Irish Tax Institute

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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.

Customs Update – Autumn 2022

John O'Loughlin and **Gavin Williams** guide CTAs through key areas of customs duties.

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 May 2022 and 31 July 2022 are listed.

Direct Tax Cases: Decisions from the Irish Court

Mark Ludlow

Irish High Court

» The Court of Appeal considered the self-employed vs employed (contract for services vs. contract for service) distinction *in Karshan (Midlands) Limited trading as Domino's Pizza vs Revenue Commissioners* [2022] IECA 124

» In *Revenue Commissioners v Henry Walsh* [2022] IEHC 305 the High Court heard an appeal taken by Revenue against a determination of the Tax Appeal Commission (172TACD2020) considering the issue of co-op patronage shares

» The High Court, in *Thornton v Revenue / McDermott v Revenue* [2022] IEHC 396, considered the requirements of a valid Expression of Doubt, as well as the operation of s812 TCA 1997

» In *Yesreb Holdings Limited v Revenue Commissioners* [2022] IECA 127 the Court of Appeal heard an appeal from the High Court taken by the Taxpayer. The matter concerned whether 'sub-sale relief' from stamp duty (s46 SDCA 1999) applied to a transaction.

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

» In *HMRC v BlackRock Holdco 5 LLC* [2022] UKUT 199 (TCC), the Upper Tribunal overturned the decision of the First-tier Tribunal in relation to the deductibility of interest payable on $4 billion worth of loan notes

» In *Bruce Firth and Rita Firth as the trustees of the L Batley 1984 Settlement v HMRC* [2022] UKFTT 219, the FTT had to consider whether the operation of "aparthotels" qualified for business property relief or was a business of making and holding investments

» In *Foundation Partners v HMRC* [2022] UKUT 167, the Upper Tribunal rejected the general partnership's appeal against the finding that its activities carried out in 2008-09 did not constitute a trade

» In *Ignatius Tedesco v HMRC* [2022] TC8498, the First-tier Tribunal held that the repayment of secured debt was not a deductible expense for capital gains tax purposes despite it being a condition of sale.

» In *S Kavanagh v HMRC* [2022] UKFTT 173 (TC), the First Tier Tribunal held that an individual holding 4.997% of a company was unable to access entrepreneurs' relief on the disposal of his shareholding.

- In *HMRC v Euromoney Institutional Investor plc* [2022] UKUT 205 (TCC) (29 July 2022) the Upper Tribunal affirmed the FTT's decision that share for share relief applied, as the structuring did not result in the overall arrangements having a "main purpose" of tax avoidance

CJEU Case

- The General Court of the EU cases (T-363/19 and T-456/19) has dismissed both the UK and ITV plc's applications made in respect of the European Commission's UK Controlled Foreign Company State aid decision.

International Tax Update

Louise Kelly and **Claire McCarrick** summarise recent international developments

- BEPS/OECD: Recent Developments
    - OECD has delivered a report to the G20 Finance Ministers on the implementation of the international tax reform agreement, which discussed the Pillar One revised timeline and Pillar Two latest developments.
    - Czech Presidency aims to forge agreement on Pillar Two Directive by October 2022.
    - Hungary has blocked implementation of OECD global minimum tax.
    - European Parliament has adopted Resolution in response to failure to adopt Minimum Taxation Directive.
    - HMRC has published draft legislation along with an explanatory note in respect of the UK's domestic implementation of an income inclusion rule (IIR) under the BEPS Pillar Two rules.
    - As part of the implementation of the BEPS Action 5 minimum standard on harmful tax practices the OECD/G20 Inclusive Framework agreed new conclusions on 12 preferential tax regimes and substance in "no or only nominal tax jurisdictions".
    - OECD has published updated "arbitration profiles" for 19 jurisdictions applying arbitration under part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).
- US Tax Developments
    - President Biden has signed the Inflation Reduction Act of 2022 into law.
    - US Department of Treasury has announced that the US had notified Hungary of its termination of the Convention between the Government of the United States of America and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, in force since 1979.
- UK Tax Developments
    - UK Government has published draft legislation on new transfer pricing documentation requirements.
    - HMRC has introduced draft legislation on changes to the research and development tax relief entitlement and processes.
- EU Tax Developments

    The European Commission announced a consultation on tackling the role of intermediaries (referred to as "enablers") in facilitating arrangements or schemes that lead to tax evasion and aggressive tax planning.

    The European Commission announced the release of a draft for a new Directive to address the tax-induced debt–equity bias.
- The Minister for Finance, Paschal Donohoe TD, published Ireland's Tax Treaty Policy Statement.
- The German Ministry of Finance (MOF) published the draft Bill of the Annual 2022 Tax Act.

- Luxembourg's Chamber of Commerce submitted a proposal for an additional 50% to 100% super deduction on certain research and development (R&D) costs.
- The Cyprus House of Representatives voted comprehensive transfer pricing requirements for businesses into law.
- The EU had included the HKSAR on its watchlist of non-cooperative tax jurisdictions after a review of FSIE regimes.

VAT Cases & VAT News

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

VAT Cases

- *Autoridade Tributária e Aduaneira v DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes SA* C-218/21 related to the rate of VAT applicable to the lift repair and maintenance services carried out.
- *UAB 'ARVI' ir ko v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* C-56/21 considered the interpretation of Articles 135 and 137 together with the principles of fiscal neutrality, effectiveness and proportionality in the context of opting to tax an exempt sale of property.
- *Uniqa Asigurări SA v Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor, Direcția Generală de Administrare a Marilor Contribuabili* C267/21 examined VAT on the reverse charge basis in respect of services received from partner companies.

Tax Appeals Commission Determinations

- 81TACD2022 dealt with a holding company's entitlement to input VAT recovery in respect of ongoing activities and a number of transactions.

Accounting Developments of Interest

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

Revenue Commissioner's Update

This update from Revenue includes information on the Central Register of the Beneficial Ownership of Trusts (CRBOT) and a reminder to customers to update their banking provider details held on their Revenue records.

Legal Monitor

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

Tax Appeals Commission Determinations

Tara Duggan lists of all TAC determinations published, including tax head, if case stated and key issues considered.

Tax Technology Update – Autumn 2022

John Curry covers the relevant of technology to tax and addresses the challenges faced by CTAs.

Key Tax Dates

Helen Byrne details key tax-filing dates for both companies and individuals.

Feature Articles

Interview with New Institute President, Colm Browne

Colm Browne was inaugurated as the 47th President of the Institute at the AGM on 8 September. Colm is a Tax Director with PwC and is based in PwC Limerick. He also leads PwC's Corporate Tax Compliance Centre. Before taking up his role, he spoke to the host of Tax Talk, our podcast series, Business Editor of the *Sunday Independent*, Samantha McCaughren, about his background in the tax and the challenges in the year ahead.

Congratulations on your appointment, Colm. Tell us a bit about your background in tax.

Thank you, Samantha. My background in tax is mixed in that I have work in big and small firms. I started off in PwC Dublin, trained there and qualified as a Chartered Accountant and Chartered Tax Adviser and progressed to Tax Manager.

I'm originally from Clare, and the west of Ireland roots were calling me back. So I moved to Limerick, where I worked in BDO for about two years before joining OBI, a smaller practice where I was partner for about 10 years. Then, in 2018, I rejoined PwC as Tax Director. So I've had a broad mix of work and clients in my career so far.

The experience of working in a small practice and then a very large company like PwC gives you an interesting perspective. Tell me, what's the difference between the two work environments?

Well, of course, there's more support in a larger environment. There are people to assist with things like IT and HR and all of that. If you're the partner in a smaller firm, you're responsible for a lot of support functions as well. But from a pure tax perspective, it still comes back to the fundamentals of needing to know your client, needing to understand their business. Clients expect that, and then it's about building the trust and relationship with the client, so that when they need advice, they can trust your opinion in giving that advice. That's the same whether your client is a large multinational or a small Irish indigenous business. All clients want to know they can trust the people they're working with.

One of the key issues that the Irish Tax Institute has been pursuing in recent years is the simplification of the corporation tax code. You're the lead of PwC's Centralised Corporation Tax Compliance function in Kilkenny, so you're at the coalface of the exceptional level of change that has taken place in corporation tax over recent years. What does that mean for the businesses that you're dealing with.

Yes, we have seen very significant change in global tax over the past five years between EU Directives being transposed into Irish law and the changes arising out of the OECD BEPs process, and all of this then finds its way back into the tax code. We now have a huge amount of this new legislation layered on top of already very detailed existing legislation. We want Ireland to remain competitive and to be seen as a good place to do business in terms of the tax reporting burden, but the corporate tax return has become quite lengthy at this stage. The Institute really would like to see a review of the tax code and a review of the tax return to see if the administrative burden on business could be eased.

Research shows that simplification comes up as a common theme, both for Irish companies and for multinationals. I'm just wondering, would it be very difficult to simplify or is it something that could be done with relative ease?

It certainly wouldn't be easy; I think we have to acknowledge that. But there are areas where I think we could make progress. For example, the pre-population of forms: there's a huge amount of data going to Revenue and some of it is pre-populated, but more could be done. That requires resources and investment in technology. But I think it's important for our domestic businesses, as well as for foreign direct investment, that we keep an eye what competitors are doing in terms of compliance. We need to make sure that Ireland remains an attractive place for businesses to locate in.

Because, presumably, complexity in tax is not just time-consuming but also more costly, and leaves more room for error?

Yes, and obviously, that's what clients pay tax practitioners to help and support with. But we have to take the longer-term view and think about what's best for Ireland Inc., and I think if there's an opportunity to simplify legislation and make tax easier to administer, we need to get ahead of the game.

And that leads us to my next subject – the OECD Framework Agreement. The changes it will bring once it is implemented will have a significant impact at a time when it has never been more important for us to be competitive

That's right, and the levers that were available to Government in the past are being taken away to a certain degree by the broader agreements on international tax. So it's important that we find ways to use the levers that are available to us because tax is central to retaining Ireland's competitive edge. It's not the only issue, but it is a key issue in terms of making Ireland attractive as a location for business.

But there's also uncertainty now about whether the so-called Two-Pillar Agreement will be implemented at the global level. What do you think is going to happen?

It's very difficult to say at this time, Samantha, but I think what we can be certain about is that there will be change. I think it's likely that we're going to see the implementation of the 15% at the EU level at least. Of course, Ireland is retaining its core 12.5% rate for SMEs; the 15% rate applies only to companies where turnover is above the €750 million bracket, and I think we will see that happen. Whether the US comes on board is still unclear, but it's still all to play for and we'll probably see it close out in the next 5 to 6 months.

And in terms of the 15% rate, even if it is just an EU-wide measure, it's going to be quite a big change for companies to implement, isn't it?

It will be a big change, but Covid and Brexit have taught us that businesses adapt, and once companies have certainty on the roadmap ahead, they'll find ways to cope and to do what needs to be done to live within the rules that apply. Ultimately, what we need is certainty about how the Framework Agreement will work in practice, and then I think companies will adapt.

We are increasingly hearing concerns being raised at the highest levels about our over-dependence on large companies for corporate tax. And for many years the Institute has been calling on Government to do more to enhance incentives for small companies in the areas of innovation and productivity, for example. Do you think progress has been made?

First of all, we must recognise that Ireland is a small, open economy and we will always need to focus on foreign investment – retaining the foreign direct investment that is here and continuing to attract new investment into the future.

But I think we also need to grow and protect our indigenous SME sector, including the small family businesses that have made a huge contribution to Ireland over recent decades. We need to ensure that the existing supports and incentives reward the people in this sector who take the risks and who create a huge number of jobs in the economy.

The Institute has played a key role in representing the interests of domestic businesses by consistently making the case for reform of important tax measures such as the research and development (R&D) tax credit and the Key Employee Engagement Programme.

It has also pressed for change in the capital gains tax rate, which, at 33%, is one of the highest CGT rates among our competitors. I think rewarding and incentivising those who take risks in business is a key issue that the Institute will continue to raise.

And, presumably, both smaller indigenous companies and the big employers should have a tax code that is the best in class? It is not a case of either one or the other.

Yes, absolutely. I think the larger multinationals are hugely important, as we've said, to Ireland. The amount of corporation tax revenues they generate has grown exponentially in the last five or six years. They also employ over 760,000 people and pay more than half of all employment taxes.

But, equally, if we want to have a vibrant indigenous sector that can help to future-proof Ireland in the event of shocks to the FDI community, we need to support and develop our SMEs now. We need to be proactive and build the sector for the future.

And maybe it's a case of less is more: concentrate on getting some of the key reliefs reformed and streamlined to work really well for small business rather than expecting that we can have everything we want in regard to every relief.

The focus has been on the R&D tax credit recently because of the consultation undertaken by the Department of Finance. Some of the suggestions in the Institute's submission to that consultation seem very pragmatic.

Yes, the R&D tax credit is easier for larger businesses to navigate because they have more resources available to support them in the preparation of documentation, record keeping etc. But for smaller businesses, the administrative burden is very daunting indeed, and many are afraid to claim the credit in case they don't get the paperwork right.

One of the things that the Institute has proposed is that small and micro businesses be given a pre-approval process on the eligibility of their R&D activity and that some assurance be given that they meet the criteria to qualify for the credit. We also think that repayment of the R&D tax credit to these businesses should be front-loaded into year one of the claim rather than being spread over a three-year period. There would be some cash-flow impact for the Exchequer in that, but equally it would be valuable cash-flow for the small business, which obviously can struggle at times.

Just to go back to the large corporates here – the FDI firms that pay so much of our corporate tax – there are some straws in the wind about the impact of a looming global recession on the tech sector, in particular. What roles does tax have to play in ensuring that those companies continue to find Ireland an attractive economy in which to invest in a period of uncertainty in the global economy?

In the current very tight labour market, we need to be able to attract highly skilled workers to this country. In that regard, the personal rate of tax is obviously a huge consideration, and for medium- to high-income earners, Ireland's rate of personal tax, including USC and PRSI, is very high compared to our competitors like the UK, Switzerland and the US. So that's an area that we need to be very mindful of in the context of any plans to increase PRSI.

Furthermore, it's vitally important now that the R&D tax credit is reviewed to make sure that it continues to be an attractive relief for those FDI companies and that it is benchmarked against competitors.

Issues like public infrastructure, schools, housing, social infrastructure are also critical. Making Ireland an attractive place to live and work in depends on delivering on all these factors for the benefit of those who come to work in Ireland as much as for ourselves.

Irish Tax Institute President Colm Browne, pictured with Immediate Past President, Karen Frawley, and Martin Lambe, Chief Executive, Irish Tax Institute.

We mentioned Brexit earlier, and there is still a lot of uncertainty about the Northern Ireland Protocol. But how have businesses been coping with the changes it has brought to trade so far?

Day one was very much about the trading issues, keeping companies going, operational issues, and ensuring that everything was going well. But over the last 18 months we've seen that businesses have adapted, those day one trading issues have faded away in the main and businesses have found ways to deal with the barriers that Brexit created.

Right now, we're starting to see increased Revenue audits in the customs area. Issues around classification of goods, the origin of goods are emerging. At the outset, some businesses, understandably, were focused on the operational side of things, and maybe the classification of goods was wrong and, to their detriment, they may have overpaid customs duties. And some of the classifications need to be revised.

In general, there remains a lot of uncertainty about how the politics around Brexit will play out, and that's not helpful for business on either side of the border or indeed in the UK.

So do you think Brexit-related impacts will persist for companies over the next couple of years, given the continuing uncertainty?

Well, the outcome of the remaining issues to be resolved around the Northern Ireland Protocol will have some implications for business. But those are political decisions, and we will have to wait and see what happens. It will take time to see how it all plays out.

The past two years were dominated by Covid lockdown/restrictions. Now that we're heading into the autumn, are companies generally dealing well with anything that's left over from Covid or is there any anything to be ironed out yet?

The big issue hanging over from Covid is the warehousing of tax debt, and we are undoubtedly entering the most difficult phase of the repayment process as we move from a 0% to 3% rate of interest on warehoused tax debt at the end of the year.

So a huge amount of work will happen over the coming months in terms of engagement between taxpayers and Revenue as practitioners seek to get phased payment agreements in place for that warehoused debt.

To be fair, Revenue has said that it will take a pragmatic approach, and we will be asking that account is taken of the impact of the current very difficult economic environment on our SME sector. It's important that we can get proper, realistic phased payment arrangements in place so that businesses can weather this storm. Inevitably, some won't, but companies that have been profitable and compliant should be given a fighting chance.

It was a fantastic relief at the absolute height of the restrictions and the lockdowns. Have companies been preparing to start the repayment?

Like everything, there's probably a mix. But a lot of businesses have been planning and have been resourcing towards it and we've already seen a huge amount of tax debt repaid.

But this is likely to be the most problematic debt arising from Covid. So I think we need to be patient and understanding of the current difficulties facing SMEs. Ever-escalating energy costs, inflation in the cost of materials, wage inflation – all of these factors have put a huge amount of pressure on the SME sector, in particular, as it has on all sectors of business over the past year. So I think we need to be mindful of that as we approach the crunch period ahead.

Revenue's new Compliance Intervention Framework and revised Code of Practice came into operation at the beginning of May. It's a big change for practitioners and their clients, of course. Are you concerned about how it's going to work?

It's early days yet. We've just come off the summer period, and as we head into the winter months we expect to see an increased level of interventions by Revenue under the new Code.

From the outset, the Institute has engaged extensively with Revenue and with members about the process of the revision of the Code. That engagement will continue, and we'll be watching how it plays out. There is a lot of change involved, and we'll need to see what happens over the next number of months and then reassess it after a period.

Is there anything of concern at this early stage or is there any nervousness among clients that there might be some unexpected aspects to this?

I think predominantly people are taking watching brief on it. Issues like how the notification for level 2 type interventions is given are a concern for practitioners and for the Institute. Another issue is ensuring the timelines for responses to deal with some of these interventions. We need to make sure those notifications are received by the right people, and that's something we'll certainly be watching over the coming months.

Communication and having that two-way openness between practitioners and Revenue, which seems to be key to ensuring the whole system runs smoothly.

Yes, and the Institute has a very strong working relationship with Revenue, both sides obviously understanding their respective roles and respecting them, while acknowledging the benefit of good open communication and consultation around change. And I think the Institute is well respected both by Revenue and by the Department of Finance for the objective approach it takes. Its submissions are very well researched and very well thought out. So I think there's a healthy respect for the role of the Institute, and that's reflected in the high quality of engagement with Revenue.

You can listen to Colm's Tax Talk podcast interview at the following link: https://soundcloud.com/user-754410870/ep11-new-irish-tax-institute-president.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

At the Institute's recent Annual General Meeting, Colm Browne was elected as the 47th President of the Institute. Colm joined Council in 2014 and has been on many Institute committees over the last eight years. His experience in both small and large firms, and as the head of PwC's Corporation Tax Compliance function in Kilkenny, will be an invaluable resource to the Institute as we deal with tax administration issues and engage with Revenue.

Days before his inauguration at the Institute's AGM, Colm sat down with the host of Tax Talk, Samantha McCaughren, to talk about his plans for his year as President. You can listen to the podcast here.

Thank You, Karen

Colm takes over from Karen Frawley, who led us through a year of change and uncertainty in the global tax landscape. Karen's expertise in international tax was a great asset, with so much focus during the last year on the OECD's Pillar One and Two proposals.

Changes to Council

As Colm begins his tenure as President, there are a number of changes to Council. Karen becomes Immediate Past President; our new Deputy President is Tom Reynolds; and Aoife Lavan is our Vice President. We welcome our newly elected Council member, Aidan Fahy of Matheson, and welcome back five re-elected Council members.

Pre-Budget 2023 Submission

In early July we submitted our Pre-Budget Submission against the backdrop of a challenging global economic outlook. In our submission, we focused on the tax policy levers that would help the Government to secure Ireland's position in the global market. Our recommendations included:

- have a relentless focus on competitiveness in all areas of the economy;
- simplify the corporation tax code to make it more efficient and easier to administer;
- deploy effective tax measures to promote innovation, incentivise investment and build capacity in the Irish SME sector, to make the economy more resilient against external shocks;
- provide certainty to investors in the property market and consider the longer-term impact of interventions in the market; and
- develop a formal stakeholder engagement process on proposed tax policy and legislative changes.

Exploration of the R&D Tax Credit

The R&D tax credit remains a critical part of Ireland's corporation tax offering and featured heavily in our Pre-Budget 2023 Submission. To explore our response to the Department of Finance consultation and how the tax credit could be made more effective in building innovation and productivity in our economy, renowned tech investor Elaine Coughlan, of Atlantic Bridge, and Ian Collins, Tax Partner and Head of Innovation at EY, joined Samantha McCaughren for an episode of Tax Talk. They also set out how a reformed and optimised R&D tax measure could nurture the development of a world-leading green tech sector in Ireland. You can listen to the full episode here.

Commission on Taxation and Welfare Report

The much-anticipated report from the Commission on Taxation and Welfare was published on 14 September. From an initial review of the 500-page document, many recommendations echo our response to the Commission's public consultation earlier in the year. For example, we support the tax base-broadening measures and tipping the balance from regressive labour taxes in favour of indirect taxes. We have reservations about the consequences of some of the related recommendations, and we disagree with a number of recommendations, particularly in the area of capital taxes, but we will monitor any moves over the coming years.

Representation

In addition to our Pre-Budget Submission, we responded to two other consultations. In our response to the Department of Finance's public consultation on Pillar Two Minimum Tax Rate Implementation, we emphasised that an iterative process of consulting with stakeholders as the legislation is drafted and the administrative guidance developed will help to minimise the complexity involved and ensure the successful practical implementation of the Directive into the Irish corporation tax code. We also responded to the consultation by the Department of Enterprise, Trade and Employment on a White Paper on Enterprise Policy.

