in the 2010 Directive". Most notably, as a result of Brexit this provision no longer includes, nor has it been extended to include, the UK.

Application to Facts

Cash repatriation

Corporate groups with companies in multiple jurisdictions must decide what to do with cash accumulated through successful overseas operations. The cash can be used to reinvest in those operations or repatriated around the group for financial, operational and tax purposes. However, as a result of Brexit and the inability to avail of the Parent–Subsidiary Directive, a UK company in the structure can present an unappealing tax cost where cash needs to be repatriated through that UK company. Take, for example, a UK company that is a subsidiary of an Irish company.

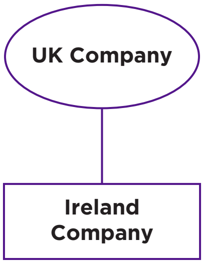


Generally, profits repatriated from the UK company to the Irish company by way of dividends would be subject to Irish corporation tax at 25% (or 12.5% where the election under s21B TCA 1997 is available), subject to double taxation credits for underlying tax/ withholding tax suffered. Where there is insufficient underlying tax/withholding tax suffered on those profits repatriated, there is a real risk that a portion of those profits would be subject to incremental corporation tax in Ireland. As mentioned above, subject to satisfying certain conditions, typically the AFTC would have provided a "top-up" credit to ensure that no additional tax arises in the Irish company; however, as a result of Brexit, the AFTC is no longer available. This can create a real tax cost for the Irish recipient of those dividends repatriated, which can have a knock-on cash-flow effect around the group. It is worth noting that there is ongoing consultation on a possible move to a "territorial system of taxation", which may impact the analysis above.

More broadly, before Brexit, clients in the renewable energy sector would have historically implemented a structure whereby a UK company was inserted as an intermediary holding company above project companies based in the EU – for example, Italy. The purpose of this structure was to benefit from a more preferential tax outcome on the ultimate disposal of the Italian project companies through the UK–Italy double taxation treaty, which grants full taxing rights to the UK, with the UK company then looking to rely on the UK "substantial shareholding exemption".

Now that those structures are complete and income generating, it would be worthwhile undertaking a review of the structure with a view to managing and avoiding any potential withholding tax leakage.

In addition to the above, it is important to consider an alternative scenario, whereby an Irish company is a subsidiary of a UK company.

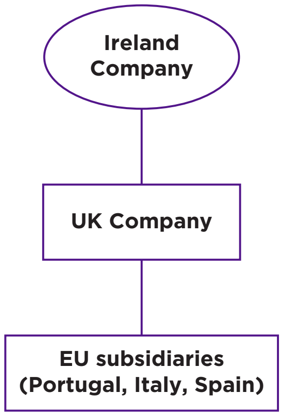


As mentioned, the Parent–Subsidiary Directive provides a full automatic exemption from DWT on distributions made from Irish companies to a parent within the EU provided that the parent holds 5% of the shares of the Irish company. There are no forms or other administrative requirements to avail of that exemption (excluding the DWT return, which is required in all cases). As the Parent–Subsidiary Directive is not available to UK companies, it is important to look to domestic legislation for DWT exemptions. Irish domestic legislation provides full exemptions from DWT on dividend payments from Irish companies to their parent provided certain conditions are satisfied and appropriate declarations are in place in advance. More rigid compliance and monitoring must therefore be applied to ensure that the domestic exemption can be availed of, with Revenue placing a greater degree of focus and scrutiny on ensuring compliance with the relevant legislation.

Group restructuring/reorganisation

From time to time, corporate groups may look to restructure their group structure for various reasons, including a legal entity rationalisation, a carve-out of functions/entities for third-party sale or simply to create more efficiencies. Historically and with careful management, based on an array of reliefs and exemptions, a group was often able to undertake such a restructuring/reorganisation in a tax-neutral manner. However, a UK company in that structure can present challenges and potentially a tax cost as part of such a restructuring.

Take the earlier scenario of the renewable energy group where various EU companies are subsidiaries of a UK intermediary holding company, which is in turn a subsidiary of an Irish company.



Let's say that the shares of the EU subsidiaries need to be transferred from the UK company to the Irish company. Previously, a group may have considered a straight distribution of those shares from the UK to Ireland. Notwithstanding that the UK company may have availed of the UK "substantial shareholding exemption" on that disposal, resulting in no UK CGT arising, given that the disposal was "subject to tax" in the UK the AFTC would have been available to the Irish company. However, as a result of Brexit, we know that the AFTC is not available, and therefore groups must reconsider how such a restructuring may take place.

One option may be to transfer the shares of the EU subsidiaries in exchange for consideration, with that consideration being in the form of a note. However, the unwind of that note would need to be considered. As we have learned, a simple distribution of that note is not a tax-efficient option in this case for the reasons outlined. The UK company could consider buying back its own shares in exchange for the note, with the Irish company availing of the profit participation exemption (subject to satisfying the relevant conditions); however, the tax, company law and accounting aspects of this would need to be carefully considered.

Another alternative may be to consider liquidating the UK company, with the shares of the EU subsidiaries transferred by way of a liquidation distribution. This would be considered a capital disposal for Irish tax purposes, and provided the Irish participation exemption conditions are satisfied, no additional tax charge should arise for the Irish company. Again, there are company law and accounting considerations associated with this alternative. In addition, liquidation can be a lengthy process, and there may also be a requirement to continue the UK operations through that UK company. Therefore, a liquidation may not be appropriate/practical in all cases.

Every group and fact pattern will have its own nuances, which need to be carefully thought through, with an appropriate tax review undertaken to ensure that no additional tax charge arises as part of a reorganisation.

Parent–Subsidiary Directive

As outlined above, the secondary line of defence under the Parent–Subsidiary Directive is no longer available. Although the inability to avail of the Parent–Subsidiary Directive may not be crucial, given the withholding tax exemption available under Irish domestic legislation (i.e. s172D TCA 1997), distributions from an Irish subsidiary to its UK parent require additional consideration and administration to ensure that domestic legislation applies. A UK parent company needs to ensure that the appropriate declaration is provided to the Irish subsidiary before any distribution is received in order for Irish withholding tax (albeit at a reduced rate under the treaty) not to apply . The declaration also requires a look-through to the ultimate beneficial owner, which can prove tricky and cumbersome where the UK parent company is owned directly/indirectly by a fund or private equity firm.