Revenue's debt warehousing scheme has been a key area of focus in our recent representations at TALC meetings, in particular the importance of Revenue's adopting a pragmatic and realistic approach to payment arrangements to pay off the tax debt. We also updated members in TaxFax on Revenue's announcement of an opportunity for taxpayers participating in (or eligible for) the debt warehousing scheme to make an unprompted qualifying disclosure for taxes eligible for warehousing by 31 January 2023 to avail of the reduced interest rate of 3% per annum when paying the debt from 2023.

Leading up to the corporation tax filing deadline in September, we engaged with Revenue on issues that some members experienced when filing corporation tax returns prepared on ROS. As Revenue worked on a solution, we kept members informed once we received updates. We will keep members updated with further developments from TALC and the Branch Network.

Promotion of a Career in Tax

We continue to promote the career in tax at both second and third level. In the coming weeks we will attend career fairs across the country, meeting students face to face again. Our own virtual Career in Tax Fair is also coming up on 6 October.

Our Fantasy Budget 2023 competition is live, and we have received great feedback from lecturers, who are updating their syllabi to include the competition as part of their assessment from 2023. The Third-Level Scholarship winner will be announced shortly, the shortlisted applicants having been interviewed earlier this month.

Our third-level textbook, *Irish Taxation: Law and Practice*, is available now. It is used in third-level institutions around Ireland and is also the basis of our Tax Trainee Induction Programme. Thanks to our editors, Dr Patrick Mulcahy and Laurence May, and our authors, Caitriona Gaynor, Raymond Holly, Pat Kennedy, Paul Murphy, Margaret Sheridan and Martina Whyte, for their contributions.

Education

The summer exam results are due to be released between 22 September and 12 October. We wish all of the students the very best with their results. Recruitment for our autumn 2022 courses is ongoing. As tax and technology embeds itself into our profession, we are working to have this important topic included in the Chartered Tax Adviser (CTA) syllabus going forward.

Lifelong Learning

The Tax Trainee Induction Programme was popular again this year, with participants coming to our offices for the live Q&A session on 16 September. The programme is designed to give trainees the tools and knowledge to get started in their careers.

The Autumn/Winter 2022 CPD Programme is well under way and is filled with seminars to suit advisers working across tax heads. The busy programme focuses on key issues for CTAs and their clients, including the Finance Bill and Act 2022 series, Complete Tax Round-Up for the Corporate Sector and Taking a Tax Appeal – The Theory and The Practice.

The next webinar in our Global CTA Webinar series, in collaboration with our sister CTA institutes in Australia, Hong Kong, South Africa and the UK, is Global Mobility in 2022 and Beyond on 6 October, 2022. This complimentary webinar will be chaired by Sarah Connellan of EY Ireland, with expert panellists Gavin Duffy of Vialto Partners (South Africa), Joanne Haslehurst of Deloitte Global Employer Services (UK) and Desmond Wong of PwC (Hong Kong).

RIP Terry Cooney

On behalf of all in the Institute I would like to send my condolences to the family and friends of Terry Cooney, who passed away on 8 September 2022. Terry was a great friend of the Institute and will be fondly remembered. Following his Presidency in 1988–1989, Terry continued to support the Institute's work throughout his career, sharing his wisdom and expertise without any hesitation. May he rest in peace.

Policy and Representations Monitor

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

News Alert

Institute representations before Budget 2023/Finance Bill 2022

At the end of June the Institute submitted recommendations to the Minister for Finance, Paschal Donohoe TD, setting out a number of legislative changes for consideration in the drafting of Finance Bill 2022. The submission contains 18 detailed recommendations on legislative technical amendments, identified in conjunction with members of the Institute's Policy & Technical Committee, which cover measures to support the growth of the indigenous sector, tax technical measures required to mitigate certain "unintended consequences" arising from existing legislative provisions, and simplification measures to provide certainty to taxpayers.

The submission emphasised the importance of considering ways to improve the Irish corporation tax system and enhance Ireland's attractiveness as a place to do business, given that the scope to compete for foreign direct investment based on the country's corporation tax rate has been reduced since joining the OECD International Tax Agreement in October 2021.

In our submission we also stressed the importance of moving to a territorial system of taxation and progressing with the implementation of a participation exemption and foreign branch exemption to ensure that Ireland can remain an attractive location for investment. We also highlighted the need to simplify the interest deductibility rules and outlined the existing provisions that we believe, after the adoption of the ATAD interest limitation rule into Irish law, either are no longer necessary or require simplification.

In July the Institute delivered its Pre-Budget 2023 Submission to Minister Donohoe and the Minister for Public Expenditure and Reform, Michael McGrath TD. The overall theme of the submission was enhancing Ireland's competitiveness through tax policy levers. Our submission made the case for the Government, in the current, changed global economic, monetary and fiscal environment, to:

- have a relentless focus on competitiveness in all areas of the economy, including Ireland's corporate and personal tax systems;
- simplify the corporation tax code to make it more efficient and easier to administer;
- deploy effective tax measures to promote innovation, incentivise investment and build capacity in the Irish SME sector, to broaden the productive base and make the economy more sustainable and resilient against external shocks;
- provide certainty to investors in the property market and consider the longer-term impact of interventions in the market; and
- develop a formal stakeholder engagement process on proposed tax policy and legislative changes to ensure that they are effective and to guard against unintended consequences.

Budget 2023 will be presented to the Dáil on Tuesday, 27 September. The Summer Economic

Statement noted that Budget 2023 will provide for an overall package of €6.7bn, which will include tax measures of €1.05bn.

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

Other Institute tax policy submissions

Consultation on the R&D tax credit and the KDB

On 30 May the Institute responded to the Department of Finance's public consultation on the research and development (R&D) tax credit and the knowledge development box (KDB). The purpose of the consultation was to consider the current challenges facing firms that carry on R&D activities in Ireland, as well as the implications of recent domestic and international tax reforms for both reliefs. All input to this consultation will be considered by the Department in the context of this year's Budget and Finance Bill.

In our response we made 18 key recommendations on the R&D tax credit, including: ensuring that the R&D tax credit is considered a "qualified refundable tax credit" for the purposes of the Pillar Two GloBE Rules; recommending that the current three-year R&D tax credit refund is condensed to one year for all businesses or, at the very least, for SMEs; and ensuring that Ireland continually benchmarks the R&D tax credit against key competitor jurisdictions to ensure that we can continue to attract additional R&D investment.

We also recommended that legislation be introduced to clarify that rent is a qualifying cost for the purposes of the R&D tax credit.

Specific recommendations for SMEs included: considering introducing a pre-approval process for first-time R&D tax credit claims by small/micro companies, to help alleviate the uncertainty over Revenue's subsequently challenging a claim on the "accounting test"; and providing SME-friendly guidance, with step-by-step instructions on the claims process and practical case studies, together with tips on how to avoid common errors, similar to the approach adopted by HMRC in the UK.

The Institute also made three recommendations on the KDB in our response to the public consultation. We recommended that intellectual property (IP) acquired by companies for use in furthering the R&D carried on by a company should be included in qualifying expenditure for KDB purposes.

We called for more flexibility in the approach to calculate overall income for the KDB and requested that the rules are adapted to allow profit from an entire IP asset to avail of the KDB, not just the portion of the profit related to the patentable element. Finally, we recommended simplifying the existing significant compliance and documentation burdens in making a KDB claim, noting that this would enhance the KDB regime, particularly for SMEs.

Consultation on the KEEP

On 17 June the Institute responded to the Department of Finance's public consultation on the Key Employee Engagement Programme (KEEP). We outlined that our members would welcome the commencement of the Finance Act 2019 amendments to the KEEP, as these changes would help to improve the uptake of the scheme by SMEs. However, we emphasised that other measures, in addition to the 2019 changes, need to be introduced to ensure that the KEEP can operate effectively and deliver on its policy objective of helping Irish SMEs to attract and retain key talent.

Based on the feedback we received from members, we recommended the following further reforms to the existing legislation:

- Develop an agreed "safe harbour" approach to share valuation and impose an appropriate sanction where there is an undervalue.
- Further amend the definition of a "qualifying holding company" to permit the group as a whole to be considered, rather than simply considering the holding company in isolation.

- Create liquidity in KEEP shares by allowing a company to buy back KEEP shares.
- Simplify the qualifying share option limits for the KEEP by removing the annual emoluments cap.
- Allow the continuing availability of the relief should the SME undergo a corporate reorganisation during the period in which the KEEP share option rights are outstanding.
- Provide for "roll-over relief" in respect of KEEP share options, which would apply where, during the exercise period, a transaction is entered into that results in the share capital of the company being acquired, and unexercised KEEP share options are exchanged or assigned for new options in the acquiring company.

Consultation on a new EU-wide system for withholding taxes

On 24 June the Institute responded to the European Commission's public consultation regarding a proposed new common EU-wide system for withholding tax on dividend, interest and royalty payments. The consultation is part of the Commission's initiative to tackle burdensome withholding tax (WHT) refund procedures for cross-border investors in the EU.

In our Position Paper, which accompanied our completed consultation questionnaire, we highlighted that cross-border investors face burdensome WHT refund procedures in the EU, with the recovery of WHT on dividends from listed companies being particularly problematic. In many cases, investors may not have the necessary knowledge regarding the existence of mechanisms for claiming WHT refunds. Where investors seek to claim WHT refunds, onerous administrative procedures – including the non-digitalisation of refund application forms, language difficulties, high compliance costs and delays associated with refund claims – can lead to investors abandoning the refund process. This results in permanent double taxation being suffered by such investors.

Confirming our support for the Commission's initiative to introduce a common EU-wide system for WHT, we emphasised that a harmonised framework for WHT procedures across the EU is necessary to reduce the incidence of double taxation as a result of the divergent and complex administrative procedures that exist in EU Member States. We recommended that a common EU system for relief at source, with the relevant double taxation treaty rate applying to payments to cross-border investors from EU Member States, would minimise the incidence of double taxation. However, if it is not possible to implement a relief-at-source system, we proposed streamlining WHT refund processes, including the introduction of a one-stop shop where an investor could log in and make a refund claim irrespective of the source Member State.

Consultation on Pillar Two Minimum Tax Rate Implementation

On 22 July the Institute responded to the Department of Finance's public consultation on the Pillar Two Minimum Tax Rate Implementation. The purpose of the consultation was to seek the views of stakeholders on the transposition of Pillar Two into Irish law and to consider any challenges in that regard.

In our submission we made detailed recommendations in response to the queries raised in the Consultation Paper and emphasised a number of key matters that policy-makers should consider when transposing the Directive into Irish law. These recommendations are outlined in the article in this issue of *Irish Tax Review* titled "Institute Responds to Consultation on Implementing Pillar Two Minimum Tax Rate", by Anne Gunnell and Clare McGuinness.

Consultation on White Paper on enterprise policy

On 26 July the Institute responded to the public consultation by the Department of Enterprise, Trade and Employment on a White Paper on enterprise policy. The responses received to this consultation will inform the

White Paper to be published at the end of the year on the future direction of Ireland's enterprise policy.

In our response we noted that a reappraisal of enterprise policy is timely, as Ireland faces significant challenges in an increasingly difficult global trading environment. We urged that the White Paper address the productivity gap between a remarkably resilient and profitable multinational sector and a comparatively underperforming domestic sector.

We recommended changes to three tax measures that are particularly important to SMEs: the R&D tax credit, the Key Employee Engagement Programme (KEEP) and the Employment Investment Incentive Scheme (EIIS).

Given the low level of CGT receipts in recent years, we proposed that it is now time to re-examine the headline rate of CGT, and we recommended that a rate of 25% should apply to disposals of active business assets.

We noted that inward investment will continue to be critical to Ireland, as a small open economy. However, with the scope for tax competition set to narrow under new international tax rules on a global minimum effective rate, the Government must find other ways to make our tax system more attractive to foreign investment. In that context, we highlighted that it is essential that the R&D tax credit is considered a "qualified refundable tax credit" for the purposes of the OECD Pillar Two Model Rules.

We proposed that a project to simplify the corporation tax code would send a clear signal to outside investors that Ireland is a good place for business. We also noted that, with the imminent introduction of a global minimum corporate tax rate, personal tax regimes and the cost of employment will become increasingly important factors in the investment decisions of international businesses.

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

Developments on the 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 the building blocks of Amount A of Pillar One since early 2022.

As highlighted in the last edition of "Policy and Representations Monitor", the Inclusive Framework has been 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. At the time of writing the last article, the OECD had undertaken five consultations on the building blocks for Amount A of Pillar One.

On 27 May the OECD launched two additional public consultations relating to tax certainty under Amount A of Pillar One. On 15 June it released the public comments that it received in response to these two consultations.

After this, on 11 July, the OECD launched a public consultation on the Progress Report on Amount A of Pillar One, which contains the different building blocks of the new taxing right under Amount A in the form of domestic model rules. Despite the rolling consultations on the building blocks of Amount A since the start of the year, the Progress Report notes that further deliberation is merited regarding the novel concepts relating to the new taxing right. Therefore, the Inclusive Framework is seeking stakeholder feedback on the overall design of the Amount A rules, as well as the specific building blocks, before reaching final agreement. Responses to the consultation were to be submitted by Friday, 19 August 2022.

A public consultation meeting has been scheduled for 12 September and will focus on the key questions identified in the consultation document and issues raised in the written submissions received as part of the consultation process.

Policy News

Extension to 9% VAT rate for tourism and hospitality sectors

In May the Minister for Finance, Paschal Donohoe TD, announced an extension of the 9% VAT rate for the tourism and hospitality industry for a further six months, following approval by the Government at a Cabinet meeting. The 9% VAT rate, which was to apply until 31 August 2022, will remain in place for these sectors until 28 February 2023.

This extension will cover the same goods and services as the original measure, such as: restaurant supplies; tourist accommodation; cinemas; theatres; museums; historic houses; open farms; amusement parks; hairdressing; and certain printed matter, such as brochures, leaflets, programmes and catalogues.

Minister Donohoe publishes Ireland's Tax Treaty Policy Statement

On 27 June the Minister for Finance, Paschal Donohoe TD, published Ireland's Tax Treaty Policy Statement. The Policy Statement was approved by the Government and developed after a public consultation in May 2021. The Institute responded to this public consultation last year, and we highlighted the vital role of Ireland's tax treaty network in supporting trade and investment between Ireland and treaty partner countries by eliminating double taxation and providing tax certainty for taxpayers.

The Policy Statement has two main aspects: formalising the existing policy of maintaining and enhancing the network of Double Taxation Agreements (DTAs) to provide for continued economic prosperity, including through the creation of a priority list of potential partners; and a specific policy approach for least developed countries.

Ireland's tax treaty policy for least developed countries will adhere to a series of core principles, which include a rule to not approach a least developed country. Where Ireland is approached, an analysis will be carried out to ensure that any treaty will be economically beneficial for both treaty partners and be cognisant of the specific needs of partner countries.

The publication of the Policy Statement delivers on the commitment to publish a treaty policy statement contained in Ireland's Corporation Tax Roadmap: January 2021 Update. Outlining Ireland's economic policy for DTAs, the Policy Statement confirms that the Department will:

- create prioritisation criteria to ensure that scarce resources are deployed to maximise new and enhanced trade opportunities;
- continue to seek to remove barriers to trade and investment, including through reduced rates of withholding taxes, where appropriate;
- incorporate OECD minimum standards and best practices, aligned with the positions adopted by Ireland in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, into new and existing treaties; and
- engage with stakeholders on an ongoing basis to ensure that Ireland's tax treaty policy continues to support increased investment, additional economic activity and economic growth.

The Policy Statement notes the importance for Ireland to continue to expand and enhance its tax treaty network and identifies having DTAs with all G20 members, all current OECD member countries and EU accession countries as key priority areas.

Brexit: UK announces Bill to amend Northern Ireland Protocol

On 17 May the UK Foreign Secretary, Liz Truss MP, updated the House of Commons on the UK Government's intention to introduce legislation to make changes to the Northern Ireland Protocol. After the announcement, the Vice-President of the European Commission for Interinstitutional Relations and Foresight, Maroš Šefčovič, made a statement noting that the European Commission stands ready to continue discussions with the UK Government to identify joint solutions within the framework of the Protocol that would benefit people and businesses in Northern Ireland. Mr Šefčovič said that if the UK decides to move ahead with a Bill disapplying constitutive elements of the Protocol, "the EU will need to respond with all measures at its disposal".

On 13 June the UK Foreign Secretary published draft legislation to make changes to the Northern Ireland Protocol. In a press release announcing the publication of the Northern Ireland Protocol Bill, the UK Government stated that the Bill "will allow the government to address the practical problems the Protocol has created in Northern Ireland in 4 key areas: burdensome customs processes, inflexible regulation, tax and spend discrepancies and democratic governance issues".

During a press conference on 15 June Mr Šefčovič stated that unilaterally changing an international agreement is a breach of international law. Noting that the EU has been withholding legal action over the last year because it wanted to create a constructive atmosphere in which to find solutions, he confirmed that the EU would now proceed with the infringement process launched in March 2021 regarding, for instance, the movement of agri-food. If the UK does not reply within two months, the EU may take the UK to the Court of Justice of the European Union.

In addition, the EU launched two new infringement procedures against the UK on 15 June:

- for failing to carry out the necessary controls at border control posts in Northern Ireland, by ensuring adequate staffing and infrastructure; and
- for failing to provide the EU with essential trade statistics data to enable the EU to protect its Single Market.

On 22 July the Commission launched four additional new infringement procedures against the UK for not complying with significant parts of the Protocol. These are in addition to the infringement procedures launched on 15 June and are in respect of:

- failing to comply with the applicable customs requirements, supervision requirements and risk controls on the movement of goods from Northern Ireland to Great Britain;
- failing to notify the transposition of EU legislation laying down general EU rules on excise duties, which will become applicable from 13 February 2023;
- failing to notify the transposition of EU rules on excise duties on alcohol and alcoholic beverages, which facilitate access for small and artisan producers to lower excise duty rates, among other provisions; and
- failing to implement EU rules on VAT for e-commerce, namely, the Import One-Stop Shop (IOSS).

The decision to launch the infringement procedures marked the beginning of formal infringement procedures, as set out in Article 12(4) of the Protocol, in conjunction with Article 258 of the Treaty on the Functioning of the European Union. The UK has two months to reply to the letters, after which the Commission may take further measures.

Commission proposes debt-equity bias reduction allowance

On 11 May the European Commission published a proposed Directive laying down rules on a debt–equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes. The debt–equity bias reduction allowance, known as DEBRA, is intended to support businesses by introducing an allowance that will grant equity the same tax treatment as debt.

This initiative was first proposed by the Commission as part of its Communication on Business Taxation for the 21st Century. It aims to address the "pro-debt bias" in the current tax framework, whereby businesses can deduct interest attached to debt financing but not costs related to equity financing.

The proposed Directive would apply to all taxpayers that are subject to corporate tax in one or more Member State, except for financial undertakings. The Directive, subject to certain conditions, provides for a deduction from the tax base of a taxpayer in respect of the increase in its equity in a given tax year.

In addition, the Directive would introduce a new limitation on interest deductibility, which would be applied alongside the interest limitation rules under the Anti-Tax-Avoidance Directive (ATAD).

Optional reverse-charge mechanism remains up to 2027

On 3 June European Finance Ministers adopted a Directive amending EU VAT legislation to extend the application period of the optional VAT reverse-charge mechanism until 31 December 2026. The reverse-charge mechanism aims to reduce the risk of VAT fraud, particularly Missing Trader Intra-Community fraud, by shifting liability for VAT payment from the vendor to the customer.

The extension will also apply to the Quick Reaction Mechanism to combat VAT fraud. The Quick Reaction Mechanism allows Member States quickly to introduce a temporary reverse-charge mechanism for the supply of goods and services in particular sectors if sudden, massive fraud occurs that is liable to lead to considerable and irreparable financial losses.

Commission launches consultation on options to tackle the role of enablers in tax evasion and aggressive tax planning

On 6 July the European Commission launched a call for feedback and public consultation on a proposed Directive to tackle the role of enablers involved in facilitating tax evasion and aggressive tax planning in the EU, known as SAFE (Securing the Activity Framework of Enablers).

The consultation questionnaire sets out the following options currently being considered by the Commission for the proposed Directive:

- **Code of Conduct** – which would prohibit the enablers who design, market, organise or assist in the creation of tax-evasion and aggressive tax-planning schemes without any complementary mandatory measures.
- **EU register of enablers** – with either mandatory registration for enablers to be able to provide tax advice or optional registration that gives access to certain benefits (e.g. submitting tax return on behalf of their clients).
- **Due diligence procedures** – to perform a self-assessment test to demonstrate that the tax schemes do not lead to tax evasion or aggressive tax planning.
- **New reporting requirement** – for EU taxpayers of participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means in a non-listed company outside the EU.

The consultation questionnaire also considers monetary penalties as enforcement measures to deter enablers from facilitating tax evasion and aggressive tax planning, such as a proportion of their fees, a proportion of the amount of tax evaded or absolute fixed amounts.

The impact of this initiative will vary depending on the ultimate design. However, it will likely have an impact on: businesses engaging and operating in the EU, including those that avail of and provide tax advice or services; individuals resident in the EU, including those that avail of tax advice or services; and the tax administrations of EU Member States.

The feedback period for the call for evidence for an impact assessment and the public consultation runs until Wednesday, 12 October 2022.

UK publishes draft legislation to implement Pillar Two Income Inclusion Rule

On 20 July the UK Government published draft legislation for the adoption of the main charging provision of the OECD Pillar Two GloBE Rules. The draft legislation would implement the income inclusion rule (IIR) into UK law.

A top-up tax will be charged on UK parent members when a subsidiary is located in a non-UK jurisdiction and the group's profits arising in that jurisdiction are taxed at below the minimum rate of 15%. The measure will have effect for multinational enterprise groups with accounting periods beginning on or after 31 December 2023.

The publication of the draft legislation follows a public consultation on the UK's implementation of Pillar Two, which closed in April. A Summary of Responses to the consultation has been published. The document includes an outline of the UK Government's intended approach to the implementation of Pillar Two and confirms that the UK Government intends to legislate for the IIR in Finance Bill 2022–23 to allow businesses have as much certainty as possible on the requirements in UK legislation and the maximum time possible to prepare.

In respect of the undertaxed profits rule (UTPR), the document states that there will be a later update on the timing and design of the UTPR in light of wider developments internationally.

The UK Government is seeking feedback on the draft legislation. This technical consultation will last until 14 September 2022 to inform the final drafting of the legislation.

Developments on proposed EU Directive to implement Pillar Two GloBE Rules

At a meeting of the Economic and Financial Affairs Council on 17 June, European Finance Ministers discussed the European Commission's proposed Directive to implement the Pillar Two GloBE Rules into EU law, to ensure a global minimum level of taxation for multinational groups in the EU. Having previously opposed the Directive, Poland confirmed that it was able to support the Directive. However, Hungary, which had previously supported the proposed Directive, stated that it could no longer support the adoption of the Directive, due to 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.

Revenue eBriefs Issued from 1 May 2022 to 31 July 2022

No. 103 Taxation of Part Time Lecturers/ Teachers/Trainers

The manual "Part-Time Lecturers/Teachers/ Trainers" has been updated to include a reference to the updated Code of Practice on Determining Employment Status at paragraph 1. An example of employee status has been included at paragraph 2.

The manual incorporates a new appendix 2 covering the treatment of payments for "once-off" lectures up to and including 31 August 2019. Minor amendments have also been made throughout the manual to make the content more readable.

No. 104 Exempt Unit Trusts (EUTs)

The manual "Taxation of Unit Trusts for Pension Schemes and Charities – Exempt Unit Trusts (EUTs)" has been updated to reference the revised Form EUT1 and the relevant details required to be disclosed on the form.

The manual has also been updated to remove old references to the introduction of Alternative Investment Fund Managers Directive in Ireland in 2013.

No. 105 Import of Motor Vehicles from the UK

The manual "Importation of Motor Vehicles from the UK" has been updated to provide additional guidance on how to register for Customs & Excise to facilitate the submission of an import declaration using the import declaration portal in the Customs import system, Revenue's Automated Import System.

No. 106 Stamp Duty Tax and Duty Manual "Section 83D Residential Development Refund Scheme" Updated

Section 83D SDCA 1999 provides for a refund of the difference between the stamp duty rate on non-residential property of 2% that applied before 11 October 2017 and higher rates of 6% effective from 11 October 2017 and 7.5% from 9 October 2019, where the land is developed for residential purposes. Revenue's Stamp Duty Manual "Residential Development Refund Scheme Part 7: Section 83D" has been amended in part 3.6 to remove the requirement to provide a certified copy of the deed that transferred ownership of the land.

No. 107 Stamp Duty Tax and Duty Manual "Section 81D: Leases of Farmland" Updated

The introduction to sections 4 and 5 of the Stamp Duty Manual "Relief for Leases of Farmland Part 7: Section 81D" has been updated to reflect changes to the maximum amount of *de minimus* aid that may be granted under the 2013 Regulation.

Section 81D SDCA 1999 provides for relief from stamp duty on leases of farmland. The relief, which is intended to encourage more productive use of farmland, constitutes an EU State Aid. It is granted in accordance with European Commission Regulation (EU) No. 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimus* aid in the agriculture sector. In accordance with the Regulation, a ceiling is imposed on the amount of *de minimus* aid that any one farmer or farming entity can receive over a three-year period. This impacts the amount of relief that may be obtained under s81D SDCA 1999.

No. 108 Capital Acquisitions Tax Manual Part 19: Miscellaneous Updated

The manual "Miscellaneous Issues – Capital Acquisitions Tax Manual Part 19" has been updated to include a new part 19.21, which sets out the CAT treatment applying where trustees pay, out of the capital of a life interest trust, the CAT charged on the taxable value of the life interest on behalf of the life tenant.

No. 109 VAT – Postponed Accounting

The manual "VAT – Postponed Accounting" has been updated to clarify that it is the importer (consignee) that is obliged to account for postponed accounting. Additional information links to the Revenue website have also been added to the manual.

No. 110 Tax Treatment of the Pandemic Special Recognition Payment to Frontline Healthcare Workers

Revenue confirmed that any payment made under the Government's Pandemic Special Recognition Payment scheme is exempt from income tax, USC and PRSI. The exemption applies to a maximum of €1,000 per qualifying individual and applies only to payments made under the scheme.

Revenue noted that as it is the clear intention of the Government that the payment is exempt from income tax, USC and PRSI, employers and payroll operators making Pandemic Special Recognition Payments to qualifying individuals may make such payments free of tax, USC and PRSI, pending enactment of the Finance (Covid-19 and Miscellaneous Provisions) Bill 2022.

Revenue's eBrief also includes an overview of the scheme, summarising its scope and the conditions regarding receipt of the payment.

No. 111 Case V Excess Capital Allowances and Case V Losses: Order of Set-off for Individuals and Between Jointly Assessed Spouses and Civil Partners

The manual "Case V Excess Capital Allowances and Case V Losses: Order of Set-off for Individuals and Between Jointly Assessed Spouses and Civil Partners" has been updated in paragraph 3 to include reference to s97A TCA 1997, dealing with pre-letting expenditure in respect of vacant premises.

The manual also notes that allowances under s285A TCA 1997 cannot be claimed against rental income. Such accelerated wear-and-tear allowances are available only for eligible energy-efficient equipment used in a trade.

No. 112 VAT Treatment of eGaming Services

The manual "VAT Treatment of eGaming Services" has been updated to provide clarity on the taxable amount for Irish VAT purposes.

No. 113 VAT Treatment of Depositary Services and Global Custody Services

Revenue has published a new VAT manual titled "VAT Treatment of Depositary Services and Global Custody Services", setting out the VAT treatment of depositary services and global custody services provided in respect of an Irish special investment fund.

No. 114 Schedule E Basis of Charge with Effect from Year of Assessment 2018

The manual "Schedule E Basis of Charge with Effect from Year of Assessment 2018" has been updated in paragraph 4.2 to confirm that income that is subject to a PAYE Exclusion Order continues to be assessed on the "earned basis". In addition, a reference link to the "PAYE Exclusion Orders" manual has been included for further information on this topic.

No. 115 Part 42-04-55 – National Co-op Farm Relief Service Operators

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

No. 116 C&E Online Payments in ROS and myAccount

The manuals "C&E Online Payments in ROS or myAccount" and "C&E TAN Reports Available on ROS" have been updated to include details of a new payment notification that will issue to customers' ROS inbox in real time where another customer makes a payment to their C&E TAN account.

No. 117 Pensions Manual Amended

Revenue's Pensions Manual "Small Self-administered Pension Schemes – Chapter 19" has been updated in paragraph 2 to state that applications for approval to act as a pensioneer trustee for such schemes should now be made through MyEnquiries.

No. 118 Share Fishing

Revenue's manual "Share Fishing: the Tax Implications for Boat Owners, Skippers and Share Fishermen/women" sets out an overview of the tax implications for boat owners, skippers and share fishers of High Court decisions in the cases of *Francis Griffin v The Minister for Social, Community and Family Affairs* and *Wm. Deasy v The Minister for Social, Community and Family Affairs* in 2001. In these cases it was confirmed that share fishermen were partners in a partnership and that each venture out to sea was a separate partnership.

The manual has been updated to confirm that where the crew of a fishing vessel is reasonably stable from one fishing voyage to the next, the same partnership can be considered to cover multiple fishing voyages. Whether this treatment can apply will need to be considered on a case-by-case basis.

No. 119 Charitable Tax Exemption: Tax Exemption for Charities under Section 207 and 208 Tax Consolidation Act 1997

The manual "Charitable Tax Exemption – Tax Exemption for Charities under Sections 207 and 208 Taxes Consolidation Act 1997" has been updated in paragraph 8 to include a link to the list of Irish registered charities on the website of the Charities Regulatory Authority. The lists of charities eligible for the Charitable Donation Scheme under s848A and Schedule 26A TCA 1997 are also referenced in paragraph 8.

No. 120 On-line Payments of Tax

Revenue has updated table A in the manual "Using Online Methods to Make a Payment to Revenue". This table identifies the taxes that can be paid online and whether the taxpayer must be registered for a particular tax to make a payment.

No. 121 Corporation Tax: Losses in Transactions From Which Income Would Be Chargeable Under Case IV or V of Schedule D (Section 399 TCA 1997)

Revenue has updated section 4 of the manual "Corporation Tax: Losses in Transactions From Which Income Would Be Chargeable Under Case IV or V of Schedule D (Section 399 TCA 1997)" to reflect the Finance Act 2021 amendments to the taxation of non-Irish-resident corporate landlords in receipt of rental income but who are not trading in Ireland through a branch or agency. These corporate landlords are subject to corporation tax rather than income tax on Irish rental income from 1 January 2022.

No. 122 Tax and Duty Manual Part 34-00-10

The manual "Special Assignee Relief Programme (SARP)" has been updated as follows:

- A new paragraph 4.1 is included, which provides guidance on the eligibility of an assignee to avail of SARP in cases where he/she spends time in the State in the six-month period before arrival.
- In the Summary of Conditions table in paragraph 4, wording is included to reflect the requirement that an assignee must spend at least 12 consecutive months working in the State after arrival to avail of the relief. A new example (Example 20) has been added to the appendix, accordingly.
- A new paragraph 5 on administrative requirements has been included.
- Paragraph 7 (Calculation of the Relief) has been updated to reflect the position that SARP relief cannot be claimed on employment income that qualifies for double taxation relief in the State.

No. 123 Expression of Doubt (Full Self-Assessment) IT/CT/CGT

The manual "Expression of Doubt (Full Self-Assessment) IT/CT/CGT" has been updated in paragraph 2 to provide further clarification on how to submit an Expression of Doubt. The additional text notes that the taxpayer must clearly identify that he/she is submitting a "letter of Expression of Doubt" for the purposes of s959P TCA 1997 (this can be done by ticking the box on the relevant tax return indicating that the taxpayer is making an Expression of Doubt).

The manual further notes that a separate Expression of Doubt should be made for each return where a taxpayer has a genuine doubt regarding the application of the law.

No. 124 Guidelines on the Processing of Online Tax Evasion Reports

The manual "Shadow Economy: Processing Online Tax Evasion Reports" has been updated in part 2, which deals with enquiries from the public on how tax or duty evasion/suspicious activity reports can be made, to include additional areas of suspicious activity that are of interest to Customs.

It also provides that members of the public may contact the appropriate Revenue office in writing or by telephone, as well as through the Freefone number and direct email address listed.

In addition, part 7 of the manual now refers to s851A(1) TCA 1997, which provides a definition of an "investigation authority".

No. 125 Individuals Described as "Locums" Engaged in the Fields of Medicine, Health Care and Pharmacy

The manual "Individuals Described as 'Locums' Engaged in the Fields of Medicine, Health Care and Pharmacy" has been updated at paragraph 3 to refer to the revised Code of Practice on Determining Employment Status published in July 2021.

No. 126 Accelerated Wear and Tear Allowances for Gas Vehicles and Refuelling Equipment

The manual "Accelerated Wear and Tear Allowances for Gas Vehicles and Refuelling Equipment" has been updated to reflect amendments made by Finance Act 2021 to the scheme of accelerated capital allowances available under s285C TCA 1997. The updates reflect the amendments to extend the scheme until 31 December 2024 and that capital expenditure incurred on or after 1 January 2022 on certain hydrogen vehicles and related refuelling equipment qualifies for the scheme.

No. 127 Guidelines for Article 9 Correlative Adjustment Claims

The manual “Guidelines for Article 9 Correlative Adjustment Claims” has been updated as follows:

- Section 3.1 has been updated to include a reference to s955 TCA 1997, applicable to accounting periods starting prior to 1 January 2013.
- Section 3.3 has been updated to remove a reference to Revenue’s manual “Guidelines for Requesting Mutual Agreement Procedure (‘MAP’) Assistance in Ireland”, as it is no longer relevant, and to advise that, where a company is approved for Transport Layer Security (TLS), the claim form and supporting information and documentation can be submitted by secure email.
- Section 4.2 has been updated to include further information on making an appeal.
- The appendix has been updated to make it clear that documents should be provided in English (or Irish); to provide clarity on the information required under items iv and v(c); and to include, under item vi, a requirement to provide confirmation that no sum has been deducted in computing the amount of profits or gains to be charged to Irish tax for any amount paid or payable to an associated company arising from the transfer pricing adjustment.
- The Form CA1 has also been updated in part 1 to include details of the Irish tax impact of the adjustment and in part 2, at items 6, 8 and 9, to align with the changes made to the appendix. Item 2 of the notes has been updated to include information on the use of TLS.

No. 128 Employed Person Taking Care of an Incapacitated Individual

The manual “Employed Person Taking Care of an Incapacitated Individual” has been updated to provide additional clarity on the interaction between the tax relief available under s467 and ss465 and 466 TCA 1997. The computational examples throughout the manual have also been updated to reflect the position for the current year of assessment.

No. 129 Code of Practice [on] Determining Employment Status (Employed or Self-Employed)

Revenue has updated the manual “Code of Practice on Determining Employment Status (Employed or Self-Employed)” to insert a link to the revised Code published in 2021.

No. 130 Chapter 3 Pensions Manual – Employee Contributions

Revenue has updated Chapter 3 of the Pensions Manual, “Contributions by Employees”, in paragraph 3.3 to provide further details on the operation of income tax relief through the net pay arrangement

No. 131 Provision of Guarantee in Cases of Phased Payments

The manual “Collection of Customs Debts” has been updated to provide additional guidance to staff on requesting and recording guarantees in relation to Customs debts entering a phased payment agreement.

No. 132 Share Schemes Manual – Recent Updates

Revenue updated the following chapters of the Share Schemes Manual:

- “Chapter 3 – Unapproved Share Options” has been updated to refresh examples and update section 3.7.1 in respect of the annual employer return.
- “Chapter 6 – Forfeitable Shares” includes additional guidance material regarding filing the Employer’s Share Awards return (Form ESA) in respect of forfeitable shares in section 6.6, together with a refresh of

existing examples and the addition of new examples.

- "Chapter 10 – Approved Profit Sharing Schemes (APSS)" includes a refresh of the examples.

No. 133 Revenue Pensions Manual – Abolition of Approved Minimum Retirement Fund Requirement

Chapters 22, 23 and 28 of the Pensions Manual have been updated to reflect the abolition of the Approved Minimum Retirement Fund (AMRF) requirement in Finance Act 2021 with effect from 31 December 2021. The changes are set out below:

- "Chapter 22 – Pension Adjustment Orders": paragraph 5 has been updated to remove references to AMRFs, and a paragraph has been added to provide details on the abolition of this product.
- "Chapter 23 – Approved Retirement Funds" has been extensively updated throughout to reflect the abolition of the AMRF in Finance Act 2021 and the removal of specified minimum income requirement for all individuals wishing to avail of this retirement option. Additional updates to this manual include:
  - Paragraph 2 has been updated to remove the specified minimum income requirement reference, to add a paragraph to state that this no longer applies and to include details on the option to transfer benefits to an ARF for a surviving spouse or dependants where an employee of an occupational pension scheme dies in service.
  - The former paragraph 4, which covered Deferral of Annuity Purchase, has been removed.
  - Paragraph 4, previously 5 (Specified Income Requirement), removes the previous minimum specified income requirements when choosing to invest in an ARF.
  - Paragraph 5, previously 6 (Approved Minimum Retirement Funds), is updated to detail the removal of AMRF products and the process by which they were transferred to ARFs.
  - Paragraph 6, previously 7 (Withdrawals from an AMRF/Conversion of an AMRF to an ARF), is updated to remove conditions outlining the transfer of funds from an AMRF to an ARF and to remove the previous guidance on transitional arrangements for AMRFs, and details on Pension Adjustment Orders have been updated to reflect the abolition of AMRFs.
  - Paragraph 7, previously 8 (Full Withdrawal of Balance in Retirement Fund), has been updated to remove reference to the previous minimum income requirement.
  - Paragraph 8, previously 9 (Approved Retirement Fund), is updated to include the option to purchase an annuity before transferring the balance of the fund to an ARF.
  - Paragraph 9, previously 10 (Qualifying Fund Manager), has been updated to remove the specified income reporting on declarations.
  - Paragraph 14, previously 13 (Imputed Distributions), is updated to remove historical information regarding the operation of imputed distributions.
- "Chapter 28 – Imputed Distributions from Approved Retirement Funds and Vested Personal Retirement Savings Accounts": paragraph 1 has been updated to remove legacy rules on the treatment of imputed distributions. In addition, paragraphs 2 and 4 have been updated to reflect the AMRF abolition in Finance Act 2021. The manual has also been updated to include details on the procedure for payment of tax on ARF distributions.

No. 134 myAccount User Manual

The "myAccount User Manual" has been updated at paragraph 3 to reflect amended timelines for the validity of temporary passwords. Temporary passwords issued by text or email remain valid for one hour from the time sent. Temporary passwords issued by letter are valid for 21 days for addresses within the EU and 28 days for all non-EU addresses.

No. 135 Payment and Receipt of Interest and Royalties Without Deduction of Income Tax

The manual "Payment and Receipt of Interest and Royalties Without Deduction of Income Tax" has been updated as follows:

- To note that a Certificate of Residence (Form 6166) is acceptable in lieu of having the self-certifications forms certified, in view of the difficulties encountered by US residents in having the self-certification forms certified.
- To outline the procedures to be followed when completing a Form CT1 or Form 11 for 2021 in cases where the practice whereby a taxpayer can withhold tax at the double taxation agreement (DTA) rate from interest or royalties paid to residents of a treaty partner has been availed of (rather than withhold and remit an amount of tax that is subsequently refundable under that DTA).
- To clarify the details to be included in the Additional Notes panel of the Company Details panel of the ROS Form CT1 for 2021 (see paragraph 9.1).
- In respect of the Form 11, details of the interest paid should be returned under the Gross Amount of Rents, etc. payable to Non-Residents heading in Panel H [Annual Payments, Charges and Interest Paid].
- To outline the procedure to be followed when completing a Form CT1 for 2021 where an individual makes a self-certification on a Form 08-03-06 to the person making the royalty payments in order that royalty withholding tax, as required under the provisions of s238 TCA 1997, is applied at the appropriate DTA rate. Paragraph 9.1 sets out the details to be included in the Additional Notes panel of the Company Details panel of the ROS Form CT1 for 2021.

No. 136 Non-resident Students Exercising a Short-Term Employment in the State

The manual "Non-resident Students Exercising a Short-term Employment in the State" has been updated to reflect the change made to the personal tax credit by Finance Act 2021. The personal tax credit was increased to €1,700 for the year of assessment 2022 and subsequent years.

No. 137 Guidance on the Anti-hybrid Rules

Revenue has updated the manual "Guidance on the Anti-hybrid Rules" to reflect Finance Act 2021 amendments. The updates include:

- **Section 3: Interpretation (Section 835Z)** has been updated for the broadening of the definition of "entity" to include forms of business that do not have legal personality.
- **Section 5: Worldwide System of Taxation (Section 835AB)** has been updated for the broadening of the scope of that section to include situations where an individual payee or investor is subject to a system, or effective system, of worldwide taxation.
- **Section 7: Associated Enterprises (Section 835AA)** updates have been made to paragraphs (e) and (f) of sub-section (2) to ensure that the provision operates as intended and to insert a new segment setting out the application of the "associated enterprises" test to Irish partnerships.
- A new **Section 12: Reverse Hybrid Rule** has been included to reflect the introduction of Chapter 10A, Reverse Hybrid Mismatches, into Part 35C TCA 1997. The section sets out relevant definitions and provides guidance on the operation of the rule.

No. 138 Irish Real Estate Funds (IREF) July 2022 Filing – Updated Form IREF Available

Irish real estate funds (IREFs) with accounting periods ending between 1 July 2021 and 31 December 2021 are required to file a Form IREF on or before 30 July 2022, as provided by s739R(2) TCA 1997.

Revenue updated its website to include a new version of the Form IREF, which is available in the Related Forms panel of the Collective Investment Vehicles webpage. Updates to the Form IREF 2022 include:

- Part 3 of the form now requires disclosure of further details relating to:
  - units held in other IREFs,
  - shares held in REITs (real estate investment trusts),
  - shares held deriving the greater part of their value from land and buildings and
  - specified mortgages held.
- Part 4 of the form now requires disclosure of the following information:
  - amounts paid to unitholders comprising a return of capital,
  - remaining capital investment not returned to unitholders and
  - confirmation that a valid declaration provided for by Schedule 2C TCA 1997 is in place for each non-specified (i.e. exempt) unitholder, as provided for under s739K(1).
- The Notes and the Pay & File tabs have been updated to provide further guidance.

Several formatting updates have also been made throughout the Form IREF, which affect the layout of the form only, and a panel has been inserted on each part of the form to capture the Tax Reference Number (TRN) of the IREF. These panels should automatically populate from the TRN input at Part 1 of the form.