Interest and Royalties Directive

The impact of the Interest and Royalties Directive as a result of Brexit was briefly outlined above. Under both Irish domestic tax legislation and the Ireland–UK double taxation treaty, interest payments made by an Irish company to a UK company are not subject to a withholding tax. Such treaty protection may not be available where other EU countries make interest payments to the UK. There may be an obligation for the EU company to withhold tax on those interest payments to the UK.

Generally, royalties (with the exception of patent royalties) are not subject to withholding tax under Irish domestic legislation (i.e. s242A and Chapter 6 of Part 8 TCA 1997). Chapter 6 of Part 8 refers to the Interest and Royalties Directive, whereby a “Member State” means “a Member State of the European Communities”. We know this is no longer applicable to UK-resident companies in receipt of royalties from an Irish company – therefore companies must rely on s242A TCA 1997. There are certain conditions to be satisfied to avail of the withholding tax exemption under s242A TCA 1997.

Notwithstanding the above, royalty payments made by an Irish company to a UK company can be made free from withholding tax under the treaty. The same treaty concerns as above arise where other EU countries make royalty payments to the UK. There may be an obligation for the EU company to withhold tax on those royalty payments to the UK.

Limitation of benefits

As the UK is no longer part of the EU, the LOB provisions in certain US treaties providing for relief (subject to meeting the base erosion test) for certain treaty-based residents 95% owned by seven or fewer EU or North American Free Trade Agreement persons needs to be considered further. Similarly, where businesses were relying on the "equivalent beneficiary" measures in the LOB provisions to access the benefit of the US treaty, this also needs to be considered, as post-Brexit, UK companies are no longer '"equivalent beneficiaries". This may result in increased withholding tax costs or a denial of treaty relief claims on intra-group flows for corporate groups.

Many UK multinationals have EU subsidiaries that would have claimed benefits under a US treaty as they previously qualified under the LOB clause by virtue of the fact that the group is headed by a UK-listed multinational. Impacted structures include UK groups' financing companies (e.g. in Luxembourg) and other EU IP hubs or holding companies.

To help mitigate some of the impact of Brexit, the US Internal Revenue Service published the text of a joint agreement between the competent authorities of the UK and the US, which states that, for the UK–US treaty, a company resident in the UK continues to be a "resident of a Member State of the European Community" for the purposes of the definition of an "equivalent beneficiary". However, this applies only to the UK–US treaty, and therefore the withholding issue for some groups related to the LOB provisions in certain other US treaties (e.g. US–Luxembourg) as a result of UK-resident companies no longer being "equivalent beneficiaries" post-Brexit remains.

Conclusion

Although Brexit gives the UK greater flexibility and control over its own tax regime, it also presents challenges and additional considerations where a UK company sits in an EU corporate group structure. From a direct tax perspective, additional consideration and due diligence must be undertaken to minimise the potential impact of a UK company in such a structure.

Groups may also decide to consider alternatives whereby they take steps to separate the UK company to the extent possible or even look to avail of the group reorganisation reliefs/ exemptions to restructure into a more tax-efficient structure. Although businesses have, understandably, been largely focussed on the VAT and customs aspects of Brexit, if advice has not been taken to date on the direct tax impact, it may be now an opportune time for this to be considered.

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Residential Zoned Land Tax: Under the Legal Lens

Introduction

As part of the Government's Housing for All strategy unveiled in September 2021 a new residential zoned land tax (ZLT) was introduced by the Finance Act 2021[1] with the objective of encouraging the development of relevant zoned land. This article examines ZLT and considers its potential impact on property owners and developers.

What Land Will Be Subject to ZLT?

A "relevant site" to which ZLT is to apply is a site identified by the local authority as suitable

1 Section 80 Finance Act 2021 inserts a new Part 22A "Residential Zoned Land Tax" into the Taxes Consolidation Act 1997.

for residential development in accordance with specific criteria set out in the legislation and, importantly, one that is not already in use or suitable for use as a dwelling and to which local property tax (LPT) applies.

Relevant sites open to identification by local authorities as chargeable to ZLT will be land that is zoned either solely or primarily for residential use or for a mixture of uses including residential and that it is reasonable to consider is (a) serviced or has access to services and (b) not physically affected by anything that would preclude the provision of housing on it.

Land that comes within the following descriptions is expressly excluded:

- land that, although zoned residential, is used (in compliance with planning) to carry on a trade or profession by a business that is liable to pay commercial rates and that provides services to residents of adjacent residential areas;
- land that is required for, or occupied by, other uses such as social, community or governmental infrastructure – including education and healthcare facilities; facilities used for the purposes of public administration; transport facilities and infrastructure; utilities, energy and telecommunications infrastructure and facilities; water and wastewater infrastructure and facilities; waste management and disposal infrastructure; and recreational infrastructure, including sports facilities and playgrounds;
- land that is subject to a statutory designation that may preclude development; and
- land in respect of which the derelict sites levy is payable.

Land that is zoned for mixed-use purposes including residential will also not be identified by local authorities as a relevant site for ZLT unless it is reasonable to consider that the land is vacant or idle (meaning not required for, or integral to, the operation of a trade or profession being carried out, in compliance with planning, on, or adjacent to, the land). Also, where non-residential development commences on a site zoned suitable for mixed-use purposes including residential, the part of the site that is being developed for non-residential purposes is no longer a relevant site.

Local authorities are tasked initially with identifying relevant sites by 1 December 2023 in accordance with the detailed procedures set out in the legislation and then producing revised maps annually on and from 31 January 2025. For the initial process of identification, those procedures include publication of first draft maps by 1 November 2022, with supplemental draft maps to be published by 1 May 2023, culminating in final maps to be published no later than 1 December 2023.

Opportunities exist (a) to have sites excluded (i) on the basis that they do not meet the relevant criteria or (ii), for the initial process of identification only, that the lands should be rezoned, and (b) to amend the date on which the site satisfied the relevant criteria – but these opportunities are limited and are exercisable only in accordance with strict timelines set out in the legislation. Affected landowners have a window of two months from the designated publication date of the draft maps at each of the two initial stages to make submissions and ultimately a further right of appeal to An Bord Pleanála.