No. 139 Securitisation Regulation (Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021); Notification of Investment ("NOI")

Revenue published a new manual, "Securitisation Regulation: Notification of Investment", which provides guidance in relation to an Irish-resident investor who is required to submit a Notification of Investment to Revenue.

Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021 (Securitisation Regulation) entered into force on 9 April 2021. It provides that an investor in a Securitisation Special Purpose Entity (SSPE) established after 9 April 2021 in a jurisdiction listed in Annex II of the Council of the European Union's list of non-cooperative jurisdictions for the reason of operating a harmful tax regime must notify the tax authority in the Member State in which the investor is tax resident.

No. 140 Allowances, Expenses and Gratuities Payable to Local Authority Chairpersons and Members

The manual "Allowances, Expenses and Gratuities Payable to Local Authority Chairpersons and Members" has been updated to reflect changes to the expenses and allowances of elected members of local authorities. The changes to the manual arose from new Regulations (SI 313 of 2022) that came into effect from 1 July 2021, unless otherwise stated.

No. 141 Dependent Relative Tax Credit

The manual "Dependent Relative Tax Credit" has been updated to confirm that the specified amount for the 2022 year of assessment is €16,156.

No. 142 War of Independence – Special Allowances and Military Service Pensions

The manual "War of Independence – Special Allowances and Military Service Pensions" has been updated to clarify that surviving spouses, children and dependants of veterans qualify for an exemption from tax in respect of War of Independence Pensions.

No. 143 Taxation of Exam Setters, Exam Correctors, Exam Attendants, Invigilators, Etc.

The manual "Taxation of Exam Setters, Exam Correctors, Exam Attendants, Invigilators, Etc." has been updated to include exam attendants and refer to the Code of Practice on Determining Employment Status.

The manual notes Revenue's view that exam setters, exam correctors, exam attendants, invigilators etc. engaged by the State sector, private colleges or associations are, in general, likely to be engaged under a contract of service and are therefore employees. Consequently, any emoluments that they receive are subject to deductions under the PAYE system.

No. 144 ROS Form CT1 2022 – the CT Return for Accounting Periods Ending in 2022

Revenue published a new manual on "Completion of Corporation Tax Returns Form CT1 2022", including updated and mandatory questions and providing details of the panels on the Form CT1 that have been updated, including:

- Company Details,
- Trading Results,
- Extracts from Accounts,
- Irish Rental Income,
- Irish Investment and Other Income,
- Deductions, Reliefs & Credits,
- Research & Development Credit,
- Close Company Surcharge,
- Recovery of Income Tax and
- CT Self Assessment.

In addition, the Form 46G company for accounting periods ending in 2022 is available for filing. Filers can complete the online version in ROS for up to 30 payees, the offline version for up to 3,000 payees or the 46G Return Tool. Filers should ensure that the period returned in the Form 46G matches the accounting period in the Form CT1.

No. 145 Computational Examples in Tax and Duty Manuals

Revenue has updated computational examples throughout several manuals to reflect the position for the current year of assessment. The updated manuals are:

- "Incapacitated Child Tax Credit",
- "Repayments under Section 460 Taxes Consolidation Act 1997",
- "Medical Insurance",
- "Home Carer's Tax Credit",
- "Tax Relief for Retirement for Certain Income of Certain Sportspersons",
- "Relief for Key Employees Engaged in Research and Development Activities",
- "Single Person Child Carer Credit" and
- "PAYE Reviews Where Week 53 Applies".

No. 146 Plant in Leased Buildings – Treatment of Leasing Income and Capital Allowances

Revenue has archived the manual "Plant in Leased Buildings – Treatment of Leasing Income and Capital Allowances – Part 09-01-03". Guidance in respect of plant in leased buildings can now be found in the manual "Plant in Leased Buildings – Treatment of Leasing Income and Capital Allowances – Part 09-02-03".

No. 147 iXBRL – 2022 Taxonomies Now Being Accepted

Revenue has updated the manual "Submission of iXBRL Financial Statements as Part of Corporation Tax Returns" to reflect the release of three new iXBRL taxonomies. A summary of the changes to the manual is included in appendix III.

Revenue is now accepting iXBRL submissions tagged with the 2022 Irish Extension taxonomies:

- FRS 101 Irish Extension 2022,
- FRS 102 Irish Extension 2022 and
- EU IFRS Irish Extension 2022.

The structure of the taxonomies can be viewed on Taxonomy Viewer.

No. 148 Guidance on the Residential Zoned Land Tax – Part 22A TCA 1997

Revenue published a new manual titled "Guidance on the Residential Zoned Land Tax". RZLT was introduced in Finance Act 2021 and is an annual tax calculated at 3% of the market value of land within its scope. The tax applies to land that, on or after 1 January 2022, is zoned as being suitable for residential development and is serviced, with certain exclusions.

It does not apply to existing residential properties. However, owners of residential properties with yards and gardens of greater than 0.4047 hectares will need to register for the RZLT but do not need to pay it.

The legislation requires each local authority to prepare and publish a map identifying land within the scope of the tax. These maps will be updated annually to reflect changes in the zoning and servicing status of land.

An owner of land that was zoned as suitable for residential development and serviced on 1 January 2022 and on which development has not commenced before 1 February 2024 will be liable to file a return and pay RZLT due in respect of such land on or before 23 May 2024.

Where the land is zoned as suitable for residential development and/or serviced after 1 January 2022, tax will first be due in the third year after it comes within scope. The tax will continue to be payable each year in respect of the land unless a deferral of the tax applies or the land ceases to be liable to the tax.

In cases of non-compliance, including undervaluation of the land in scope and late filing of returns, interest, penalties and surcharges will apply, as appropriate.

No. 149 Revenue Pensions Manual – Updates to Chapters 7, 10, 12, 13, 16 and 24

Revenue has made a number of updates to Chapters 7, 10, 12, 13, 16 and 24 of the Pensions Manual to reflect Finance Act 2021 amendments:

- "Chapter 7 – Lump Sum Benefits and Commutation" has been updated at paragraph 7.4 to remove the reference to the specified minimum income requirement regarding the investment in an Approved Minimum Retirement Fund (AMRF) and to state that Trivial Pension rules may be applicable where residual funds are available to secure spouses', civil partners' and dependants' pensions.
- "Chapter 10 – Benefits on Death-in-Service" has been updated at paragraphs 10.2 and 10.3 to state that occupational pension scheme rules can provide that the aggregate pension that can be provided for a spouse or for dependants of a deceased member of a scheme who dies in service either can be taken as a pension or the benefits transferred to an Approved Retirement Fund (ARF). In addition, paragraph 10.2 has been updated to state:
  - Where benefits are transferred to an ARF, the rules relating to ARFs shall apply. A link to "Chapter 23 – ARFs" is included.
  - Payment of death-in-service benefits including benefits transferred to an ARF, or provided as a dependent's pension, is not considered a benefit crystallisation event.
  - Where benefits are payable and do not exceed the aggregate value of €330 per annum, an approved scheme may permit full commutation of the benefits.
- "Chapter 12 – Withdrawal from Service (Leaving a Pension Scheme)" has been updated at paragraph 12.6 to clarify that where a withdrawing employee dies before deferred benefits become payable, benefits may transfer to an ARF for a spouse, civil partner and/or dependants, on the basis explained in Chapter 10 of the Pensions Manual.
- "Chapter 13 – Transfer Payments" has been updated at paragraph 13.2 to remove reference to the 15-year rule requirement for transfers from an occupational pension scheme to a personal retirement savings account and to state that where details are provided for transfers between schemes, details of any irrevocable waiver of the right to a lump sum must be included.
- "Chapter 16 – Group Schemes" has been updated at paragraph 16.1 to include that tax relief is available for pension contributions

made by a company (described as a "relevant contributor") to occupational pensions schemes to benefit current or former employees of another company where the contributions are paid under the terms of a legally binding agreement between two or more companies, and not only in cases where the other company is a party to that agreement.

- "Chapter 24 – Personal Retirement Savings Accounts" has been updated as follows:
  - Paragraph 24.2 has been updated to provide some examples of calculating tax relief.
  - Paragraph 24.4 has been updated to remove the previous AMRF investment requirements for PRSA benefits being taken on retirement. References to AMRF have been removed throughout the manual.
  - Paragraph 24.7 has been updated to state the removal of AMRF and its impact on PRSAs when exercising the ARF option, and the rules for PRSAs regarding ring-fencing and administration of vested PRSAs.
  - Paragraph 24.8 has been updated to remove the 15-year rule for transfers from an occupational pension scheme to a PRSA.
- Paragraph 24.9 has been updated to remove legacy rules regarding imputed distributions of vested PRSAs.

No. 150 Stamp Duties Consolidation Act 1999 – Notes for Guidance Updated

An up-to-date version of "Stamp Duties Consolidation Act 1999 – Notes for Guidance" has been published on the Revenue website. The Notes for Guidance have been updated to include all amendments to SDCA 1999 by subsequent Acts up to and including the Finance (Covid-19 and Miscellaneous Provisions) Act 2022.

No. 151 VAT Treatment of the Special Flat-Rate Scheme for Farmers

Revenue published a new manual titled "Flat-Rate Scheme for Farmers" to provide guidance on the VAT treatment of the special flat-rate scheme for farmers. In addition, the manual "Farmers and Intra-EU Transactions" has been marked as no longer relevant.

Direct Tax Cases: Decisions from the Irish Courts

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	Topic	Court
01	**Employment Status in the Gig Economy – Contract of Service or Contract for Services**	Court of Appeal
02	**Co-op Patronage Shares – Income Tax**	High Court
03	**Expression of Doubt: Loss-Making Transactions – Income Tax**	High Court
04	**Sub-sale Relief – Stamp Duty**	Court of Appeal

01 Employment Status in the Gig Economy – Contract of Service or Contract for Services

The Court of Appeal considered the self-employed vs employed (contract for services vs contract of service) distinction in ***Karshan (Midlands) Limited trading as Domino's Pizza vs Revenue Commissioners*** [2022] IECA 124.[1]

Karshan operated a pizza takeaway business (trading as Domino's). Revenue had assessed it to PAYE and PRSI in respect of sums that it had paid to delivery drivers. Karshan had appealed those assessments to the Tax Appeals Commission (TAC). Its position was that those delivery drivers were self-employed (i.e. they worked under contracts for services), whereas Revenue contended that they should be treated as employees (i.e. working under contracts of service). Revenue had been successful before the TAC and, again, before the High Court. Karshan appealed the High Court's decision to the Court of Appeal.

The written agreements between Karshan and the delivery drivers expressly provided (among other things) that:

- The driver was to provide the delivery service and the promotional service (wearing Domino's-branded clothes) to Karshan as an independent contractor.
- The driver was to provide his/her own insured vehicle (but Karshan was prepared to offer insurance or a rental vehicle).

1 See also article by Julie Galbraith and Robert Dever "The Analysis of Employees and Contractors in Ireland "Pizzas, Elephants and Uber"", in this issue.

- The driver could engage a substitute contractor if he/she was unavailable at short notice.
- Karshan was not obliged to use the driver's services at all.
- The driver agreed to notify the Karshan in advance if he/she became unavailable to perform a previously agreed service.

The drivers also signed a separate document titled "Social Welfare and Tax Considerations", which provided: "This is to confirm that I am aware that any delivery work I undertake for Karshan Limited is strictly as an independent contractor. I understand that, as such, Karshan Limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive from this or any of my other work related activities."

The drivers also signed a "Promotional Clothing Agreement", which provided for a deposit to be paid in respect of a branded clothing that they were provided with.

The Tax Appeals Commissioner's findings of fact were summarised by the court. These included that the practice was that drivers would fill out an "availability sheet" a week in advance of the roster's being drawn up, and the store manager would then prepare a roster. Substitute drivers would be drawn from the pool of Karshan's drivers. The drivers were required to wear branded clothing and were subject to checks by Karshan's manager. Drivers would also be provided with magnetic promotional signs, which they would affix to their own vehicles (no rental vehicles were available). Drivers had to provide evidence of appropriate insurance (or could be provided with insurance by Karshan for a fee). Drivers would use their own phones to contact customers. Karshan limited the number of deliveries that a driver could take at any one time to two. Some drivers were asked to fold pizza boxes while waiting for a delivery. Karshan prepared the invoices for many of the drivers to sign. The drivers clocked in and clocked out through Karshan's computer system. Drivers would be provided with a cash float at the start of their shift, which they would return at the end of their shift. The delivery rate was €1.20 per drop, with an additional 20c payable for insurance, and they were also paid a brand promotion/advertising rate of €5.65 per hour. These rates were non-negotiable. Some drivers engaged an accountant to look after their records.

The Commissioner noted three deviations between the terms of the agreements and the practices of the parties: (1) there were no company vehicles available to rent; (2) Karshan prepared the invoices, which the drivers signed (rather than the drivers preparing the invoices themselves); and (3) some drivers performed work that was not stipulated in the contact (i.e. assembly of pizza boxes).

Karshan challenged the inferences drawn by the Commissioner from those primary facts, the application of law to the primary facts and the written agreement, and the inferences drawn from both.

The essential issues before the court were:

- whether the Commissioner had correctly found that "mutuality of obligation" existed;
- whether the Commissioner had correctly applied ancillary concepts (i.e. "substitution" and "integration"); and
- what was the proper weight to be given to the terms of the contract.

In the Court of Appeal the case was heard by a three-judge panel, each of whom gave their own written judgment. The majority (Costello J and Haughton J) held for the appellant (the taxpayer) on a finding that there was no mutuality of obligation. Whelan J gave a dissenting opinion.

Mutuality of obligation

All three judges agreed that mutuality of obligation was the *sine qua non* (the essential condition) of employment. In the absence of an ongoing mutuality of obligation, there could be no employment relationship.

Costello J held that the TAC had erred in applying the UK authorities of *Pimlico Plumbers* and *Autoclenz* (these UK cases held that mutuality of obligation is not absent merely because a clause in a contract states that the provider of work has no obligation to offer work and the putative recipient no obligation to accept work), finding instead that the TAC should have applied the principle of mutuality of obligation as that principle was established in the Irish cases of *Barry*, *Manson*, *McKayed* and *Brightwater*, which "[all] state clearly that for mutuality of obligation to be present there must be an obligation to provide work on one party, and an obligation to perform the work on another party".

On reviewing the terms of the agreement, Costello J held that there was no obligation on a driver to "turn up" for a rostered shift, and no sanction for failure to turn up for a rostered shift (findings that Whelan J disagreed with in her dissenting opinion).

Haughton J voiced his broad agreement with the judgment of Costello J. Haughton J held that the terms of the written agreement executed by the parties (to which "the law must accord appropriate deference") demonstrated that the parties had not intended to have mutuality of obligation.

Haughton J also commented on the effect of variances between the terms of the written contract and actual practice. He noted that although the variances (no vehicles actually available for rental; not all drivers actually prepared and submitted invoices; some drivers did additional work not stipulated in the contract) had been found to exist, these variances did not impact on the question of mutuality of obligation.

The majority therefore found that there was no "mutuality of obligation" and thus no employment relationship between the parties.

Substitution and integration

Having found that mutuality of obligation was not present and that there was therefore no employment relationship, Haughton J held that it was not necessary to consider the additional tests, i.e. the degree of control over the worker, the level of integration of the work undertaken and the opportunity of the worker to profit.

Costello J did address the question of the substitution and integration tests in her judgment. The agreement provided that the driver could arrange a substitute driver if he/she could not turn up to do the rostered shift at short notice, and that the substitute driver would be paid directly by Karshan. Costello J held, on the facts, that the right of substitution was not genuine, as although the drivers had an unfettered right of substitution, they would have "no particular interest in ever exercising this right: [because] the substitute would be paid for the work, not the originally rostered driver".

As regards the integration test, Costello J also held that it was open for the Commissioner to hold that the drivers were integrated into the business of the appellant.

Proper weight to be given to the terms of the contract

The social tensions created by the "gig economy" were recognised by the court. In her dissenting opinion, Whelan J emphasised the "asymmetrical nature of a transaction where one party is the exclusive author of the instrument and the other can only generate an income in an arrangement with the company by signing the document". She put forward the position that "purposive approaches to construction are required for contracts where there is a material imbalance between the parties in the negotiation of the written agreement and the availability of independent legal advice".

In Whelan J's judgment this purposive approach was required to tackle the challenges presented by the "gig economy" and the resultant inequality of bargaining power. To that end, the dissenting judgment at some points places more emphasis on what was omitted from the contract than what was included, with the one-sided drafting of the agreement argued to be a basis to "read in" meaning from purported omissions to determine the "true construction" of the contract. For example, in the context of the question of the existence of mutuality of obligation and whether the drivers were obliged to provide themselves for work to Karshan, Whelan J, after noting that clause 14 of the agreement expressly provided that Karshan was not obliged to provide work to the drivers, described as "fatal" the omission of a reciprocal statement that the drivers were never obliged to make themselves available for work, concluding "[i]f it were intended that the drivers were never obliged to make themselves available for work, that would have been expressly stated".

Whelan J's purposive approach was not adopted by the majority. The majority espoused a conventional approach to the interpretation of the parties' agreements and the court's role in applying, rather than making, law.

Haughton J recognised that "the law must accord appropriate deference" to the terms of the written agreement executed by the parties. Costello J cautioned against courts' seeking to change the law to address changes in market conditions, noting that the constitutional doctrine of the separation of powers restricts the courts in this regard and that it was for the Oireachtas to make such policy changes. She further noted that such changes must also be prospective rather than retrospective. She quoted Underhill LJ (from the UK's *Uber* case) to express the point that she wished to make: "in cases of the present kind the problem is not that the written terms misstate the true relationship but that relationship created by them is one that the law does not protect".

02 Co-op Patronage Shares – Income Tax

In ***Revenue Commissioners v Henry Walsh*** [2022] IEHC 305 the High Court heard an appeal taken by Revenue against a determination of the Tax Appeals Commission (172TACD2020).

The taxpayer, a dairy farmer, had supplied milk to Kerry Co-op. Pursuant to the Co-op's rules (which gave the taxpayer a right to subscribe at par for one patronage share in Kerry Co-op for every 4,546.09 litres of raw milk supplied by him), the Co-op had granted the taxpayer a right to subscribe for 107 shares in Kerry Co-op at par value of €1.25 (the "patronage shares") rather than their market value. Revenue had assessed the taxpayer to income tax, USC and PRSI in respect of the market value of the patronage shares as an income receipt of his trade.

There were a number of other tax appeals dealing with the same issue before the TAC, and the matter was treated as the lead case. At a case management conference (CMC) the Commissioner decided to deal with the "core issue" of whether the receipt of patronage shares was a receipt from the taxpayer's trade as a milk supplier or a capital receipt outside the charge to income tax and stayed other issues concerning what value to place on the receipt of the right to subscribe for the patronage shares, or their allotment, such issues being "parked".

The Commissioner held that (1) the receipt of the right to subscribe for patronage shares was an income receipt but (2), as that right to subscribe was personal to the taxpayer and could not be assigned, it had no value.

Revenue appealed on the basis that as the Commissioner had held (1) that the right to subscribe for patronage shares was an income receipt, it should follow that the core issue should have decided the case in Revenue's favour. The taxpayer counter-appealed in respect of finding (1).

The tax technical issues before the court were:

- Was the receipt of the right to subscribe for patronage shares arising in these circumstances an income receipt?
- If not, was the subsequent allotment of the patronage shares an income receipt?

The procedural issues before the court concerned:

- Whether the Commissioner had erred in making a determination on the valuation issue in circumstances where that issue had been "parked" and, accordingly, arguments and evidence had not been proffered by Revenue.

Decision:

- Egan J in the High Court agreed with the Commissioner that, on the facts, the receipt of the right to subscribe for patronage shares was received in consequence of the taxpayer's trading activities and "falls to be taken into account when calculating the full amount of the respondent's profits in the year of assessment". It was thus within the charge to income tax.
- The court agreed with the Commissioner that the allocation of the patronage shares on the subsequent exercise of that right was a separate and distinct transaction and was not received by the respondent in consequence of his trading activities. The subsequent allotment was therefore outside the charge to income tax.
- The court held that the Commissioner had erred in expressing a view on the value attributable to the right to subscribe (or the subsequent allotment of shares) in circumstances where the issue had been "parked" after the CMC and no evidence or argument had been presented by Revenue at the hearing pending the determination of the core issue. The Commissioner's findings in respect of valuation were reversed.
- The court declined to make any determination on the question of what value should be placed on the right to subscribe, as arguments in respect of same had not been made before the TAC on account of the issue's having been "parked" by the TAC with the agreement of the parties.
- The court remitted the valuation question back to the Commissioner.

In reaching its decision, the court noted that:

- Section 18 TCA 1997 provides that tax liability under Schedule D, Case I, arises in respect of "any trade".
- Section 65 TCA 1997 provides that "income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment".

For the court, the question was whether the relevant benefits received by the taxpayer had resulted from his activity as a trader (as Revenue contended) or from his status as a trader under the Co-op's rules (as the taxpayer contended).

Having reviewed the Co-op's rules and correspondence from the Co-op to the taxpayer, the court rejected the taxpayer's contention that he received the right to subscribe for the shares merely from his status as a trader:

> "It does not arise because the [taxpayer] is a person who generally supplies milk to the co-op but because he has actually supplied a particular quantity of milk in the relevant year, and has therefore actively traded with the co-op. The invitation to subscribe was received because of, and as a result of, the [taxpayer's] trading activity".

Adopting the analogy used by Hanna J in *Robinson v Dolan* to the current facts, Egan J stated: "the supply of milk is the tree and the invitation to subscribe for the shares [is] one of the fruits thereof". Hence, she found that the invitation to subscribe was taxable as a trading receipt. The High Court judgment did not address the question of the valuation of that invitation to subscribe, which was remitted to the Commissioner.

Revenue has since released eBrief No. 159/22 (8 August 2022) to say that its Tax and Duty Manual Part 25-01-04 has been updated to remove previous guidance regarding "patronage shares", stating that:

> "This removal reflects Revenue's acceptance that shares issued by a co-operative at a value less than market value to members arising from the trading relationship between the member and the

co-operative (or a nominated purchaser), otherwise known as patronage shares, does not give rise to a trading receipt within the charge to income tax".

Neither the eBrief nor the updated Tax and Duty manual states how Revenue proposes to treat the receipt of the invitation to subscribe for those shares.

03 Expression of Doubt: Loss-Making Transactions – Income Tax

The High Court in ***Thornton v Revenue/ McDermott v Revenue*** [2022] IEHC 396 considered the requirements of a valid Expression of Doubt, as well as the operation of s812 TCA 1997. This judgment was made in respect of two separate appeals. In each, the taxpayer had participated in a syndicate that had bought and sold various investments, including, in particular, a right to receive a dividend from a British Virgin Islands (BVI) company. The taxpayers claimed that the purchase price of the right to receive the dividend was an allowable expense of their trade in financial instruments and securities but that the receipt of that dividend (pursuant to that right) was not subject to income tax, per s812 TCA 1997. Accordingly, each claimed that the transaction had created an allowable Case I trading loss (albeit that no economic loss had been sustained), which could be used to shelter their other income. The taxpayers had also filed an 'Expression of Doubt' on their tax return with a view to protecting themselves from exposure to interest and penalties if Revenue disallowed the loss.

Revenue disputed that treatment and raised assessments against the taxpayers. It also rejected the expression of doubt on the basis that it was not valid. The taxpayers unsuccessfully appealed to the Tax Appeal Commission and then appealed the Commissioner's determination to the High Court.

The main issues before the High Court were:

- Was the taxpayer carrying on a trade in financial instruments and securities?
- Did s812 TCA 1997 apply to treat a dividend received by the taxpayer as not being his income?
- Had the taxpayer submitted a valid 'Expression of Doubt'?

In respect of these issues, Egan J in the High Court held:

- The taxpayer was not carrying on a trade. The court reached its decision having regard to the facts and precedent. It cited with approval the "Badges of Trade" as well as the decision of the House of Lords in *Lupton*, which had held that the presence or absence of "fiscal elements" (i.e. a tax advantage) is not determinative but, rather, the substance of the entire transaction must be considered. In so doing, the court rejected the appellant's argument that *Lupton* was no longer good law in Ireland since the *McGrath* decision.
- Section 812 treated the dividend as being income of the BVI company rather than of the Irish taxpayers. The court rejected Revenue's argument that "income" must be interpreted as "income chargeable to tax" in Ireland and thus s812 should apply only where the entity disposing of the right to receive the dividend is within the charge to Irish tax. Although the court's decision on this point is *obiter* (given its finding that the applicant was not trading), it gave its decision after hearing arguments from both parties and at their request (in the event of an appeal on the trading issue).
- The taxpayer's Expression of Doubt was not valid. The court held that although the requirements for a valid expression of doubt (as they applied in 2009 and 2010) were "minimalistic", they were not satisfied by the taxpayer in this case. It stated that "at a bare minimum, the expression of doubt must adequately alert the inspector to the essential issues giving rise to the existence of the relevant doubt (or doubts)".

The text of taxpayer's expression of doubt read: "We have been advised that a transaction entered into as part of the Schedule D case 1 trade could fall within s812 of the Taxes Consolidation Act, 1997. The computation of the relevant Schedule D case 1 trade has been prepared on the basis of s812 TCA 1997."

The court held that "a valid expression of doubt would draw the inspector's attention to the relevant matter in question, which is, broadly, that there is a doubt as to whether the dividend purchase transactions constitute trading" and, separately, as regards the s812 point, "whether the deeming provision applies in the case of a purchase of dividend rights from a non-resident owner of securities who will not themselves be paying tax on the income". The court held that "there was nothing in the expression of doubt, or indeed in the tax return as a whole, which would alert the inspector to any of these factors".

The court rejected the taxpayer's arguments that separate ancillary filings (being a provisional notification in respect of s812) could supplement the expression of doubt: "[t]his, in my view, cannot cure any defect in the expression of doubt. The provisional notification is made at a different time and for a different purpose to the expression of doubt." However, the court also rejected Revenue's argument that the taxpayer must "set out a significant level of detail in relation to the scheme pursuant to which the dividend purchase transaction took place".

It should be noted that the Expressions of Doubt in question were made in tax returns for 2009 and 2010, when the applicable law was s955(4) TCA 1997, which provided:

> *"Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter."*

Expressions of Doubt are now governed by s959P TCA 1997 (inserted by Finance Act 2012), which has expanded the requirements for a valid expression of doubt and provides that it must (a) set out full details of the facts and circumstances of the matter; (b) specify the doubt, the basis for the doubt and the law giving rise to the doubt; (c) identify the amount of tax in doubt in respect of the chargeable period to which the expression of doubt relates; (d) list or identify the supporting documentation that is being submitted to the appropriate inspector in relation to the matter; and (e) be clearly identified as a letter of expression of doubt for the purposes of that section.

04 Sub-sale Relief – Stamp Duty

In ***Yesreb Holdings Limited v Revenue Commissioners*** [2022] IECA 127 the Court of Appeal heard an appeal from the High Court taken by the taxpayer. The judgment was written by Allen J (with Costello J and Haughton J in agreement).

The matter concerned whether "sub-sale relief" from stamp duty (s46 SDCA 1999) applied to a transaction. The facts of the matter were:

- On 1 July 2005 a contract was entered into between executors of the estate of PAD (vendors) and Mr Dunne (purchaser) for a house, known as Walford, for the price of €57.95m. A 10% deposit of €5.795m was paid at that time. That contract contained a special condition that expressly provided that the contract was personal to the purchaser (Mr Dunne), that he could not assign it without the previous consent in writing of the vendors and that the vendors would not be required to deliver a deed of assurance in favour of any other party other than Mr Dunne (or a member of his family or a company controlled by him or them).

- By deed of trust dated 23 July 2005, Mr Dunne declared that his entire interest in the contract to purchase Walford was held by him on trust for Mrs Dunne.
- In July 2006 the balance of the purchase price under the contract was paid, the title documents were delivered and possession passed.
- In October 2006 a nominee agreement was entered into, by which Matsack Nominees Ltd was appointed to hold Mrs Dunne's interest in the property as nominee.
- In October 2011 the executors agreed that they would execute a conveyance of the property at the request of Matsack rather than Mr Dunne.
- The property was put up for sale, with Matsack listed as the vendor in the draft contract.
- On 28 March 2013 a contract was signed by "Sean Dunne (as trustee for Gayle Dunne)" as vendor and Yesreb as purchaser, whereby Mr Dunne agreed to sell Walford to Yesreb for €14m.
- On 29 March 2013 a deed of conveyance executed by Mr Dunne, Mrs Dunne, Matsack Nominees Limited and Yesreb Holdings Limited transferred the property to Yesreb for €14m.

A stamp duty return was filed by Yesreb in April 2013. It paid stamp duty on the consideration that it paid of €14m, claiming that it was entitled to sub-sale relief under s46(1) SDCA 1999. Revenue took the view that sub-sale relief did not apply and raised an assessment, which was appealed to the Tax Appeals Commission (TAC), where Yesreb was unsuccessful, and then to the High Court (where Yesreb was also unsuccessful).

The principal issues before the court were:

- whether the conditions of sub-sale relief had been satisfied and
- who was the accountable person for the stamp duty arising.

The court rejected Yesreb's appeal, agreeing with the decisions of the TAC and the High Court. It noted that sub-sale relief requires three conditions to be satisfied:

- The purchaser in the main contract and the vendor in the sub-sale contract must be the same person (the "identity" requirement).
- The conveyance must have been in consequence of both the original contract and the sub-sale contract and must arise from contracts that are enforceable by means of specific performance (the "in consequence" requirement).
- There must have been no act other than the signing of the sub-sale contract between the main contract and the execution of the conveyance (the "no intervening act" requirement).

The court noted that the TAC had found that:

- Per special condition 14, the contract was personal to Mr Dunne, and there was no evidence that the executors of the estate had consented to the trust arrangement with Mrs Dunne.
- The effect of the 23 July 2005 trust arrangement was to make Mr Dunne a mere nominee/bare trustee of Mrs Dunne, and he had no power of sale in respect of the property.
- As the 2005 contract pre-dated the enactment of the Land and Conveyancing Law Reform Act 2009, the relevant law for determining the extent to which Mr Dunne had a beneficial interest in the property was the decision in *Tempany v Hynes*, and accordingly, Mr Dunne had only ever held a 10% beneficial

interest in the property (i.e. being the amount of the deposit monies paid by him).

Accordingly, the Court of Appeal held:

- As Mr Dunne had no power of sale (without the concurrence of Mrs Dunne), there could be no legal nexus between the 2013 contract (executed by Mr Dunne) and the 2013 conveyance (executed by executors), so that conveyance could not have been "in consequence" of the 2013 contract.
- The conveyance to Yesreb by Mr Dunne also required the concurrence of the executors, Mrs Dunne and possibly also Matsack, and thus it could not be said that the property was immediately conveyed to Yesreb by Mr Dunne.

It followed that sub-sale relief under s46 SDCA 1999 was held not to apply.

Turning to the question of the accountable person and the quantum of stamp duty liability, the court held that:

- Yesreb, as the transferee under the conveyance, is the accountable person to pay the stamp duty (per s1 SDCA 1999), and the stamp duty liability (in the absence of sub-sale relief) is calculated by reference to the total value of the consideration in both of the contracts (per s7 SDCA 1999).

The decision illustrates how the particular terms of a contract and nuances of conveyancing law can have a large impact on the stamp duty treatment.

Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Corporation Tax – Interest Deductibility**	UK First-tier Tribunal
02	**Inheritance Tax – "Wholly or Mainly" Test for Business Property Relief**	UK First-tier Tribunal
03	**Corporation Tax – Trading Status**	UK Upper Tribunal
04	**Capital Gains Tax – CGT Deductions**	UK First-tier Tribunal
05	**Capital Gains Tax – Entrepreneurs' Relief**	UK First-tier Tribunal
06	**Capital Gains Tax – Share-for-Share Exchange**	UK Upper Tribunal
07	**State Aid – UK CFC Regime**	General Court of the European Union

01 Corporation Tax – Interest Deductibility

In ***HMRC v BlackRock Holdco 5 LLC*** [2022] UKUT 199 (TCC) the Upper Tribunal (UT) overturned the decision of the First-tier Tribunal (FTT) in relation to the deductibility of interest payable on $4bn worth of loan notes. The loan notes were part of intra-group financing for a third-party corporate acquisition. The UT ultimately denied the interest deduction.

The UT had to consider two issues, the first being whether the interest expense arose in the first place under transfer pricing rules. On this matter the UT reversed the FTT's finding in relation to the application of the transfer pricing legislation, determining that the loans would not have been made between independent enterprises acting at arm's length. The FTT was found to have erred in law in permitting new third-party covenants absent from the actual transaction to be taken into account when considering whether an independent lender would have made the $4bn loan. Essentially, by permitting the introduction of third-party covenants, the FTT had compared a different transaction to the actual one. As an independent lender would not have made the loans without the covenants, the FTT should have determined that there was no comparable arm's-length transaction and that the loans would not have been made between independent entities.

Although the decision on the first ground, i.e. the transfer pricing issue, meant that the appeal was decided, the UT nevertheless considered the second ground of appeal. The Tribunal had to consider whether the loan had an "unallowable purpose". The "unallowable purpose" issue concerns whether there was a commercial purpose to the loans or the purpose was to secure a tax advantage (or there were dual purposes). The FTT had found that the loans had both a commercial purpose and a tax advantage purpose but that it would be just and reasonable to apportion all of the interest costs to the commercial purpose, meaning that they were fully deductible. The UT reversed the FTT's approach to apportionment. The UT held that the FTT was wrong to decide that the just and reasonable apportionment was solely to the commercial purpose. "But for" the tax advantage purpose, there would have been no commercial purpose to the loans. On that basis, the attributable interest costs would be disallowable.

02 Inheritance Tax – "Wholly or Mainly" Test for Business Property Relief

In ***Bruce Firth and Rita Firth as the trustees of the L Batley 1984 Settlement v HMRC*** [2022] UKFTT 219 (TC) the First-tier Tribunal (FTT) had to consider whether the operation of "aparthotels" qualified for business property relief or was a business of making and holding investments. This case is the latest in a long line that have considered this matter – see, for example, the decision in *Executors of the late Sheriff G L Cox v HMRC* [2020] UKFTT 442 (TC), as reviewed in "Direct Tax Cases: Decisions from the UK and European Courts", *Irish Tax Review*, 34/1 (2021). However, it was accepted that the business carried on in this case by the taxpayer in the present case was not of a type previously considered by any of these other cases.

The FTT decided, having looked at the business in the round, that the non-investment activities of the taxpayer did not take the business over the line into the non-investment side of the spectrum.

The taxpayer highlighted the breadth of the services that were being provided and compared the business to that of a boutique or up-market hotel. HMRC focused on the services that were not being provided. Ultimately, the FTT held that there was a lack of clear evidence to substantiate claims made by the appellants that additional services were regularly provided to guests. Accordingly, the FTT agreed with HMRC and found nothing exceptional about the business to elevate it beyond the designation of an investment activity. Interestingly, while denying the taxpayer relief, the Tribunal stated that "*some*" aparthotels, such as "*Staybridge Suites*", would be considered to be providing services with ancillary occupation of the accommodation.

03 Corporation Tax – Trading Status

In ***Foundation Partners v HMRC*** [2022] UKUT 167 (TCC) the Upper Tribunal (UT) rejected the general partnership's appeal against the finding that its activities carried out in 2008–9 did not constitute a trade. The FTT decision was reviewed in "Direct Tax Cases: Decisions from the UK Courts", *Irish Tax Review*, 34/2 (2021).

Foundation partners was formed in July 2008. Its role was to be the investment vehicle for property development in Montenegro. It took the form of a tax-transparent partnership so that investors would be able to set sideways any trading loss realised by Foundation against those investors' own taxable income. In its partnership tax return for 2008–9, it claimed a trading loss of £36m. The loss arose as a result of an impairment in trading stock.

HMRC sought to deny tax relief for the full loss. The UT upheld the decision of the FTT that Foundation's activities were not of a trading character. The UT held that there was no error of law in the FTT's decision that the absence of commerciality was a factor of considerable weight. There was also no reason to disturb the FTT's finding that the arrangements to which Foundation Partners was party were "so distorted by tax considerations, that they break down as a credible trading proposition". The uncommerciality arose from arrangements designed to provide investors with sideways loss relief, and there was a "rational basis" for the FTT's conclusion that the principle in *Lupton* applied. *Lupton* is authority for the proposition that where the only purpose of a transaction that is a *prima facie* trading transaction is to establish a claim against the revenue authority and the transaction is denatured by its overriding fiscal objectives, it is not a trading transaction. The principles set out by the court in *Lupton* were cited with approval in Ireland in *MacCarthaigh v D* [1985] IR 73.

On the basis of the above, the FTT decision was upheld and loss relief was denied.

04 Capital Gains Tax – CGT Deductions

In ***Ignatius Tedesco v HMRC*** [2022] UKFTT 171 (TC) the First-tier Tribunal (FTT) held that the repayment of secured debt was not a deductible expense for capital gains tax purposes despite its being a condition of sale.

The appellant sold shares in a company for £1.5m. It was agreed that the sale of the shares would be staggered, with "sale shares A" being sold at first completion and the remaining shares (described as "sale shares B") being sold at second completion some time later. It was provided in the share sale agreement that the shares would be bought free from any encumbrance. It was a condition of the sale that the sellers (i.e. the appellant) had to undertake to repay from the first funds from the buyer all of the company's secured borrowings. The appellant discharged the company's borrowings using the first funds received. The appellant then received additional funds on second completion. The appellant claimed the cost of repaying the debt as a CGT deduction. HMRC disagreed and argued that such a cost was not included among the items that could be claimed under the UK equivalent of s552(1)(b) TCA 1997.

The taxpayer appealed. However, the FTT found in favour of HMRC. The principal finding was that the discharge of the company's borrowings was not expenditure "on" the shares, and it was not expenditure that was reflected in the "state or nature" of the shares at either first completion or second completion. The appellant argued that there had been an increase in the value of the shares – the shares had, indeed, become more valuable as a result of the appellant's discharging the debt. However, it was held, in line with the *Aberdeen Construction and Blackwell v Inland Revenue* case, that a change in the value of a share is not a sufficient change to the state or nature of that share for the purposes of the UK equivalent of s552(1)(b) TCA 1997. Something more fundamental, such as a change to the rights that are acquired by holding that share, is required.

The tribunal sympathised with the taxpayer to an extent, in that the taxpayer could have realised a lower capital gain if the appellant had either settled the debt and then sold the shares at an enhanced value or sold the shares at a lesser value on the basis that the buyer would then settle the debt. But that was not how the deal was structured, and whether there could have been a different outcome on different facts was not the Tribunal's concern.

05 Capital Gains Tax – Entrepreneurs' Relief

In ***S Kavanagh v HMRC*** [2022] UKFTT 173 (TC) the First-tier Tribunal (FTT) held that an individual holding 4.997% of a company was unable to access entrepreneurs' relief on the disposal of his shareholding. The Tribunal also held that there was no evidence of other shareholders' holding any shares on trust for Mr Kavanagh.

Mr Kavanagh was a director and shareholder of a holding company in a group that carried on an estate agency business. After a share-for-share exchange, the appellant was registered as owning 1,842 shares in the holding company. The other three individuals were registered as owning 15,000, 15,000 and 5,000 shares respectively. All of the shares had a nominal value of £0.01 each. The taxpayer sold his shares and claimed entrepreneurs' relief.

The taxpayer's 1,842 shares amounted to 4.997% of the holding company's ordinary share capital. However, all of the shareholders had worked on the assumption that the shareholding equalled 5%, but this was because they were essentially treating the 1,842 shares as approximating to 5%.

The FTT held that all references to a 5% holding in various documentation were merely shorthand for the exact percentages.

The taxpayer further argued that the others held 0.0027% of the other shares on trust for him, meaning that he was the beneficial owner of 5% in total and, therefore, met the conditions for entrepreneurs' relief. However, the Tribunal held that the shares were not held on express, constructive or resulting trust for the taxpayer. There was insufficient certainty of subject matter, i.e. there was no evidence regarding whose shares were to be held on trust for the taxpayer.

The appeal was, therefore, dismissed.

06 Capital Gains Tax – Share-for-Share Exchange

In ***HMRC v Euromoney Institutional Investor plc*** [2022] UKUT 205 (TCC) the Upper Tribunal (UT) affirmed the FTT's decision that share-for-share relief applied, as the structuring did not result in the overall arrangements having a "main purpose" of tax avoidance.

HMRC argued that an anti-avoidance rule equivalent to that of s586(3) TCA 1997 applied, which would prevent roll-over relief on the basis that the share-for-share exchange "*form[s] part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to tax*".

The facts of the case were relatively straightforward. The UK taxpayer company wished to sell its 50% holding in a trading company to a third-party purchaser. The disposal would not have qualified for participation exemption. The original proposal was that the consideration for the sale would be made up of a mixture of cash (*c.* 25%) and ordinary shares in the purchaser (*c.* 75%). Had the transaction been structured in this way, there would have been a capital gains tax liability on the cash element received. Roll-over relief would have been claimed on the share-for-share exchange. In the end, the transaction was structured so that the purchaser would issue preference shares rather than pay the cash amount. The gain would be rolled over. The preference shares would then be redeemed at a later date, when participation exemption would apply, meaning that no tax charge would arise.

The taxpayer accepted that the rationale for substituting the cash for preference shares was to achieve a tax saving. However, HMRC failed to convince the UT that the FTT's factual findings were incorrect. In particular, the UT rejected HMRC's contention that the preference share issue should be isolated and regarded as the "arrangement". Ascertaining the scope of the "scheme or arrangements" was a question of fact. In that regard, the UT held that there was nothing irrational with a finding that the scheme or arrangements included both (1) the exchange of shares for a combination of ordinary shares and preference shares and (2) the subsequent redemption of the preference shares for cash at a time when participation exemption was available.

The UT also upheld the FTT's finding that avoidance of tax was not a "main purpose" of the arrangement. The UT proceeded on the basis that "Main purpose" is a purely subjective test (but did not express a view as to whether that was correct). The FTT's conclusion was considered to be reasonable given the size of the intended tax advantage relative to the total sale consideration, the fact that the taxpayer did not recognise the "downside" risk of the preference share issue and the insignificant amount of time spent on the preference share arrangements.

European Court Cases

07 State Aid – UK CFC Regime

On 8 June 2022 the General Court of the European Union dismissed in their entirety both the UK and ITV plc's applications (T-363/19 and T-456/19) made in respect of the European Commission's State Aid decision on the UK controlled foreign company (CFC) rules.

In April 2019 the European Commission (EC) announced that it had found that the Group Financing Exemption ("GFE") in the UK CFC rules constituted unlawful State Aid in certain circumstances. The UK CFC rules broadly allow the UK to tax the income of overseas subsidiaries controlled by a UK corporate parent where that income is regarded as artificially diverted from the UK.