Notably, local authorities are required to make the maps available on their websites and at their offices and to publicise their availability in one or more newspapers but are not required to notify affected individuals personally.

Who Will Be Liable for ZLT and the Obligations Under the Legislation?

Each "owner" in respect of a relevant site will be entitled to make submissions and appeals in respect of the identification of the relevant site by the local authority and must also register as owner of the site.

Importantly, "owner" is widely defined to include not just the registered owner or any person (other than a mortgagee not in possession) entitled to receive a "rack rent" (being a market rent) in respect of the land, as might be expected, but also a "person who holds any estate, interest or right in accordance with which that person may carry out development on or to the land". This will include developers with contractual rights to develop the land.

Where more than one person is considered an "owner" under the legislation, each has an obligation to register and to submit a return, and they are held under the legislation to be jointly and severally liable for the tax. However, the obligation to submit the return may be satisfied by one of the liable persons identified to be the "designated liable person" for that purpose in accordance with the legislation.

Although residential property subject to LPT falls outside the charge to ZLT, owners of residential property identified as a relevant site for ZLT and having a curtilage greater than 0.4047 hectares (i.e. 1 acre) must register their ownership of the additional curtilage. The purpose of this registration is not entirely clear, given that owners of those lands are not otherwise "liable persons" obliged to file returns or comply with any other aspect of the legislation as currently enacted.

How Is ZLT To Be Applied?

ZLT will be charged at a rate of 3% of the market value of the relevant site on the valuation date set by the legislation. In the year in which the ZLT first applies to a liable person in respect of the relevant site, the valuation date will be the same as the liability date (i.e. 1 February of that year). That valuation date remains relevant for three years before a new valuation is required on 1 February of the fourth year.

All relevant sites that are included on the final map published by each local authority on 1 December 2023 (and that met the relevant criteria for identification on 1 January 2022) will be chargeable to ZLT for 2024 on 1 February 2024. As above, each local authority will produce a revised map by 31 January in 2025 and each following year (with 1 February being the annual liability date). Where a site becomes a relevant site after 1 January 2022, it will be chargeable for each year beginning with the third year following the year in which it becomes a relevant site. This means that there is an effective two-year lead-in time from identification as a relevant site to ZLT's taking effect.

Much like LPT, ZLT is a self-assessed tax, with responsibility placed on affected owners to register with the Revenue Commissioners and to prepare and deliver returns, along with a self-assessment of liability, to Revenue. Annual returns must be made and the ZLT paid on or before 23 May (being the annual return date) in the year for which it is charged.

Surcharges and interest will apply for non-compliance, including late payment, failure to file a return on time or at all, and undervaluation of the market value of the land. **Any sums due that remain unpaid after they are due and owing operate as a charge on the land.**

Abatement, Deferral and Repayment

Once the site is included on the final map settled by the local authority and the obligations to file annual returns and make payments commence, in principle the obligations continue until construction of residential units on the relevant site is completed. Where only part of a relevant site is developed, it is treated as two separate relevant sites for ZLT once planning permission is obtained for the part.

The trigger for release of a relevant site from ZLT obligations is the lodgement with the Building Control Authority of a certificate of compliance on completion in accordance with building control legislation. In the meantime and until the certificate of compliance on completion is lodged, the annual returns may include applications for deferral or abatement in certain circumstances, including if a process in connection with any permitted submission or appeal or in respect of the inclusion of the site as a relevant site has not formally concluded or if a relevant site cannot be developed due to its physical condition.

Importantly, a liable person can also apply to defer the ZLT payable on a relevant site once planning permission is granted for its development and a commencement notice for the development is lodged. The right to a deferral ceases, however, if before a certificate of compliance on completion is lodged with the Building Control Authority one of the following occurs: (a) works on the relevant site permanently cease, (b) the planning permission granted in respect of the development expires or (c) the relevant site is sold or transferred.

Where the conditions for a deferral cease to apply in a way that triggers a payment of the tax, the return must be amended and the tax paid.

Where development cannot be commenced because planning permission granted in respect of the relevant site is under appeal or is subject to judicial review that is undetermined at a liability date and a relevant appeal is determined in favour of the liable person such that development can commence, the liable person can apply for a repayment of all ZLT paid from the date on which the appeal was made to the date on which the grant of planning permission was upheld. Where an appeal has not been determined by the next return date, the liable person may include in their return a claim to defer payment of the ZLT due on the site in respect of which the grant of planning permission has been appealed. This deferral may continue until the appeal is determined, and if:

- the appeal upholds the grant of planning permission, ZLT so deferred is no longer due and payable;
- the appeal overturns the grant of planning permission, the liable person must amend the returns in which a deferral was claimed and pay any ZLT and interest due;
- the owner sells the property before the appeal is determined, the liable person must amend each return in which such claim was made and pay any tax and interest due accordingly.

Once a certificate of compliance on completion is lodged with the Building Control Authority, an application can also be made for repayment of any ZLT overpaid in respect of the site.

Treatment of ZLT on Sales and Transactions

A liable person who intends to sell a relevant site must file a return in the prescribed form with the Revenue Commissioners before the sale completes and pay all tax and interest due. Notably, a "sale" is where a relevant site is transferred from the liable person to another person, including:

- as a result of, or as a result of the giving of notice of intention to exercise, a compulsory purchase order;
- where a site is transferred for less than market value; and
- where a lease is entered into for more than 35 years or indefinitely.

The Revenue Commissioners are required to provide the liable person, or a person acting on their behalf, with confirmation of any unpaid ZLT, interest or penalties due in respect of a relevant site or confirmation that there are no amounts outstanding. Given the requirement for ZLT to be paid before a sale completes, irrespective of any deferrals in effect up to then, the latter confirmation will be the one expected to be delivered on completion of the sale of a relevant site, and the new owner must register and comply from commencement of ownership.

Conclusion

Despite the 40-odd pages of detailed legislative provisions, ZLT is based on some simple concepts, including, at its heart, that owners and others with development rights in respect of any lands zoned for residential development must either take steps to develop it or pay to leave it undeveloped. It applies to a wider category of land and with much less scope for exemption than the much criticised vacant site levy that it is set to replace. But whether such a simple approach can be applied to the complex art of housing development to achieve the intended output of an increase in built units remains to be seen.

Although we might expect that, in framing this new regime, learnings had to be taken from the almost universally perceived failure of the vacant site levy, much more stands in the way of achieving built residential units than the landowner's desire to build. Availability of labour and materials, the costs of both allowing for a viable development, the regulatory and procedural difficulties in achieving satisfactory planning permission, and the increased pressures brought by economic and geopolitical events entirely outside of a landowner's control are all key factors, none of which are recognised by the ZLT regime. The regime may struggle to overcome these practical difficulties.

However, with the legislation in force, owners and others with development rights in respect of residential-zoned lands, whether primarily or partly, must now take note of how ZLT is to operate and their rights and obligations under the legislation and should be ready to review and take appropriate steps in relation to the inclusion of their lands on the draft plans that become available on or before 1 November 2022. In keeping with the simplicity of the ZLT approach, the options available for consideration will be to:

- sell the lands,
- pursue rezoning or
- implement plans to develop.

If lands are ultimately included on the final maps published by the local authority on 1 December 2023 without any of the options above having been taken, owners and others with development rights will need to be prepared to pay the annual 3% charge and comply with all associated ZLT obligations.

Important dates	
Initial draft maps by local authorities	**1 November 2022**
Submissions on initial draft maps	**1 January 2023**
Submissions published	**11 January 2023**
Submissions assessed and responded to	**1 April 2023**
Local authority response can be appealed to An Bord Pleanála	**1 May 2023**
Supplemental maps by local authorities	**1 May 2023**
Submissions on supplemental maps	**1 June 2023**
Submissions on supplemental maps published	**11 June 2023**
Submissions assessed and responded to	**1 August 2023**
Response can be appealed to An Bord Pleanála	**1 September 2023**
Final maps published	**1 December 2023**
Annual revised maps	**31 January from 2025**
Annual "liability date"	**1 February in each chargeable year**
Annual "return date"	**23 May in each chargeable year**
Valuation date	**1 February in initial chargeable year and every third 1 February after that**

This article has been prepared by McCann FitzGerald LLP for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed.

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The Tax Appeal Process

Introduction

Over my five years in the Tax Appeals Commission (TAC) I have developed an appreciation of the assortment of tax issues and the difficulties faced by practitioners. In this article I share my practical experiences that will hopefully assist practitioners in taking an appeal before the TAC.

Overview

The failure to resolve tax disputes with Revenue is invariably the primary reason for appealing an assessment. Therefore, for many practitioners, an appeal hearing is the next, and often the last, stage in the conclusion of a tax dispute.

From the 600 tax appeal hearings before the TAC, only three have been overturned by the High Court, one being a tax-avoidance case that is currently under appeal to the Court of Appeal. Therefore, all necessary care and resources should be devoted to the preparation of a hearing before the TAC. Furthermore, in most cases, an appeal of a decision to the High Court can be made only on a point of law, and therefore all evidence should be ventilated at a hearing as it is not possible to introduce any new evidence after the TAC has heard the appeal.

The statutorily prescribed 30-day time limit for appealing an assessment should be firmly on the practitioner's radar, as the ramifications of a late appeal are more onerous. Failure to state the precise grounds of appeal in the appeal notice has also caused difficulties for several practitioners, as in many cases it is not possible to rely on an unstated ground at the hearing. Unfortunately, several negligence claims have been made against practitioners on grounds of the lost opportunity of presenting an argument beneficial to the taxpayer's case.

There has been a significant decrease in the number of marketed tax-avoidance-type cases, as most of those cases have now been determined by the TAC and therefore the majority of the substantial tax disputes relate to factual disagreements and statutory interpretation. There are also a significant number of appeals relating to repayment claims and vehicle registration tax issues, which also require a written determination and publication thereafter. The incidence of case stated applications in respect of those types of appeals is negligible.

The judgment of the Court of Justice of the European Union in *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission* C-378/17 confirmed that tribunals such as the TAC possess the jurisdiction to consider and give full effect to a taxpayer's rights under EU law by disapplying any contravening domestic laws. Although, there have been initial objections from Revenue, there now appears to be tacit acceptance that the TAC enjoys full jurisdiction in the implementation of the provisions of EU law, and as a consequence the number of tax appeals concerning purported breaches of EU law is increasing.

Pre-hearing

Over my time at the TAC I have presided over several hundred case management conferences (CMCs), a forum that has been beneficial not only in addressing the issues but also in providing the parties with the opportunity to resolve the dispute before an independent and objective tribunal. A CMC is an informal process where the Commissioner and the representatives of both sides identify the matters in dispute, the possibility of settlement or – in the absence of a settlement – the documents and submissions to be presented at the hearing, and agreements on the exchange of those documents between the parties. Therefore the CMC process also limits any confusion about the parties' submissions and ensures that the hearing runs smoothly.

Appeal Preparation

Facts are the foundation stone of any case, and they can be varied as well as many. Therefore a fundamental principle of any adversarial hearing is the giving of evidence. However, there have been several incidences where the requisite evidence has not been adduced, and therefore a taxpayer's opportunity for success was reduced. As a consequence, I have regularly impressed on practitioners the importance of adducing all necessary evidence, as "it is not what you know but what you can prove". To this extent, I invariably recommend, usually at a CMC, that witness statements be prepared in advance.

The benefits of preparing a witness statement are:

- all essential facts that require proof are addressed;
- the risk of not disclosing relevant evidence is reduced, as in most cases there is no second opportunity to present evidence;
- the strengths and weaknesses of the case are clearly identifiable;
- challenges on leading questions are reduced;
- the Commissioner is made fully aware of all relevant facts; and
- the risk of initiating judicial review proceedings is reduced in the event that a Commissioner fails to take important evidence into consideration.

Submissions

Submissions should be drafted in the same format as the determinations issued by the TAC, and therefore the following structure should be adhered to:

Issues

Provide a brief background to the appeal and the parties' respective positions.