The provisions in question, relating to the GFE, were introduced as part of the 2012 revision of the UK CFC rules and apply to offshore group financing arrangements, with the result that, in certain circumstances, only 25% of the finance income is subject to a CFC charge (and in certain circumstances, none at all).

The EC focused on the two ways in which income might be regarded as related to the UK:

- where the loans are financed with funds or assets that derive from capital contributions from the UK and
- where activities relevant to managing the financing operations are located in the UK.

The EC considered that the application of the GFE in circumstances of the first category was justifiable, as the exemption avoided a complex and burdensome intra-group tracing exercise. However, where the GFE had been applied to arrangements in the second category, the EC considered that the exemption was not justified and instead constituted unlawful State Aid.

The UK and a number of affected groups, including ITV plc, made applications to the General Court seeking to annul this decision. As a result of UK amendments effective from 1 January 2019, the EC decision is relevant only to periods up to 2018.

The General Court considered that the reference system was the CFC regime, rather than the UK corporation tax system as a whole. It concluded that the objective of the CFC regime was to tax profits that are regarded as having been artificially diverted from the UK. It further concluded that where any activities relevant to managing the financing activities are located in the UK, the corresponding profits are, under the CFC rules, to be regarded as profits artificially diverted from the UK. As a result, the court ruled in favour of the EC and agreed that companies applying the GFE benefited from a selective advantage (to the extent that the relevant activities took place in the UK). The court also dismissed the arguments made regarding justification, which concerned administrative simplicity and compliance with the fundamental freedoms.

International Tax Update

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01 BEPS: Recent Developments

OECD Inclusive Framework on BEPS

On 11 July 2022 the OECD delivered a report to the G20 Finance Ministers on the implementation of the international tax reform agreement, which discussed the Pillar One revised timeline and Pillar Two latest developments.

Pillar One

On 11 July 2022 the OECD published a consultation document, "Progress Report on Amount A of Pillar One", containing draft domestic model rules ("draft model rules") for the new taxing right ("Amount A") in favour of market countries, on which comments were invited by 19 August 2022. This followed the statement on global tax reform agreed by more than 135 members of the OECD/G20 Inclusive Framework on BEPS in October 2021 and OECD consultations on Amount A draft rules published between February and May 2022.

The Inclusive Framework will review stakeholder input and seek to "stabilise" the Amount A rules in October 2022. The rules on administration and tax certainty for Amount A are expected to be released before October. When the model rule are finalised they will provide a basis for a multilateral convention to implement Amount A. This is expected to be available for signature by countries in the first half of 2023. The aim being that the Amount A rules would enter into force in 2024, subject to countries ratifying the convention.

A lot of progress has been made regarding Amount A of Pillar One, including on the difficult issue of eliminating double taxation. Public consultation to allow the business community to consider the draft model rules, definitions and practical approach is welcomed.

There are a number of open matters to be developed and agreed – for example, in relation to withholding tax, and in particular withholding tax on royalties; work on the proposed marketing and distribution profits safe harbour (and interaction with double taxation relief); and administration and certainty in relation to Amount A.

The OECD has confirmed that, as part of the work on Amount A, a list of digital services taxes and "other relevant similar measures" will be published. The plan it for the abolition of these taxes when Pillar One comes into effect as part of the multilateral convention.

Although the consultation document focuses exclusively on the reallocation of profits under Amount A, the OECD indicates that progress is being made in respect of Amount B (the fixed transfer pricing return for marketing and distribution activities), and this is expected to be delivered by the end of 2022.

On 12 September 2022 a public consultation meeting on Amount A will focus on the key questions in within the consultation document and on issues raised in the submissions received.

Pillar Two

According to the OECD Secretary General Tax Report to G20 Finance Ministers and Central Bank Governors, July 2022, the technical work on Pillar Two is now largely complete, with the agreement on the model Global Anti-Base Erosion (GloBE) Rules (December 2021) and Commentary (March 2022). It seems that most members are planning is for the entry into force in 2024.

Also a number of countries have also announced that they will implement a domestic top-up tax. The consequences of Pillar Two implementation for developing countries continue to be discussed.

The signalled 2024 implementation provides the more time to develop the Pillar Two Implementation Framework.

In addition, work continues on the Pillar Two Subject to Tax Rule (STTR) draft model provision, its related Commentary and the multilateral instrument for its implementation.

Czech Presidency aims to forge agreement on Pillar Two Directive by October

According to Zbyněk Stanjura, Minister of Finance of the Czech Republic and President of the Economic and Financial Affairs Council (ECOFIN), the Czech Presidency is aiming to reach an agreement on the Minimum Taxation Directive at the October ECOFIN meeting. Stanjura added that the next months will be used to find suitable solutions to the concerns expressed by Member States.

This information was provided during the Economic Dialogue and exchange of views of the Committee on Economic and Monetary Affairs (ECON Committee) of the European Parliament with the ECOFIN President on 13 July 2022.

According to the Programme of the Czech Presidency of the Council of the European Union, addressing the current legislative proposals, including in relation to the OECD/G20 global agreements, is one of the priorities in the area of taxation of the Czech Presidency of the Council.

The October ECOFIN meeting will take place in Luxembourg on 4 October 2022.

Hungary blocks implementation of OECD global minimum tax

Hungary exercised its veto during a 17 June 2022 vote at a meeting of EU Finance Ministers in Luxembourg. Hungary's opposition was somewhat of a surprise following Poland's withdrawal of its veto.

EU Directives require approval by all 27 Member States for implementation. The French Finance Minister, Bruno Le Maire, had hoped this vote would have finally had the required unanimity. Hungarian Finance Minister, Mihály Varga, position being that passing the minimum tax at this time would only worsen current economic challenges.

On 9 September, France, Germany, Italy, Spain and The Netherlands issued a joint statement re-affirming their commitment to Pillar 2. They urged consensus on the Draft Directive but stated "we stand ready to implement the global minimum effective taxation in 2023 and by any possible legal means", which seems an effort to encourage Hungary to support the directive.

European Parliament adopts Resolution in response to failure to adopt Minimum Taxation Directive

On 6 July 2022 the European Parliament adopted a Resolution in response to the recent failures to have the Minimum Taxation Directive adopted by the Council of the European Union because of the opposition of a single Member State. The Resolution underlines that Hungary's reported demands were largely taken into account in the international agreement. The European Parliament therefore:

- calls on Hungary to "immediately end its blockage";
- urges the European Commission and the Member States not to engage in "political bargaining" and to "refrain from approving Hungary's national recovery and resilience plan unless all the criteria are fully complied with"; and
- recommends exploring alternative options to honour the European Union's commitments at an international level, notably through the enhanced cooperation procedure.

The Resolution notes that unanimity "must be counterbalanced by a very high level of responsibility and must be in line with the principle of sincere cooperation", referring to other proposals that were blocked in the Council, such as the Common Consolidated Corporate Tax Base (CCCTB), the revision of the Interest and Royalties Directive and the reform of the Code of Conduct on Business Taxation. The Resolution also recommends that Member States consider the benefit of transitioning to qualified majority voting and that the Commission relaunch the idea to introduce it in tax matters gradually. The adoption of the Resolution follows the discussion held at the European Parliament on 23 June 2022 on the same topic. The Resolution was adopted with 450 votes in favour, 132 against and 55 abstentions. Resolutions adopted by the European Parliament do not have a legally binding effect.

UK multinational top-up tax: draft legislation on Pillar Two published

HMRC published draft legislation along with an explanatory note in respect of the UK's domestic implementation of an income inclusion rule (IIR) under the BEPS Pillar Two rules. Feedback which the UK government obtained from businesses under the consultation process earlier in the year was also published.

The draft legislation provides for the application of the IIR to accounting periods beginning on or after 31 December 2023. The draft legislation does not contain clauses to implement the undertaxed payments rule. The Government is preparing to introduce such clauses, and an update on their introduction will be released at a later date.

The UK government maintains that there are strong arguments in favour of implementing a UK domestic minimum top-up tax. If implemented, it is expected to apply to both UK-headed and non-UK-headed groups, above the Pillar Two revenue threshold (i.e. with turnover per annum greater than €750m). Consideration is being given to the its application to wholly domestic UK groups.

The UK government is not proposing to produce a comprehensive list of covered taxes for the purposes of calculating the effective tax rate. However, there is confirmation that the UK digital services tax is not a covered tax. There is also a statement that the UK's diverted profits tax, UK tax payable under the offshore receipts in respect of intangible property (ORIP) rules and the US's federal excise tax will all be treated as covered taxes.

Comments on the draft legislation are invited by 14 September 2022.

New results from OECD show progress continues in combating harmful tax practices

As part of the implementation of the BEPS Action 5 minimum standard on harmful tax practices the OECD/G20 Inclusive Framework agreed new conclusions on 12 preferential tax regimes and substance in "no or only nominal tax jurisdictions". Agreement was reached at a meeting of The Forum on Harmful Tax Practices (FHTP) on 22nd April last. Eswatini and two regimes in Honduras are now in the process of being amended/eliminated. Four regimes have been amended to be in line with the standard and are now not harmful (in Costa Rica, Greece and two in Kazakhstan). Italy abolished its patent box regime. Three regimes were concluded to be potentially harmful (in Pakistan and two in Armenia). The next meeting of the FHTP will assess whether these regimes are actually harmful. Finally, there is also one new regime from Cabo Verde is under review.

The FHTP undertakes an annual monitoring exercise to assess whether the standard on substantial activities requirements in "no or only nominal tax jurisdictions operates effectively in practice. The FHTP started this exercise in 2021 and the results following year one of monitoring were as follows; four jurisdictions (Anguilla, the Bahamas, Barbados, and the Turks and Caicos Islands) received recommendations for substantial improvement; four jurisdictions were also identified for focused monitoring (Bahrain, Bermuda, the British Virgin Islands and the Cayman Islands). There were no issues were identified for Guernsey, Jersey, the Isle of Man or the United Arab Emirates.

OECD publishes updated profiles for jurisdictions applying arbitration under MLI

On 28 June 2022 the OECD published updated "arbitration profiles" for 19 jurisdictions applying arbitration under part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The updates include a new arbitration profile for Lesotho (which signed the MLI on 9 February 2022) and updated profiles for 18 jurisdictions: Andorra, Australia, Austria, Belgium, Canada, Finland, Germany, Hungary, Italy, Japan, Luxembourg, Malta, Mauritius, Papua New Guinea, Singapore, Slovenia, Switzerland and the UK.

The arbitration profiles for parties that have chosen to apply part VI of the MLI are accessible through links in the list of signatories and parties to the MLI and provide jurisdiction-specific information on the application of part VI of the MLI, which may include the following:

- links to competent authority agreements concluded by the jurisdiction to settle the mode of application of part VI,
- lists of certain reservations made by the jurisdiction and
- further clarifications that the jurisdiction has chosen to make publicly available.

02 US Tax Developments

Inflation Reduction Act

On 16 August last President Biden signed the Inflation Reduction Act of 2022 into law.

Estimates are that this will generate over $850 billion of revenue and budgetary savings over 10 years, with increases in tax revenue and reduction in Medicare costs through lower prescription drug prices and inflation rebates. The act replaced the Build Back Better legislation which had not progressed in the Senate since December of last year.

The Act includes a new book-minimum tax on certain large corporations, and an excise tax on stock buybacks. The book-minimum tax imposes a 15% minimum tax on "adjusted financial statement income" (AFSI) of applicable corporations over the "corporate AMT foreign tax credit for the taxable year." effective for taxable years beginning after 31 December 2022.There were no changes under the Act to bring GILTI into line with Pillar Two requirements. The excise tax introduced is a 1% tax on repurchases of stock by certain publicly traded corporations.

US notification of termination of 1979 tax convention with Hungary

On 8 July 2022 the US Department of Treasury announced that the US had notified Hungary of its termination of the Convention between the Government of the United States of America and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, in force since 1979. It is seen to be a response to Hungary's failure to support the EU Pillar Two Directive.

The termination will be effective from 8 January 2023 (in line with the provisions on termination under the Convention). The Convention will cease to have effect on 1 January 2024 with respect to taxes withheld at source, and with respect to other taxes it will cease to have effect for taxable periods beginning on or after 1 January 2024.

03 UK Tax Developments

UK Government publishes draft legislation on new transfer pricing documentation requirements

On 20 July 2022 draft legislation was published introducing powers for regulations to be made regarding new transfer pricing documentation requirements for the largest UK businesses in line with the requirements in the OECD BEPS Action 13 Final Report (2015). The UK Government will legislate to require large businesses to maintain a master file and local file and a supporting summary audit trail. The new documentation requirements will take effect from April 2023.

UK draft R&D credit legislation would expand availability and narrow focus to UK-based expenditure

On 20 July 2022 HMRC introduced draft legislation on changes to the research and development tax relief entitlement and processes. The measure expands the categories of qualifying expenditure to better reflect developments in technology by including the costs of datasets and cloud computing. It also focuses the reliefs more effectively on UK expenditure, with the intention that more of the spill-over benefits will arise in and benefit the UK. New claimants, or those that have not claimed in one of the previous three accounting periods, will need to inform HMRC in advance that they plan to make a claim. The consultation on this draft legislation will close on 14 September 2022. The measures will have effect for accounting periods beginning on or after 1 April 2023.

04 EU Tax Developments

European Commission launches initiative to tackle role of enablers in aggressive tax planning

On 6 July 2022 the European Commission announced a consultation on tackling the role of intermediaries (referred to as "enablers") in facilitating arrangements or schemes that lead to tax evasion and aggressive tax planning. The consultation runs from 6 July to 12 October 2022 and aims to collect views from stakeholders on the role of enablers that contribute to tax evasion and aggressive tax planning, the magnitude of the problem, the need for EU action and the potential policy responses.

The initiative will interact with existing initiatives to combat tax evasion and aggressive tax planning, including Council Directive (EU) 2018/822 amending Council Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 6), and existing and future measures in the Anti-Money-Laundering Directives and Directive (EU) 2019/1937 ("the Whistleblower Directive").

European Commission proposes Directive to address tax-induced debt–equity bias

On 11 May 2022 the European Commission announced the release of a draft for a new Directive to address the tax-induced debt–equity bias. The proposal includes a a notional interest deduction on equity (a debt–equity bias reduction allowance (DEBRA)) and a limitation on the tax deductibility of debt-related interest payments.

Currently there is tax relief in EU Member States for interest costs which arise under debt financing arrangements but not necessarily for costs that arise under equity financing arrangements. This can result in a bias which favours debt over equity investment. According to the Commission, encouraging companies to accumulate debt may lead to a high incidence of insolvency, with a negative effect on the EU as a whole. The debt bias also penalises the financing of innovation through equity. The Commission proposes the introduction of two separate rules that would apply to all taxpayers that are subject to corporate income tax in one or more Member States, except for certain financial undertakings.

The draft Directive proposes an allowance on equity by providing for the tax deductibility of notional interest on increases in net equity. The deductible amount would be computed by multiplying the allowance base by the applicable notional interest rate (NIR). The allowance base is the year-on-year increase in net equity, i.e. the difference between the net equity at the end of the relevant tax year and the net equity at the end of the preceding tax year.

The NIR consists of two components: the currency-specific risk-free rate and a risk premium. The risk-free rate is based on Directive 2009/138/EC (the Solvency II Directive), and the risk premium generally would be set at 1%. However, a higher rate of 1.5% is proposed for small and medium-sized enterprises to acknowledge that they usually face a higher burden in obtaining financing.

The allowance on equity would be granted for 10 years, meaning that it would be deductible in the year it was incurred and in the next successive nine years. There are various anti-avoidance measures.

The allowance on equity is accompanied on the debt side by a rule limiting the deductibility of interest. This rule is generic and would limit the deductibility of interest to 85% of the taxpayer's exceeding borrowing costs, i.e. the excess of interest paid over interest received.

All EU Member States either already have implemented a general interest limitation rule in accordance with Article 4 of the EU Anti-Tax-Avoidance Directive (ATAD 1) or are continuing to apply equally effective existing domestic measures up to 1 January 2024 under transitional provisions in ATAD 1. The Commission has indicated that the interest limitation rules based on ATAD 1 should apply in parallel to the interest limitation rule proposed in this Directive. Taxpayers would calculate the deductibility of exceeding borrowing costs first under the proposed new rule and then under ATAD 1, with the lower of the two amounts being deductible. If the parallel application resulted in a lower deductible amount under the ATAD 1 rule, the taxpayer would be entitled to carry the difference forward and/or back in accordance with the domestic implementation of the ATAD 1 rule. However, the interest limitation under the new Directive would seem to be a permanent denial of a deduction.

If adopted, EU Member States would be required to transpose the Directive into their domestic legislation. Currently, the implementation deadline is set at 31 December 2023, and it is proposed that Member States apply the Directive as from 1 January 2024. The six Member States (Belgium, Cyprus, Italy, Malta, Poland and Portugal) that already have rules in place providing for an allowance on equity may choose to apply a "grandfathering" clause. This means that taxpayers that already benefit from a domestic allowance on equity as at the date of entry into force of the Directive would be able to continue to benefit from the specific national allowance for a period of up to 10 years.

05 Ireland: Tax Treaty Policy Statement

On 27 June 2022 the Minister for Finance, Paschal Donohoe TD, published Ireland's Tax Treaty Policy Statement. The commitment to publish a treaty policy statement was contained in the January 2021 "Update to Ireland's Corporation Tax Roadmap".

The policy statement addresses two key areas, as set out on gove.ie "(1) formalising the existing policy of maintaining and enhancing the network of double taxation agreements (DTAs) to provide for continued economic prosperity, including through the creation of a priority list of potential partners; and (2) a specific policy approach for least developed countries." The document notes on page 4 that it is a "living document" and outlines the key priority areas:

- "Priority A: Ireland already has DTAs with 16 countries that are members of the G20. Given the economic importance and geographical reach of these jurisdictions, it is an important objective to have DTAs with all G20 members.
- Priority B: A second key priority is to ensure that Ireland develops tax treaties with all current OECD member countries and accession countries, as well as EU accession countries.
- Priority C: Several of Ireland's existing DTAs are over 40 years old and may not be fully in line with the provisions of more recent Irish treaties and current international norms. Some of these tax treaties may be suitable for modernisation through renegotiation or the addition of protocols, taking due account of international tax developments."

06 Germany: Publication of Draft Bill that Would Significantly Reduce Scope of ETT/ORIP Rules

On 28 July 2022 the German Ministry of Finance (MOF) published the draft Bill of the Annual 2022 Tax Act. The Bill includes proposals to reduce significantly the scope of German taxation of certain German nexus-IP transactions by non-residents, where that nexus is the result of the German registration of rights. Currently where there is such Germany nexus-IP there is extraterritorial taxation of royalty payments between non-residents (referred to as offshore receipts in respect of intangible property, or ORIP) and intellectual property (IP) transfers by non-residents (referred to as extraterritorial capital gains taxation, or ETT).

The draft Bill is subject to Government approval and the normal legislative processes before the Houses of Parliament. This may take place before the end of 2022.

Under the draft Bill, income from royalty payments or the alienation of rights that are subject to limited German tax liability exclusively as the result of registration in a German public book or register would no longer be subject to German taxation as from 1 January 2023. For third-party royalty arrangements (where the licence agreement is concluded between unrelated parties), the limited German tax liability would be abolished with retroactive effect. Under a proposed new section 10 of the Tax Haven Defence Act, only in the case of "haven structures" – i.e. where the income is earned by a person resident in a non-cooperative tax jurisdiction as defined by the Act (which mirrors the EU list) – would the limited German tax liability be upheld in the future.

The draft Bill would, if enacted, represent a significant relief for all affected taxpayers.

07 Luxembourg: Super Deduction Proposed for R&D, Digital Transformation and Environmental Transition.

On 4 July 2022 Luxembourg's Chamber of Commerce submitted a proposal for an additional 50% to 100% super deduction on certain research and development (R&D) costs. The proposal was submitted to the Minister of Finance. The proposal would allow certain taxpayers to claim an additional 50% to 100% super deduction on their eligible R&D expenses and costs which are associated with their digital transformation and ecological and environmental transition. The proposed tax incentive should help to attract investment to Luxembourg.

The proposed period for the application of the super deduction would be from 2022 to 2026, with a proposed extension for an additional five-year period. The Chamber of Commerce also proposes an additional exemption, which is to combine the super deduction with the net wealth tax exemption on related assets.

08 Cyprus: New Transfer Pricing Documentation Requirements

On 30 June 2022 the Cyprus House of Representatives voted comprehensive transfer pricing requirements for businesses into law. The measures are aligned with the framework in Action 13 of the OECD/G20 BEPS project.

The rules have been implemented via amendments to the Cyprus Income Tax Law and the issuance of regulations. The introduction of penalties for non-compliance with the new transfer pricing documentation requirements have also been legislated for along with a framework for taxpayers to apply for advance pricing agreements. The new requirements will be implemented for tax years starting on or after 1 January 2022.

09 Hong Kong: Amendments to Passive Foreign-Source Income Exemption Regime Under Consultation

On 5 October 2021 the EU had included the HKSAR on its watchlist of non-cooperative tax jurisdictions after a review of FSIE regimes. In particular, the EU was concerned with the non-taxation of passive income where the income recipient has no substantial economic activity. The Government of the Hong Kong Special Administrative Region (HKSAR) released a consultation paper in June 2022 which proposed amendments to the HKSAR's foreign-source income exemption (FSIE) regime for passive income that are meant to address the EU's concerns. The HKSAR committed to amending its tax law by 31 December 2022. The consultation period ended on 15 July 2022. Following enactment the new regime will apply as from 1 January 2023.