Evidence

Ensure that all evidence is or will be adduced at the hearing. If the matters are not in dispute, a detailed factual background should be set out in the pre-hearing submission. If evidence is in dispute, make reference to that evidence, which will be confirmed by the summoned witnesses. At the hearing Revenue will obviously seek to challenge that evidence in cross-examination or provide its own evidence. Correspondingly, a taxpayer is entitled to cross-examine any witness appearing on behalf of Revenue.

Law

Set out the relevant law applicable to the facts given in evidence.

Application

The cornerstone of the submission involves the application of the law to the facts in the justification of the position adopted by the taxpayer. The submissions should also seek to challenge Revenue's interpretation of the facts and law. Furthermore, although all of the Appeal Commissioners were legal practitioners, some may have more tax experience than others. Therefore it is important that submissions be detailed and comprehensive.

Conclusion

Finally, the submission should conclude with the specific reasons why the assessment should be reduced or abated.

In seeking to promote their client's arguments, some practitioners include questionable submissions that, paradoxically, have the effect of undermining the legitimate arguments and thereby diminish the Commissioner's perception of the merits of all of the presented arguments. Therefore irrelevant or fundamentally flawed submissions are counterproductive and should be avoided.

Although the tax appeals process is governed by statute and not equity, highlighting a tax inequity certainly does not do any harm.

Hearings

Other than the general tax-avoidance-type appeals and in cases of fraud or neglect in the completion of tax returns, the burden of proof is on the taxpayer to satisfy the Commissioner that the assessment, opinion or decision of Revenue is incorrect. The taxpayer presents his or her case first; Revenue responds, with the taxpayer having the last word in the right of reply. Therefore if the taxpayer satisfies the burden of proof in a tax appeal, the burden of justifying the assessment falls on Revenue. It is also extremely relevant that in a tax appeal the Appeal Commissioners, pursuant to the Finance (Tax Appeals) Act 2015 s6(4):

> *"shall perform their functions in a manner that has regard to the need for proceedings before the Commissioners –*
>
> *(a) to be accessible and fair, and*
>
> *(b) to be conducted as expeditiously as possible".*

Therefore, based on the evidence adduced and the application of the law to that evidence, the taxpayer's obligation to satisfy the Commissioner to reduce or abate an assessment should not be that onerous. Furthermore, at most hearings, the taxpayer holds the tactical advantage in having the last word.

A common characteristic of practitioners who appear very regularly in Tax Appeals is their focus on the statutory provisions in dispute. However, this is an area of the hearing process that is sometimes overlooked by a high number of practitioners. Whilst TAC's role is to determine the appeal based on the facts presented in evidence, the statutory basis for the appeal must be outlined also as this is an integral part of the Appeal.

Si Vis Pacem, Para Bellum

The decision of Revenue to defend its assessments or decisions before the Appeal Commissioners has not always been successful, but in many cases there can be no criticism of the merits of Revenue's challenges. Although there have been cases where Revenue has sought a clarification of the law from an independent body, there have been a number of occasions when the decision to defend an assessment or decision brings into question Revenue's pragmatism. Therefore, in my opinion, the road to a successful outcome for a taxpayer can be long, arduous and expensive, but as I was reminded by a seasoned practitioner, *si vis pacem, para bellum* – if you want peace, prepare for war.

Commissioner's Decisions

The substantial time spent and research undertaken by practitioners in the drafting and subsequent articulation of submissions provides useful assistance to the TAC in the making of the determinations. In some of the TAC's determinations an overview of the submissions is set out in the determination, with the appropriate conclusions derived therefrom. However, the decision to synopsise submissions deprives other practitioners of the benefit associated with research and the possible diverse interpretations of the statute presented at a hearing. Therefore, in the interests of an efficient tax appeals process, determinations should also include the detailed submissions of the parties.

Case Stated

The request for a case stated application must be lodged with the TAC within 21 days from the date of the determination. Although the grounds of appeal must be based on a point of law, there are circumstances where the failure of a Commissioner to consider evidence can be regarded as a point of law.

As with the drafting of the notice of appeal, care is required when requesting a case stated of a TAC determination to the High Court, as no new ground can be introduced in the High Court if it is not contained in the initial case stated request.

Of the 32 cases that I have stated and signed for the opinion of the High Court, only three have proceeded to a hearing, with a further four waiting to be heard. In all of those cases it was not possible to get the parties to agree on the questions to be asked of the High Court or, indeed, the type of documents to be included as part of the case stated. It may therefore be time for a reconsideration of the case stated process whereby the aggrieved party appeals a TAC determination directly to the High Court.

Judicial Review

Judicial review involves a consideration by the High Court of how a public body made its decision. The High Court is not concerned with the fairness or merits of the decision itself but with the decision-making process and whether proper procedures were followed in coming to the decision. Therefore judicial review is not an appeal process, and the High Court does not substitute its opinion for that of the original decision maker. Furthermore, any procedural appeals of a particular decision must be exhausted before initiating a judicial review action.

Judicial review proceedings have been initiated against the TAC on several occasions, with grounds including:

- the refusal to state and sign a case stated;
- the decision to state and sign a case stated where there has been no manifest error in law;
- the failure to have provided a party with an opportunity to address an issue that was in a determination;
- the failure to observe procedural rights and entitlements; and
- the refusal to allow a party's question of law to be considered by the High Court.

The Future

There are now three full-time Appeal Commissioners and five Commissioners on four -year contracts. With the increasing number of scheduled hearings, many appeals will address similar – or, indeed identical – issues. Therefore it is important not for only for all parties to the appeal process but also in the interest of the integrity of the TAC, an expert tribunal, that there is consistency in the decision making.

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Arbitration in International Tax Dispute Resolution

Introduction

Effective dispute resolution is necessary to avoid taxpayers being faced with prolonged uncertainty in international tax disputes and the costs that arise from double taxation. The issue continues to be high on the international tax reform agenda and was a focus of the OECD BEPS measures under Action 14.

Effective dispute resolution is an important topic as international tax disputes are on the rise. The latest OECD statistics (published in November 2021) relating to Inclusive Framework members show a marked increase in mutual agreement procedure (MAP) proceedings between 2016 and 2020. This trend is not surprising given the many and rapid changes in the international tax environment, including the OECD BEPS measures, EU Anti-Tax-Avoidance Directives and increased domestic legislation, all of which lead to increased complexity and unavoidable tax uncertainty.

Problems with the Mutual Agreement Procedure

The MAP under double taxation treaties is one means to resolve international disputes. It is the procedure that allows the competent authorities of the relevant tax treaty states to engage with each other to resolve the dispute. It principally addresses two areas of tax dispute: cases where a taxpayer considers taxation arises that is not in accordance with a relevant tax treaty and cases where there is disagreement or uncertainty in relation to the correct application or meaning of a tax treaty.

The common form of MAP in tax treaties is that provided for by Article 25 of the OECD Model Tax Convention. However, the obligation on the competent authorities of the contracting states under Article 25 is only that they shall "endeavour" to resolve the case. The absence of a mechanism to compel competent authorities to reach an agreement, together with there being no time limit imposed under Article 25 for the competent authorities to conclude a MAP, creates an obstacle to ensuring an effective MAP for taxpayers.

This lack of means in tax treaties to reach a final resolution can lead to delays in dispute cases and, in some instances, no resolution at all. A way to address this problem is to provide for mandatory arbitration in some manner. It should be borne in mind that mandatory binding arbitration is an integral part of MAP, not an alternative to it, and it is a last resort, to be used only when cases have been left unresolved by a previous MAP attempt.

OECD Measures to Address Problems with MAP

Arbitration in the OECD Model Convention

Both the OECD and the EU have endorsed mandatory binding arbitration as the means to achieving an effective MAP, in order to guarantee resolution of cases submitted to MAP and so to enhance certainty and efficiency in tax dispute resolution. Since the 2008 update of the OECD Model Tax Convention, Article 25 includes a mandatory arbitration clause (at para. 5), under which at the request of the taxpayer the matter must go to arbitration if the MAP under Article 25 has been initiated and not completed within the prescribed timeframe.

However, there has been limited adoption of Article 25(5) in tax treaties generally. Before the adoption of the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent BEPS (the MLI), MAP arbitration provisions were included in only five of Ireland's tax treaties (Israel, Mexico, the Netherlands, Switzerland and the US). Even then, those provisions were not mandatory, in that they required agreement by both contracting states and the taxpayer for the case to go to arbitration.

A reason cited for the reluctance of countries to adopt mandatory arbitration is that many countries have concerns about surrendering their fiscal sovereignty to an arbitration panel. The OECD has recognised that for some countries "national law, policy or administrative considerations may not allow or justify the type of resolution envisaged under [para. 5]". Other reasons why countries are hesitant to adopt mandatory arbitration include a view that there are insufficient numbers of unresolved MAP cases to justify it, a lack of experience in tax arbitration, a lack of confidence in the impartiality of the arbitrators, and potential higher costs and potential losses in revenue.

Arbitration in the Multilateral Instrument

The issue of limited adoption of tax treaty mandatory arbitration is sought to be addressed by Action 14 of the OECD BEPS Action Plan, "Making Dispute Resolution Mechanisms More Effective", in that countries have the option to import mandatory binding arbitration provisions into their existing tax treaties by way of the MLI. Broadly, the MLI is a multilateral treaty that allows countries to quickly modify their existing tax treaties to give effect to the OECD BEPS recommendations. For the MLI to modify a tax treaty, both treaty partners concerned must have signed and ratified the MLI and identified those tax treaties that are to be covered by the MLI. For the MLI arbitration provision to apply, both countries must have chosen to opt in to that provision, but depending on the reservations made by the countries concerned, the exact form of this arbitration may differ from one MLI-covered tax treaty to another.

Article 19 of the MLI sets out the mandatory binding arbitration provision and is similar to Article 25(5) of the OECD Model Tax Convention in that the case must go to arbitration if the taxpayer so requests. The taxpayer concerned may request the initiation of the arbitration process only if the competent authorities are unable to reach agreement to resolve the case within the relevant time period, which is usually two years.

Where a taxpayer has requested arbitration, the case is considered by an arbitration panel. The panel comprises three members with experience in international tax matters, and they must be impartial and independent. Each competent authority appoints one member, and the two members then appoint a third member, who must not be a national or resident of either contracting state and who acts as the chair.

Default Arbitration Procedure – "Baseball Arbitration"

The MLI provides for "baseball arbitration" as the default arbitration procedure. That approach is so called because it is used to resolve salary disputes involving US Major League Baseball players. Under this approach, each competent authority submits a proposed resolution, and it may also submit a supporting position paper. Each competent authority may submit a reply submission. The arbitration panel then selects one of the proposed resolutions. No reason is to be given by the panel for its decision. This "either/or" approach should encourage the competent authorities to adopt reasonable positions, avoid the arbitration panel taking a "split the difference" approach, and provide for an efficient and timely resolution as the arbitration panel does not have to arrive at its own independent decision. The decision is arrived at by way of simple majority; it is delivered in writing and has no precedential value.

This default baseball arbitration approach has certain drawbacks. Although it is suited to the likes of transfer pricing disputes where the determination of the correct transfer price is at issue, it is not suited to cases where the exact monetary value is not the main issue, such as where the interpretation of a particular tax treaty provision is key. Countries opting in to MLI mandatory arbitration can make a reservation to have the arbitration decision by way of a reasoned opinion of the panel, adopted by majority decision. If both contracting states have not made such reservation, the competent authorities "shall endeavour to reach agreement on the type of arbitration process". In that case the MLI mandatory binding arbitration does not apply until agreement is reached.

This alternative independent opinion approach allows the arbitration panel to play a greater role than under the baseball approach. To arrive at their own independent decision, the arbitrators are required to interpret the relevant laws and treaty provisions and apply them to the facts of the case that they have determined. The panel is not restricted in reaching its decision and is not limited to choosing one of the positions put forward by the contracting states.

EU Measures to Facilitate Dispute Resolution

Transfer Pricing – the EU Arbitration Convention

Originally, the main EU measure providing for a process of international tax dispute resolution was the Arbitration Convention (Convention 90/436/EEC), which came into force in 1995. The scope of the Convention is limited in that aims to provide for a dispute resolution procedure for transfer pricing and permanent establishment profit attribution disputes.