Under the proposed FSIE regime, offshore passive income – including interest, income from intellectual property (IP), dividends, and gains from the disposal of shares or equity interests (collectively, "offshore passive income") – would be deemed to be sourced from the HKSAR and chargeable to profits tax if:

- the income is received in the HKSAR by a constituent entity of a multinational enterprise (MNE) group (the definition of MNE group – i.e. a group that includes at least one entity or permanent establishment that is not located in the jurisdiction of the ultimate parent entity – and other related terms in the OECD's Global Anti-Base Erosion Rules would be adopted); and
- the recipient entity fails to meet the economic substance requirement (for non-IP income) or fails to comply with the nexus approach (for IP income).

That is, in-scope offshore passive income would continue to be exempt from tax if certain conditions in the amended FSIE rules are met. In addition, offshore active income would still be considered non-taxable under the existing HKSAR Inland Revenue Ordinance, and the source of profits would continue to be determined based on prevailing principles.

VAT Cases and VAT News

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VAT Cases

01 Rates of VAT – Repair and Maintenance Services for Lifts in Residential Buildings

The judgment in the case of ***Autoridade Tributária e Aduaneira v DSR – Montagem e Manutenção de Ascensores e Escadas Rolantes SA*** C-218/21 was delivered by the CJEU on 5 May 2022. The matter at issue related to the rate of VAT applicable to the lift repair and maintenance services carried out by DSR in 2007. DSR is a company that produces lifts, hoists and conveyor belts, and it also provides lift repair and maintenance services. DSR applied a reduced rate of VAT to the lift refitting and repair services that it supplied and invoiced the materials at the standard rate. However, the tax authority found that it had applied the reduced rate incorrectly.

Article 96 of the VAT Directive provides that Member States are to apply a standard rate of VAT, which is to be the same for supplies of goods and services. Article 98 covers reduced rates of VAT, and these can apply only to the categories of goods and services set out in Annex III of the Directive. There were temporary provisions applicable up to 31 December 2010 in relation to certain labour-intensive services, and reduced rates could apply to the services set out in Annex IV (but only in relation to two categories or, exceptionally, three) provided certain conditions were met. The conditions to be met included that the services must be labour-intensive, they must be largely provided directly to final consumers and they must be mainly local and not likely to cause distortion of competition.

Annex IV at point 2 provided for services comprising “renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied”. Under the Portuguese VAT legislation a reduced rate could apply to “[w]orks contracts for the improvement, refurbishment, renovation, restoration, repair or conservation of immoveable property and independent parts of immoveable property for residential use – with some exceptions". Goods provided as part of the supply could qualify for the reduced rate only where their value did not exceed 20% of the total value. A circular issued by the Portuguese VAT Services Directorate, which was binding on the tax authority, indicated that the term "immoveable property for residential use" should be interpreted restrictively, as the principle of the provision does not permit the inference that it applies to repair and maintenance services relating to fixtures that form an integral part of the buildings.

The main question posed was whether the concept of "renovation and repairing of private dwellings" under point 2 of Annex IV covered repairs and renovation services for lifts in residential buildings. As noted above, point 2 of Annex IV, together with Article 106, authorises Member States to apply a reduced rate of VAT to services relating to the "renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied".

The Court indicated that the words used in point 2 are to be interpreted uniformly and as per their usual meaning in everyday language in the absence of a definition in the VAT Directive while taking account of the context in which they occur and the purpose of the rules. The only point at issue here was the application of the reduced rate to the labour services. The court considered the wording of point 2: first, the activity of renovation and repairing and, second, that those activities must relate to private dwellings. The words "renovation and repairing", it stated, referred respectively to the refurbishment of an object and the restoration of a damaged object. Maintenance services, which are provided on a regular and continuous basis, would not fall within point 2. The services must be carried out on property used for private residential purposes, whereas services carried out on properties used for commercial purposes would not be covered by point 2.

The Portuguese Government had argued that the term "private dwelling" referred in an "individualised manner to each of the independent units in a building that are actually intended for residential use, over which the owner or tenant has complete control, and that it is necessary to distinguish such independent units from the areas of common access in such a building". That being the case, the renovation and repair services relating to shared facilities would not be covered by point 2. The court disagreed and found that shared facilities in residential buildings did come within point 2. On that basis, lifts, which form an integral part of the buildings that have them, are included in those facilities. So the court concluded that point 2 covers repair and renovation services for lifts in residential buildings, excluding maintenance services for such lifts. But it noted that if the building is used for both residential and non-residential purposes, the services would have to be apportioned between each part of the property, as the standard rate will apply to the non-residential parts.

It will be up to the referring court to ascertain whether point 2 was transposed selectively by the Portuguese legislature in that it excluded services relating to lifts in residential buildings, but the court noted that the Portuguese provision did not appear to apply this exclusion and that the restrictive interpretation came from internal instructions (i.e. the circular mentioned above), as opposed to the legislation. The court stated at paragraph 46 that:

> "since the provisions of a directive must be implemented with unquestionable legal certainty and with the requisite specificity, precision and clarity, a Member State cannot rely on mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, in order to demonstrate a selective transposition of a provision of the VAT Directive authorising the application of a reduced rate of VAT for a category of services…".

It held that point 2 of Annex IV must be interpreted as meaning that repair and renovation services for lifts in residential buildings (excluding maintenance) are covered by the concept of renovation and repairing of private dwellings.

Annex IV, as referred to in this case, was deleted with effect from 1 June 2009 (under Article 1(14) of Council Directive 2009/47/EC) and its content inserted into Annex III with effect from the same date under Article 1(13) of that Directive. The VAT rate appropriate to supplies of similar services in Ireland would fall within paragraph 9(1) of Schedule 3 of the Value-Added Tax Consolidation Act 2010, which is the equivalent to Annex III, point 10a, of the VAT Directive.

02 Option to Tax Sale of Exempt Property – Requirement for Purchaser to be VAT Registered

The CJEU delivered its decision in the case of ***UAB 'ARVI' ir ko v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*** C-56/21 on 30 June 2022. This case considered the interpretation of Articles 135 and 137, together with the principles of fiscal neutrality, effectiveness and proportionality in the context of opting to tax an exempt sale of property. The case arose from proceedings between Arvi and the Lithuanian tax authority in relation to the entitlement to opt to tax the sale of exempt property to a person not registered for VAT at the time of sale. Under Lithuanian legislation, the taxable person purchasing the property must be VAT registered at the time of the purchase of the property for the option to tax to apply. Where the property is sold on an exempt basis, an adjustment will apply, and the adjustment period is ten years.

Arvi sold property in 2015 to Fondas and charged VAT on the sale. However, Fondas was not VAT registered at the time of sale, and Arvi could not opt to tax the sale. Under Lithuanian legislation, where an option to tax applies, the vendor charges output VAT. The tax authority was of the view that Arvi should not have charged output VAT but instead should have adjusted its input VAT previously claimed on the acquisition of the property.

The question referred was whether national legislation is precluded from allowing a taxable person to opt to tax the sale of otherwise exempt property only where the sale is to another taxable person who is already VAT registered and whether such a requirement is in line with Articles 135 and 137 of the VAT Directive and in accordance with the principles of fiscal neutrality and effectiveness. Article 135 provides exemption for the "supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1)". Article 137 provides that Member States can permit taxable persons to opt to tax the sale of property; they are required to set out the rules surrounding the exercise of that option, and the scope of the option can be restricted. The court noted, however, that in setting down the rules and restrictions Member States are required to consider the general objectives and principles of the VAT Directive (particularly those of fiscal neutrality and effectiveness).

The court noted that the Lithuanian national legislation set out the conditions under which a taxable person can exercise the right to tax. The court referred to the previous decision of *Vermietungsgesellschaft Objekt Kirchberg* C269/03, where it was held, first:

> "that where a Member State makes the right of option for taxation subject to certain statutory conditions, a process of prior approval enables the fulfilment of those conditions to be established and, second, that an approval process such as that introduced by that Member State is

> not intended adversely to affect the right to deduct, but, on the contrary, enables that right to be fully exercised, subject to compliance with certain requirements".

The court drew the same conclusion here, as the Lithuanian legislation merely set out the conditions to be fulfilled in exercising the option to tax. The conditions did not adversely affect the right to input VAT, but where the rules are complied with, the right to recover input VAT is allowed. Requiring the option to be exercised only where the purchaser is VAT registered means that there is legal certainty. The court held that Articles 135 and 137 did not preclude national legislation from providing that the option for taxation can be exercised only where purchaser is VAT registered.

The other questions related to whether national legislation is permitted to require the vendor to adjust its input VAT in cases where the purchaser did not satisfy the registration requirement and whether the principles of fiscal neutrality and effectiveness were breached. The obligation here to adjust input VAT related to the fact that there was not a valid waiver in place at the time of sale.

The court considered each of the principles in turn. The principle of fiscal neutrality precludes treating similar supplies of services that are in competition with each other from being treated differently for VAT purposes. With regard to this principle, the court indicated that it was not apparent that the requirement for a purchaser to be VAT registered for an option to tax to apply establishes a different treatment between similar transactions. Instead, the court noted that the option to tax does the opposite, in that a taxable person is not placed at a competitive disadvantage because the requirement that the purchaser be VAT registered applies to all taxable persons irrespective of capacity or legal form.

The principle of effectiveness precludes a national procedural provision from making application of EU law impossible in practice or excessively difficult. In this case the court noted that the legislation sets down the detailed rules required for exercising the option to tax and does not adversely impact input VAT, as the conditions are known in advance and the taxable person has several means at its disposal to be able to comply with the conditions and exercise its right to deduct.

To comply with the principle of proportionality, a "national measure must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it". The VAT registration requirement on the part of the purchaser protects the vendor's legal certainty by allowing the vendor to ensure that it can validly exercise the option to tax and that VAT is charged correctly. The registration requirement means that the tax authority is not required to carry out lengthy checks or research the purchaser's VAT status. The court noted, however, that the tax authority can consider only if the transaction is exempt or taxable and cannot take account of other factors such as the proposed use by the purchaser of the property. The relevant factor for the purposes of the right to deduct and the possible obligation to adjust is the use to which the vendor put the property.

The court indicated that the use of the property by Fondas, the purchaser, cannot affect Arvi's right to deduct the input VAT paid on the acquisition of that property as they are two separate transactions involving separate taxable persons, each pursuing its own economic activity.

The court held that the provisions of the VAT Directive and the principles of fiscal neutrality, effectiveness and proportionality do not preclude national legislation and practice under which the vendor of property is required to make an input VAT adjustment where the vendor's right to opt for taxation is not recognised because the purchaser did not satisfy the conditions that would have allowed the vendor to opt to tax.

The court also held that even though the proposed use by the purchaser is not relevant to the option to tax by the vendor, the tax authority should also consider whether fraud or abuse exists on the part of the vendor in exercising the option to tax.

The option to tax under the Irish VAT legislation is somewhat different in that a joint option to tax can apply where the purchaser is a taxable person rather than being an accountable person at the time of sale. Of course, agreeing to a joint option to tax means that a taxable person is required to register for VAT (as the person "shall be an accountable person") and to account for VAT under the reverse-charge mechanism, as opposed to being charged VAT by the vendor.

03 Supply of Insurance Services – Claims Settlement Services

The CJEU delivered its decision on 1 August 2022 in the case of ***Uniqa Asigurări SA v Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor, Direcția Generală de Administrare a Marilor Contribuabili*** C-267/21.

Uniqa Asigurări SA, headquartered in Romania, offers insurance policies there covering risks relating to motor accidents and medical expenses that occur outside Romania. With regard to motorcar insurance, Uniqa entered into partnerships with other companies that were incorporated outside Romania. The partner companies settle claims of Uniqa's customers in the country in which the accident occurred. The partner companies provide a variety of services related to handling the claims and have delegated authority to settle claims of up to €15,000; damage in excess of this amount requires agreement with Uniqa. With regard to the medical insurance policies, these are handled by Coris International in the name of and on behalf of Uniqa. As part of its services, Coris fixes the amount of compensation, ensures payment and updates Uniqa accordingly.

The matter in dispute arose as Uniqa did not account for VAT on the reverse-charge basis in respect of services received from the partner companies and Coris in 2007 to 2009. This was on the basis that in its view the place of supply of the services was the place of establishment of the supplier. But the Romanian tax authority took the view that the place of supply of the services supplied by the partner companies and Coris was not where the supplier was established but where the recipient of the services was established, i.e. Romania.

Owing to the time period when the services were supplied (pre-2010), the court reformulated the question posed by the national court, which had sought to interpret Article 59 of the VAT Directive (but this was applicable only from 1 January 2010). So the question for consideration was whether Article 56(1)(c) of Directive 2006/112 (as it applied at the time the services were provided – it has since been amended) must be interpreted as meaning that claims settlement services provided by third-party companies, in the name and on behalf of an insurance company, come within the scope of Article 56(1)(c), which covers the services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information.

The court pointed out that Article 56(1)(c) deals with supplies of services and does not refer to professions such as lawyers, consultants or engineers and noted that the EU legislature used the professions mentioned in that provision as a means of defining the categories of supplies of services to which it refers. So it noted that it is important to determine whether the claims settlement services provided in the name and on behalf of an insurance company come within the scope of supplies of services principally and habitually carried out as part of the professions listed in Article 56(1)(c).

The court made a number of preliminary points – every supply of services must normally be regarded as distinct and independent; a transaction that comprises a single supply of services from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system; and the characteristic elements of the transaction concerned must be examined to determine whether the supplies of services provided constitute several distinct principal supplies or one single supply.

The court examined each of the service descriptions in Article 56(1)(c) and compared the characteristics of each with claims settlement services to ascertain whether such services came within Article 56(1)(c).

- Engineers – the court noted that the profession of engineer covers services that involve the application of existing knowledge and procedures to specific problems and the acquisition of new knowledge and the development of new procedures designed to resolve those problems or new problems. Claims settlement services do not come within the scope of services that meet the characteristics of engineering services. Damage assessment would not be a service principally and habitually carried out by an engineer, nor would the assessment of patients in the context of medical insurance for trips abroad. The court held that claim settlement services are not covered by the concept of services of engineers.
- Lawyers – by reference to earlier case law, the court noted that these services principally and habitually concern the representation or defence of the interests of a person, as a general rule in the context of a dispute in which there are conflicting interests, and seek primarily to ensure that a claim of a legal nature succeeds. The claims settlement services do not come within the scope of services principally and habitually performed as part of a lawyer's profession. Claims settlement services in the name and on behalf of an insurance company fall more broadly within an economic activity rather than being characterised by their contribution to the administration of justice. The court held that claims settlement services provided in the name and on behalf of an insurance company are not covered by the concept of services of lawyers.
- Consultants/consultancy bureaux/accountants – the court noted that claims settlement services in the name and on behalf of an insurance company involve the exercise of decision-making power as regards the award of compensation or refusal to grant that compensation. Therefore the services are more than merely consultancy services. The claims settlement services provided by the partner companies and Coris do not correspond to the services habitually and principally carried out by a consultant etc.
- Other similar services – the court indicated that this phrase relates to services similar to the other activities viewed separately. A service must thus be regarded as being similar to that of one of the activities mentioned when they both serve the same purpose. The purpose of claims settlement services is the handling and processing of claims for compensation submitted by persons insured by the insurance company in the name and on behalf of which they are provided. None of the services of engineers, lawyers, accountants, consultancy bureaux or consultants pursues this objective and as such cannot be regarded as other similar services.
- Data processing or provision of information – the court stated that the claims settlement services cannot be likened to or treated as equivalent to these services.

The court held that the claims settlement services provided by the partner companies and Coris do not come within the scope of Article 56(1)(c). This means that the place of supply was not Romania.

Article 56(1)(c) of the VAT Directive, as it applied at the time the services in this case were provided, had provided that the place of supply of services of consultants, engineers, etc. to customers established outside the EU or to taxable persons established in the EU but not in the same country as the supplier was the place where the customer was established. Currently, the place of supply of such services where supplied to a taxable person is the place where the recipient is established (general B2B rule), and where the services are provided to a non-taxable person outside the EU the place of supply is where the person is established, as the services are excluded from the general B2C rule. The case provides useful guidance in establishing the nature of the services that are covered by s33(5)(c) of the Value-Added Tax Consolidation Act 2010 and those that would not be so covered.

04 Holding Company – Entitlement to Input VAT Recovery

The Tax Appeals Commission (TAC) published its determination in the case of **81TACD2022** on 29 April 2022. The case dealt with a holding company's entitlement to input VAT recovery in respect of ongoing activities and a number of transactions. The parties had agreed a list of issues that were to be determined, and the findings in respect of each are summarised below. The case arose in respect of assessments raised by Revenue relating to input VAT reclaimed in full by the appellant in the amount of €45m.

The appellant was the Irish-incorporated and Irish-tax-resident holding company of a corporate group of companies (appellant group). It was registered with the US Securities and Exchange Commission, and its ordinary shares were listed on the New York stock exchange. The appellant held 100% of the share capital of a number of group companies. It engaged in two main activities – it directly and indirectly held shares in all of the companies in the group, and it provided management services to a number of its indirect subsidiaries. It received services from a group company to enable it to provide the management services. The appellant group was involved in a reconstruction and de-merger (Project X), and the appellant was subsequently acquired by another company by means of a cancellation scheme of arrangement (K Transaction). After a Revenue audit, it was determined that, in respect of ongoing costs, partial input VAT recovery was allowable but no input VAT was recoverable in respect of Project X or the K Transaction.

The issues for determination included whether the appellant was engaged in an economic activity and, if so, whether this represented the whole or part of its overall activities, having regard to the full extent of activities in which it was engaged; whether it was obliged to self-account for VAT on supplies of services received from suppliers established outside the State and, if so, to what extent it was obliged to so account by reference to the nature of the supplies received (taxable or exempt); what is the test to be met by it in claiming an entitlement to deduct VAT on costs incurred and what deduction criteria will apply to the apportionment of VAT; whether and to what extent it is entitled to deduct input VAT in respect of ongoing costs relating to Project X and the K Transaction.

The Appeal Commissioner indicated that the issues for determination were as follows, and his findings are included here:

- Was the appellant engaged in economic activity? The Appeal Commissioner found that the appellant was at all material times actively engaged and directly and indirectly involved in the management of its subsidiaries and sub-subsidiaries and that the engagement and involvement in managing those companies was for the purposes of the exploitation of its holdings in those companies for the purpose of obtaining income therefrom on a continuing basis.
- What was the supply received by the appellant from Company I? The Appeal

Commissioner found that the appellant received a single composite supply of services from Company I.

- Did the appellant use the supply received from Company I for its economic activity? The Appeal Commissioner found that the services received from Company I were used in their entirety for the purposes of the appellant's economic activity.
- Is the appellant entitled to a deduction in respect of the Project X costs? The Appeal Commissioner found "the initial decision to divest the Appellant's business by way of sale or spin off, the subsequent decision to proceed by way of spin off and the subsequent implementation of that decision were all an integral part of the active management by the appellant's board of the appellant group's business as a whole". He found that the planning and execution of Project X constituted economic activity on the part of the appellant. Furthermore, he found that the services supplied to the appellant in respect of Project X had a direct and immediate link to its taxable output supplies, and it was entitled to reclaim the VAT incurred on associated costs.
- Is the appellant entitled to a deduction in respect of the K Transaction costs? As the Appeal Commissioner had found that the appellant was engaged in an economic activity at all material times, he was satisfied that input VAT recovery arose in respect of the costs associated with the K Transaction.

A request to state a case for the opinion of the High Court has been received by the TAC.

VAT News

Ireland

Flat-rate farmers

Revenue eBrief 151/22 was published on 28 July 2022 to highlight the release of a new Tax and Duty Manual on the "VAT Treatment of the Special Flat-Rate Scheme for Farmers". The manual outlines how the special scheme operates for farmers who are not VAT registered and who are not obliged to be registered. It explains the definition of flat-rate farmer, outlines how the flat-rate addition applies by way of examples and explains how it can be claimed. Also clarified are the invoicing arrangements that apply and how supplies to and by non-established persons are to be treated. The manual also sets out the details of VAT refunds claims that can be made and how spouses engaged in agricultural activities are to manage the registration obligations.

Depositary services and global custody services

Revenue eBrief 113/2022, published on 23 May 2022, provides details of the new Tax and Duty Manual on the "VAT Treatment of Depositary Services and Global Custody Services". The manual sets out the VAT treatment of these services in the context of special investment funds. It outlines the rules relating to an oversight function provided as a stand-alone service and the VAT treatment applicable where there are composite supplies of services.

eGaming services

Revenue eBrief 112/22, published on 22 May 2022, highlights the fact that the Tax and Duty Manual on the "VAT Treatment of eGaming Services" has been updated to include details of how the taxable amount is to be calculated in the context of random generator games and pooled games.

Postponed accounting

Revenue eBrief 109/22, which was published on 13 May 2022, covers the update to the Tax and Duty Manual "VAT – Postponed Accounting". The update clarifies that it is the importer (consignee) that is obliged to account for postponed accounting for VAT purposes on the importation of goods to Ireland. The manual includes further links to the Revenue website for additional information purposes.