The Arbitration Convention includes an arbitration process, but the operation in practice of that process has been limited. The latest EU statistics reference only one case in arbitration at the end of 2019, with 42 cases to be sent to arbitration. It is understood that since the Arbitration Convention entered into force in 1995 there has only been one decided arbitration (see Jonathan Schwarz, *Schwarz on Tax Treaties* (Alphen aan den Rijn: Kluwer Law International, 6th ed., 2021), at 21.12).

Despite this, the Arbitration Convention arguably facilitates the resolution of transfer pricing disputes by way of deterrent effect, as competent authorities may be encouraged to reach agreement under the Convention MAP process to avoid unwanted arbitration.

Intra-EU Disputes – the EU Tax Dispute Directive

In the case of intra-EU tax disputes only, a dispute resolution process may be available under the EU Directive on Tax Dispute Resolution Mechanisms (2017/1852) (EU TDRM), implemented in Ireland by way of the European Union (Tax Dispute Resolution Mechanisms) Regulations 2019 (SI 306 of 2019) and the European Union (Tax Dispute Resolution Mechanisms) (Amendment) Regulations 2020 (SI 673 of 2020) (together, "the Regulations"). The Regulations came into force on 1 July 2019 and apply to disputes arising in tax years starting on or after 1 January 2018 (but the relevant competent authorities may agree to apply the Regulations to earlier cases).

Given its fairly recent introduction, use of MAP under the EU TDRM has been limited. European Commission statistics (from February 2022) state that there was only one open case at the start of 2020 and that during 2020 there were no MAP decisions and only eight complaints were accepted to MAP. There were no open cases at arbitration under the EU TDRM in 2020.

The framework provided for by the EU TDRM and the Regulations is broader than that of the Arbitration Convention in that it covers disputes that arise from "the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital". The EU TDRM and the Regulations provide for mandatory arbitration where so requested by the taxpayer concerned in certain instances. They set out timeframes for the arbitration process and provide for referral to the national courts to allow the process to progress where necessary.

The composition of the arbitration panel under the Regulations differs from that under the MLI procedure. Under the Regulations the default composition of the arbitration panel, termed the "Advisory Commission", is generally composed of five members: a representative and an independent person of standing appointed by each competent authority, and one chair.

The Regulations provide for a set timeframe under which the arbitration process is to progress. The request by the taxpayer concerned for the establishment of the Advisory Commission must be made generally within 50 days of receipt by the taxpayer of notification by the Revenue Commissioners of a failure to resolve the question in dispute by agreement. The Advisory Commission must be set up within 120 days of the taxpayer's request. If the Advisory Commission is not set up within that time limit, the taxpayer may apply to the High Court to set up the Advisory Commission. The Advisory Commission must deliver its decision within six months of the matters being referred to it, and the competent authorities must then act within six months in accordance with the Advisory Commission's decision, unless they both reach an alternative agreement in that timeframe.

The Default Arbitration Approach – Independent Opinion Process

Unlike the default baseball arbitration procedure under the MLI, the Advisory Commission must reach its decision by way of an independent opinion process. The Regulations also provide that the competent authorities can agree to set up an Alternative Dispute Resolution Commission in a form agreed between the competent authorities, which may take the form of a permanent body. The competent authorities may agree that the Alternative Dispute Resolution Commission may apply a dispute resolution process other than the independent opinion process, including baseball arbitration.

In both instances, the panel's decision is binding only where the competent authorities do not reach an alternative decision and where the taxpayer agrees to accept the decision. The final decision has no precedential value.

Conclusion

The problem of ensuring a conclusion under the MAP process has been addressed to a degree by the mandatory arbitration provision in the MLI and in the EU TDRM and implementing Regulations. This fix is somewhat limited in that the EU TDRM is available only in respect of intra-EU disputes. Given its recent introduction, it is only now beginning to be utilised. Although the MLI arbitration provision provides a ready way for countries to introduce mandatory arbitration into their tax treaties, there has been limited opt-in by countries to this provision.

Effective dispute resolution, including arbitration, in international tax disputes will continue to be on the international tax reform agenda, and the effectiveness of the EU TDRM is required to be evaluated by the European Commission before 30 June 2025. The need for effective dispute resolution will only grow stronger, with the complexity of disputes expected to escalate as tax measures increase and become more involved and as tax authorities increasingly focus their attention on cross-border tax issues.

News and Moves

Record number of new Partners at PwC

PwC Ireland is delighted to announce the admission of fifteen new Partners, a record number for the Firm. The new tax partners are:

Pictured with Feargal O'Rourke, PwC Ireland Managing Partner (centre), are PwC's new Partners: Sitting (L-R): Aidan Lucey, Mairead Harbron and Paul Martin. Standing (L-R): Marie-Louise Gallagher, James McMenamin, Ciaran Cunningham, Thomas Sheerin, Seán Martin, Danielle Cunniffe, Darrelle Dolan, Robert Costello, John Dwyer, Ally McCaffrey, Áine Brassill, Leonard McAuliffe and Kieran Little.

Danielle Cunniffe becomes a **Tax** Partner leading the firm's Tax Risk & Controversy practice, advising clients on tax appeals and disputes across all sectors. Danielle has over 23 years' experience working in tax, assisting clients in preventing, managing and resolving a wide range of domestic and international tax issues and disputes. Danielle is a member of PwC Global Tax Controversy and Dispute Resolution Network, a member of Chartered Accountants Ireland, an Associate of the Irish Tax Institute and a qualified Barrister. She formerly worked in Revenue's Large Cases Division for over 8 years.

Mairead Harbron becomes a **Tax** Partner in the firm's Private Client Services practice. Mairead has 15 years' experience advising Irish and international high net worth individuals, owner-managed businesses, law firms and partnerships in relation to personal tax matters, succession planning, management incentivisation, structuring ownership of investments and property transactions. She has international private client experience, having spent a year on secondment in PwC Melbourne. Mairead is a fellow of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

Aidan Lucey becomes a **Tax** Partner in PwC's Tax Risk & Controversy practice, leading the firm's Tax Risk and Revenue interventions offering having more than 15 years' experience. Aidan also works with organisations to proactively manage their tax risk through the development and ongoing testing of their tax governance and control framework. Aidan sits on Revenue's Tax Administration Liaison Audit Sub-Committee, where he engages with Revenue on audit and compliance policy matters. Aidan is an Associate of the Irish Tax Institute.

Ally McCaffrey becomes a **Tax** Partner in the firm's Transfer Pricing (TP) practice. With 14 years' experience, including time spent in PwC Chicago, Ally advises multinational companies predominantly in the technology and pharmaceutical life science sectors and primarily on international TP structuring opportunities, managing TP controversy and domestic and international TP compliance requirements. Ally has also been involved in developing various technological analytical tools to assist clients gain better insights from their data. Ally is an Associate of the Irish Tax Institute.

Thomas Sheerin becomes a **Tax** Partner in the firm's Foreign Direct Investment practice. Thomas has 18 years' experience working with US multinational companies, predominantly in the technology sector. He works with clients on all aspects of their business, including mergers and acquisitions, financing, internal reorganisations, tax governance and reporting. Thomas is a member of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

New Partners in Tax & Legal, Deloitte

Pictured: Emmanuel Adeleke, Consulting; Ian Prenty, Tax & Legal; Michelle Byrne, Audit & Assurance; Jim Meegan, Audit & Assurance; Conor Walsh, Tax & Legal; Anlo Taylor, Risk Advisory; Geraldine McCann, Tax & Legal; Harry Goddard, CEO; Karen Goggin, Audit & Assurance; Seamus Kennedy, Tax & Legal; Claire Dowling, Consulting; John Perry, Tax & Legal; Martin Mannion, Consulting; Kieran O'Neill, Consulting; and Ian Whitefoot, Audit & Assurance

Deloitte Ireland has appointed 14 new partners across its business, following strong growth in all service lines throughout 2021, including five new partners in Tax & Legal. The appointment of five female partners brings the proportion of female partners in the firm to 28% and puts Deloitte on track to achieve 35% female partnership by 2025.

Séamus Kennedy has over 15 years' experience advising top global investment managers, banks and structured finance promoters. He advises on international tax considerations relevant to the establishment and maintenance of Irish financial services companies and investment funds.

Séamus has lectured with the Institute of Bankers, is Chair of the Irish Funds Domestic Tax Working Group and sits on its Tax Steering Group.

Geraldine McCann has over 18 years of corporate and international tax experience. She is expert in advising on tax planning and compliance and international tax issues; structuring inbound and outbound investments; and advising on tax-efficient Intellectual Property structures. She has also led the tax audit of a FTSE 500 company.

Geraldine was previously seconded to Deloitte Canada's international tax team.

John Perry is Head of Business Process Solutions (BPS), a member of Deloitte's EMEA BPS executive, Global BPS Client and Industries group and global aviation group. With over 20 years' experience, he has participated in the committees of Irish Funds and the Irish Debt Securities Association and is a member of ISTAT.

John is a Fellow of Chartered Accountants Ireland, a Chartered Tax Adviser and has a MSc in Aviation Finance from UCD's Graduate Business School. He has been an Assistant Professor at DCU and a member of the Adjunct Faculty at UCD.

Ian Prenty has over 16 years' experience advising clients on tax issues related to globally-mobile employees; domestic employment tax issues; and compensation and benefits issues. He has advised multinational and indigenous Irish companies with a focus on consumer business and technology, media, and telecoms.

Ian is a Fellow of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

Conor Walsh, a partner in Tax & Legal, is also engaged by the Irish Tax Institute as an independent contractor. He specialises in the provision of advice on indirect tax, particularly on tax audits, disputes, and litigation.

Conor has been involved in instructing legal counsel to represent taxpayers' interests at all levels of the Irish tax appeals system.

He is a member of the Irish Tax Institute and Chartered Institute of Taxation (UK); an Associate Chartered Accountant; and holds the Advanced Diploma in International Taxation awarded by the CIT, the UK VAT Compliance Diploma awarded by the Association of Taxation Technicians (UK), and a certificate in customs and trade awarded by Chartered Accountants Ireland.

Deloitte Ireland joins forces with leading Mid-West tax specialists Cahill Taxation Services

The acquisition – which came into effect on 1 June 2022 – grows Deloitte's Mid-West tax practice to 45 people and the local office to over 150 people.

Fergal Cahill, Principal of Cahill Taxation Services, will join Deloitte as a Tax Partner within Deloitte Private.

Pictured are Harry Goddard, CEO of Deloitte Ireland, Fergal Cahill, Principal and Founder of Cahill Taxation Services and Karen Frawley, International Tax Partner and Deloitte Limerick Head of Tax.

Deloitte Ireland has Appointed Cathal Noone as a Partner in its Tax Practice

Since 11th May 2022, Cathal had lead the global investment and innovation incentives service line, which includes Deloitte's support and advisory service on R&D tax credits, as well as broader grants and incentives.

As both an electronic engineer and a chartered accountant, Cathal brings a unique dual skillset which will complement Deloitte's existing offering.

Pictured are Lorraine Griffin, Head of Tax, Deloitte Ireland, with Cathal Noone, Partner, Deloitte Ireland and Harry Goddard, CEO, Deloitte Ireland Picture Jason Clarke.

New Tax Partner at Matheson

Tomás Bailey (CTA) advises Irish and international corporations doing business in and from Ireland on all aspects of corporate taxation. Tomás primarily advises on corporate acquisitions, reorganisations, tax structuring for inbound and outbound investment, and tax controversy. He frequently advises on Irish stamp duty matters particularly in the context of global corporate transactions and he regularly publishes articles and chapters in leading tax publications on international and domestic tax matters. Tomás is a qualified solicitor and Chartered Tax Adviser (CTA).

Padhraic Mulpeter, Chartered Tax Adviser (CTA) Joins Walkers Ireland LLP

Walkers Ireland is pleased to announce the appointment of **Padhraic Mulpeter (CTA)** to its leading tax advisory practice in Ireland.

Padhraic has more than 13 years' experience advising on Irish tax for clients and businesses looking to invest in and through Ireland. He advises across tax heads on all manner of financial services transactions, including securitisation and structured finance, banking transactions, and on the establishment of investment management platforms and real estate structures. Padhraic also has extensive experience advising clients on the tax aspects of aviation and asset financing deals.

Padhraic joins the Walkers' Tax team, which is highly ranked across legal and tax directories and is led by Walkers Ireland Managing Partner, Jonathan Sheehan.