UK

Business test

HMRC released Revenue & Customs Brief 10 (2022) on 1 June 2022, which dealt with how HMRC approaches determining whether an activity is a business activity for VAT purposes. HMRC had previously accepted that where a charity supplies nursery and crèche facilities for a consideration that is fixed at a level designed to cover only its costs, this is not a business activity for business purposes. Recent case law has provided for further clarification on how to determine whether an activity is a business activity – there should be no reliance on an organisation's overall objective or profit motive. The Brief covers earlier case law that had led to the Business Test criteria, and following recent case law, these Business Test criteria will no longer apply. They are replaced with a two-stage test: Stage 1 – the activity results in a supply of goods or services for consideration; and Stage 2 – the supply is made for the purpose of obtaining income therefrom (remuneration). The Brief indicates that HMRC will no longer apply the Business Test and that the approach outlined should be taken in determining whether an activity constitutes a business activity.

EU

VAT in the Digital Age Directive[1]

The Summary Report in relation to the proposal for a Directive in 2022 on VAT in the Digital Age has been published. The proposed Directive is to cover three key areas – VAT reporting obligations and e-invoicing; VAT treatment of the platform economy; and the proposed single EU VAT registration. The purpose of the report is to assess the current situation with regard to these three issues and to assess the impacts of a number of possible policy initiatives in these areas. It is intended that the report will feed into the preparation of an impact assessment by the European Commission to accompany possible legislative or non-legislative initiatives. The report can be found at https://op.europa.eu/s/wJqd.

1 For further information, please view the EU VAT Page on Institute's website.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Charities (Amendment) Bill 2022

The general scheme of the Bill has been published and proposes to introduce:

- new financial thresholds to ensure more appropriate reporting requirements reflective of a charity's size,
- clarification on the general duties of trustees,
- strengthening the Regulator's powers in relation to the protection of charitable organisations and
- the establishment of "the advancement of human rights" as a recognised charitable purpose.

Head 14 of the Bill allows for the introduction of Charity Accounting and Reporting Regulations. The proposed Bill will allow the Charities Regulator to impose accounting and audit requirements on all charities (companies, trusts and others), including a requirement for some larger charities to comply with the Charities SORP (Statement of Recommended Practice). For incorporated charities, the requirement will only ever be in addition to the existing requirements set out in companies legislation.

There will be reduced reporting and audit requirements for certain smaller charities, with two thresholds. The current €100,000 turnover threshold, below which a simplified income and expenditure account for unincorporated charities is allowed, is expected to be increased to €250,000. Very small unincorporated charities are proposed to be exempted from the requirement to report where they meet conditions in relation to balance sheet and turnover and employee thresholds.

In respect of audit and inspection, it is proposed s50 of the Charities Act 2009 is going to be amended to apply to incorporated charities as well as unincorporated charities. An incorporated charity is currently allowed audit exemption where it is a "small company" (i.e. meeting two conditions of balance sheet total not exceeding €4.4m, turnover not exceeding €8.8m and number of employees not exceeding 50). However, Revenue has imposed a requirement for an audit for any entity with turnover over €100,000 and seeking charitable tax status (CHY). The Bill proposes to put a limit in legislation decided by the Minister, rather than having a Revenue rule. In summary, it is expected that there will be an audit requirement for charities with a turnover of greater than €250,000, an inspection for charities under that limit, and no independent assurance report for very small charities. We await the final legislation for certainty on the provisions of legislation.

Accounting for the Russian Invasion of Ukraine

The European Securities and Markets Authority (ESMA) recently issued a Public Statement on the accounting implications of the Russian invasion of Ukraine. It highlighted that issues such as impairment of assets and loss of control will need to be addressed. There will also be a need for discussion on the implications of the war for judgements made, significant uncertainties and going-concern risks. The ESMA also expressed expectations regarding disclosures of the direct and indirect impacts of the war and the sanctions on entities' strategies, operations, financial performance, financial position and cash-flows, measures taken to mitigate the impacts and cyber-security risks.

Insurance Accounting and IFRS 17

The deadline for implementing IFRS 17 was postponed; however, there is still a requirement to provide users of financial statements with information on the expected impacts of new but not yet effective standards. Such disclosures enable the users to understand the expected accounting implications of the new standard when it is implemented. Given the expected impact that IFRS 17 will have on insurers' financial statements, the ESMA has issued a Public Statement titled Transparency on Implementation of IFRS 17 *Insurance Contracts*.

Discount Rates

It is disconcerting how large an effect a small change in discount rates can have on the overall reported performance of a company. Discount rates are used extensively in accounts, in areas such as rehabilitation expenses, impairment, pension accounting, provisions and financial instruments. The profile and size of a company will have an effect on its cost of capital, and therefore the discount rate that it uses will not necessarily be similar to that used by other companies. The Financial Reporting Council (FRC) in the UK has published a Thematic Review of Discount Rates, where it discusses the need for rates to be internally consistent and reflective of current market rates. The FRC urges companies to consider third-party advice where internal expertise on interest rate choice is not available. It also calls for high-quality disclosures about matters such as the rate actually used and the explanation of how that rate was determined.

Compendium of Financial Accounting Enforcement Decisions

The European Securities and Markets Authority (ESMA) recently issued a compendium of enforcement decisions. The compendium covers the measurement of expected credit losses and of net realisable value of inventory and sales costs being included in inventory. A number of areas of revenue recognition are dealt with, including recognition over time, a significant financing component and the presentation of litigation proceeds as revenue. In terms of impairment, there is discussion of cash-generating units and Covid-19 impairment indicators.

FRED 80, Draft Amendments to FRS 100

For UK (including Northern Ireland) accountants, FRED 80 proposes changes to FRS 100 to reflect changes to company law and decisions on equivalence related to the UK's exit from the European Union.

Proposed New Anti-Money Laundering Directive

The European Parliament's Committee on Economic and Monetary Affairs and the Committee on Civil Liberties, Justice and Home Affairs published a draft report on a proposal for a Directive of the European Parliament and of the Council on mechanisms to be put in place by the Member States to prevent the use of the financial system for the purposes of money laundering or terrorist financing. The proposals include a fitness-and-probity requirement for certain management positions and beneficial owners; verification of date and technology; some public access to the Register of Beneficial Ownership; access to a land/property register; changes to how the Financial Intelligence Unit operates; more oversight of self-regulating entities such as professional accounting bodies; and an increased role for the as yet to be constituted EU Anti-Money Laundering Authority.

UK Audit Quality Inspections

The Financial Reporting Council (FRC) has published anonymised key findings and good practices reported by its Audit Quality Review team in relation to their 2020/21 audit quality inspections at the seven largest audit firms. The key findings are a useful *aide-mémoire* of common weaknesses identified in audit files for all sizes of entity. The good practices document highlights some of the key aspects of an audit that, when done well, contribute significantly to the delivery of a good audit.

Beneficial Ownership in an Owners' Management Company

None of the shareholders or members of an Owners Management Company (OMC) are likely to have more than 25% ownership, and therefore the following guidance from the Register of Beneficial Ownership needs to be followed to identify the beneficial owners:

> "Where all possible means to identify the beneficial owners have been exhausted, and no natural person has been identified as a beneficial owner, the Regulations provide that the Senior Managing Officials (e.g. the Director(s) and/or CEO) shall be deemed to be the beneficial owners."

In some OMCs the directors are the senior managing officials, and therefore they would be the beneficial owners in this case. Each OMC will need to be looked at carefully to identify who really performs the function of "senior managing official", and these people need to be returned as the beneficial owners. In some cases the "senior managing official" will be the property management agent. In other cases it could be the property management agent and a subset, or all, of the directors. In yet other cases it may just be the directors, or there may be a full-time employee who manages the complex.

For accountants acting for OMCs there is a requirement to apply Customer Due Diligence (CDD) for anti-money-laundering purposes. CDD must be done on the beneficial owners and then may also be done on the directors based on a risk assessment. The process is to do a risk assessment, through this risk assessment identify who controls the OMC and then carry out CDD on those controllers. It would almost always be inappropriate to do CDD on a large number of directors as it is unlikely in an OMC that most of those directors are actually active in managing and running the OMC. Based on risk profiling, it is likely that the property agent and at most two directors would have CDD applied. However, where the managing agent has very little control over the organisation and simply acts on the directors' instructions, it would not be the beneficial owner and would not need CDD.

Audit Regulation Changing in the UK

The UK's corporate reporting and audit regime is to be revamped and strengthened through a new regulator.

Central Bank of Ireland Annual Report

The Central Bank of Ireland has published its Annual Report 2021 and Annual Performance Statement 2021–2022. The forward-looking aspect of the report identifies the four themes in the Central Bank's strategy: future-focused, open and engaged, transforming and safeguarding.

Master Pension Trusts

The Pensions Authority has issued an Information Update for Master Trusts. Given the introduction of IORP II (Directive (EU) 2016/2341), many pensions trusts are converting to master trust arrangements.

Government Green Transition Fund

A suite of Government supports have been made available to businesses wishing to become more sustainable:

- The Climate Action Voucher provides €1,800 toward the cost of developing a plan.
- The GreenStart scheme will cover up to €5,000 for a consultant for a short-term sustainability assignment.
- GreenPlus provides up to 50% of eligible costs to a maximum of €50,000 for a large-scale decarbonisation plan.
- The Strategic Consultancy Grant covers up to 50% of the eligible costs incurred in hiring a consultant, with a maximum grant amount of €35,000 for digital transformation. A shorter-term version of this grant provides 80% of the eligible costs incurred in hiring a consultant, with a maximum grant amount of €7,200.
- There are also capital grants under the Enterprise Emissions Reduction Investment Fund to fund decarbonising capex.
- Assistance was also announced for capital investment in energy metering and research, development and innovation.
- Additional details on all for the funds are available here.
- There is also the new Covid-19 Loan Scheme offering SMEs, including farmers, fishers, food businesses and small mid-caps, loans of between €25,000 and €1.5m, with terms of one to six years and unsecured loans of up to €500,000. Details of this scheme are available from the Strategic Banking Corporation of Ireland.

Professional Judgement

The UK's Financial Reporting Council has published new guidance for auditors on exercising professional judgement.

Recent IAASA Publications

Recent publications by the Irish Auditing and Accounting Supervisory Authority include:

- Information on the adoption of Quality Management Standards for auditors is in the form of a video presentation giving an overview of the Quality Management Standards and the relationship between ISQM 1, ISQM 2 and ISA 220.
- The IAASA Annual Report for 2021 outlines its audit quality inspections, reporting enforcement and engagement with the professional bodies.
- The IAASA reported on how the recognised accountancy bodies (RABs), which approve and supervise statutory auditors and audit firms in Ireland, consider the good repute of these parties.
- A suite of Standards for Investment Reporting (Ireland) have been issued. SIRs are relevant to public reporting engagements for accountants preparing investment circulars such as prospectuses and listing particulars. A video summarising the new standards is at this link, and the standards themselves are at this link.

Professional Clearance

Where a business changes from one professional accounting adviser to another, it is a professional-body requirement for an incoming accountant or auditor to send a letter of professional clearance. However, there is a common misconception that this is somehow seeking permission to act from the previous accountant; it is not. The letter merely seeks disclosure of information to assist the incoming accountant in forming his/her opinion on accepting the client. The outgoing accountant may bring a matter to the attention of the incoming accountant, and the incoming accountant is then free to act or not.

Where the outgoing accountant does not reply to the request, the incoming accountant simply sends a seven-day-notice letter to the effect that if the outgoing accountant has not replied within seven days, the incoming accountant will assume that there are not matters to be disclosed. If the outgoing accountant mentions undischarged fees, the incoming accounting should encourage the new client to pay those fees but is not obliged to force the client somehow to pay the fees or to decline to act while the fees are outstanding. The incoming practice may start to act while there is a fee outstanding to the old practice. Clearly, it would be advisable to seek payment in advance from a new client who has already defaulted on one accountant's fees.

Where the outgoing accountant has reported the client because of a suspicion of money laundering, that fact may not be mentioned in the response to a request for professional clearance. To do so would be a tipping-off offence. Most responses to a professional clearance letter will therefore start with the phrase "Insofar as law and professional requirements allow us to do so, we confirm that there are no professional reasons…". It is up to the incoming accountant to do his/her own due diligence on new clients.

Where the outgoing accountant attempts to exercise a lien over books and records or refuses to release them until paid, incoming accountants would be advised to contact their professional body. In most circumstances exercising a lien is not legal. In summary, a lien cannot be exercised over any books and records required by a client to discharge its tax liabilities or any records required by the directors for a company to show a true and fair view. There are a very limited number of documents that an accountant can therefore exercise a lien over.

Where the client is an audit client, the incoming auditor has a legal right to view the working papers of the previous auditor. There is an industry-wide agreed guidance document on how this process works. Note that s1515 of the Companies Act 2014 states that "diverging opinions on accounting treatments or audit procedures cannot constitute the basis for the passing of any resolution [to change auditors]". An incoming auditor would need to keep this in mind if such a matter were mentioned in a professional clearance letter.

Russian Sanctions

Article 5n of Council Regulation (EU) 2022/879 states:

> "It shall be prohibited to provide, directly or indirectly, accounting, auditing, including statutory audit, bookkeeping or tax consulting services, or business and management consulting or public relations services to: (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia".

There are exclusions, including "services intended for the exclusive use of legal persons, entities or bodies established in Russia that are owned by…a body which is incorporated [in the EU]" (Article 5n(4)).

Under Article 5m it is prohibited:

> "to register, provide a registered office, business or administrative address as well as management services to, a trust or any similar legal arrangement having as a trustor or a beneficiary:
>
> (a) Russian nationals or natural persons residing in Russia;
>
> (b) legal persons, entities or bodies established in Russia;
>
> (c) legal persons, entities or bodies whose proprietary rights are directly or indirectly owned for more than 50 % by a natural or legal person, entity or body referred to in points (a) or (b);
>
> (d) legal persons, entities or bodies controlled by a natural or legal person, entity or body referred to in points (a), (b) or (c);
>
> (e) a natural or legal person, entity or body acting on behalf or at the direction of a natural or legal person, entity or body referred to in points (a), (b), (c) or (d)."

It is important to note that Article 5n (accounting services) and Article 5m (registered offices) have different scope, with the latter being very prescriptive and broad and the former somewhat vague but, on the face of it, applying to a smaller cohort of businesses and persons.

The issue of what is and is not covered by the restrictions has not been addressed in the official FAQs, and formal requests for clarification have not yet been responded to. In the absence of formal guidance, accountants will need to exercise caution and seek legal advice before undertaking work that may come in scope of the sanctions.

UK Ban on Provision of Accounting Services to Russia

The UK has a restriction similar to the EU's on the provision of accounting services to Russia. The Russia (Sanctions) (EU Exit) (Amendment) (No. 14) Regulations 2022 came into force on 21 July 2022. Under the Regulations, a person must not directly or indirectly provide accounting services to a person connected with Russia. Further details of the impact of the Regulations are available at this link.

Regulation of Intermediaries

The European Parliament has produced a study on the Regulation of Intermediaries, Including Tax Advisers, in the EU/Member States and Best Practices from Inside and Outside the EU. Five countries were selected, including Ireland.

The study is part of an EU public consultation titled Tax Evasion & Aggressive Tax Planning in the EU – Tackling the Role of Enablers, on the regulation of tax advice provision in the EU, which has a response deadline of 12 October 2022.

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Revenue Commissioner's Update

Reminder to Update Your Bank Details on revenue.ie

Revenue is reminding customers who have recently changed their banking provider to update the bank account details held on their Revenue records. This will ensure their payments and refunds are processed on time using their new bank account.

Revenue is also asking tax practitioners to remind their clients to update their bank account details as soon as possible.

To ensure there is no disruption to payments to Revenue, customers need to make sure that their new bank account details are updated as soon as possible for each instruction. The new bank account details are also required should customers become eligible for any refunds. The quickest and easiest way to do this is via Revenue's online services on www.revenue.ie.

To update their bank account details via Revenue's online services, customers will need:

- the name and address of the financial institution where the new account is held
- the account holder name, or names, of the new account
- the International Bank Account Number (IBAN)
- the Bank Identifier Code (BIC).

BIC and IBAN details can be found on bank account statements or on online banking services.

Customers are required to update their bank details for each Revenue online service for which they are registered, including myAccount, ROS and LPT.

To update the bank details used for PAYE tax refunds in myAccount:

- sign in to myAccount
- select 'My Profile'
- select 'My Details' – the current bank account details will be displayed
- click on 'Edit' to amend these details.

To update bank details used for other tax registrations, such as ROS Debit Instructions, Direct Debit Instructions and refunds in ROS:

- sign in to ROS
- on the 'My Services' page, click on 'Manage Bank Accounts'
- follow the steps provided to update bank account details.

Customers who pay their Local Property Tax (LPT) by Monthly Direct Debit or Annual Debit Instruction (ADI) should also update their Revenue LPT record with the details of their new bank account. Customers can manage their bank account details, payments or payment methods through the LPT Online Portal. There are a wide range of secure payment options available. To access their LPT record, customers will need their Property ID, Personal Public Service Number (PPSN) and PIN, from previous LPT correspondence from Revenue.

Stay Safe and Secure Online

Revenue would also like to remind customers that it is important to stay safe and secure when using online services. It is important to keep sign-in details and passwords secure and to not disclose them to anyone.

Revenue will never send emails or text messages which require customers to send personal information via email or pop-up windows.

Go to www.revenue.ie for more information.

Update on the Central Register of the Beneficial Ownership of Trusts

The purpose of the Central Register of the Beneficial Ownership of Trusts (CRBOT) is to help prevent money laundering and terrorist financing by improving transparency on who ultimately owns and controls Irish trusts; its establishment is required under EU legislation. Revenue has responsibility for managing the CRBOT in Ireland and Patrick O'Connor was appointed Registrar in 2021.

The CRBOT went live on 23 April 2021, with a registration deadline of 23 October 2021 for trusts that were established on or before 23 April 2021. Trusts created after 23 April 2021 should be registered with Revenue within 6 months of their creation.

Revenue has engaged widely with professional bodies as part of the launch of the CRBOT, and the feedback received has been utilised in the design of the system and to make the registration process as easy as possible for trustees.

Revenue has recognised there may have been genuine difficulties for some trustees in registering by 23 October 2021. As a result, Revenue was prepared to accept later registrations where best efforts were made by trustees to comply within a reasonable period after the designated date. That 'reasonable period' has now expired and trustees are reminded of their obligations.

A programme of compliance activities to check the quality of data submissions to date is already underway. Revenue will also be following up with a programme of checks on sectors where trusts are commonly used, to ensure compliance with filing obligations. These sectors will include the financial, sporting and charitable sectors.

Detailed help and advice on the CRBOT is available on the Revenue website www.revenue.ie.

Legal Monitor

Caroline Austin
Partner, Tax Department, Matheson

Selected Acts Signed into Law 1 May–31 July 2022

No. 28 Remediation of Dwellings Damaged by the Use of Defective Concrete Blocks Act 2022

The Act provides for the payment of grants for the remediation of certain dwellings damaged by the use of defective concrete blocks in their construction. The legislation sets out procedures for applying for such grants and related matters, including time limits and other conditions, recovery of grants and procedures for appeals. The Act also provides for the revocation of the Dwellings Damaged by the Use of Defective Concrete Blocks in Construction (Remediation) (Financial Assistance) Regulations 2020.

No. 24 Sick Leave Act 2022

The purpose of this Act 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, 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 Act provides that the number of sick leave days may be varied by the Minister, but not reduced to fewer than three days, based on factors such as the economy, the labour market and the views of trade unions and relevant bodies.

No. 13 Consumer Credit (Amendment) Act 2022

The purpose of this legislation 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 moneylending loans. The Act amends the Consumer Credit Act 1995 by replacing the terms "moneylender" and "moneylending" with "high cost credit provider" and "high cost credit" to help consumers differentiate between licensed and unlicensed providers. The legislation will also modernise the licensing regime.

No. 12 Competition (Amendment) Act 2022

The Competition (Amendment) Act 2022 transposes the Directive (EU) 2019/1. The Directive reforms Member State competition law by making national competition authorities more effective enforcers, augmenting the powers of the Competition and Consumer Protection Commission and other national competition authorities in Ireland. Powers will include a leniency programme, non-criminal financial sanctions and surveillance powers.

No. 11 Insurance (Miscellaneous Provisions) Act 2022

This Act 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 legislation also introduces a requirement for the Central Bank to prepare a report about measures it has taken to address "price walking" and makes a number of technical amendments to the Consumer Insurance Contracts Act 2019.

No. 9 Finance (Covid-19 and Miscellaneous Provisions) Act 2022

The purpose of this Act 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.

Selected Bills Initiated 1 May–31 July 2022

No. 75 Central Bank (Individual Accountability Framework) Bill 2022

This Bill provides for an enhanced individual accountability framework for individuals working in regulated financial services providers. The Bill provides for conduct standards expected of regulated firms and individuals working in financial services, with further standards for senior executives; a senior executive accountability regime for responsibility and decision-making with respect to a firm's business; an enhancement of the current fitness-and-probity regime; and an improved enforcement process breaking the existing "participation link", which will allow individuals to be pursued for misconduct without having to show that there has been a regulatory breach by the firm.

No. 59 Assisted Decision-Making (Capacity) (Amendment) Bill 2022

The purpose of this Bill is to amend the Assisted Decision-Making (Capacity) Act 2015 with a view to commencing the 2015 Act fully, bringing an end to Ireland's current wardship system. The Bill will reform safeguards and processes under the Act, provide for increased public sector obligations in relation to employing people with disabilities and provide for the Irish Human Rights and Equality Commission to act as national monitor of the UN's Convention on the Rights of Persons with Disabilities in Ireland.

No. 51 Living Wage Bill 2022

This Bill proposes to amend the National Minimum Wage Acts with the objective of providing for a living wage as the national minimum wage.

No. 50 Right to Flexible Work Bill 2022

The purpose of this Bill is to provide employees with a right to flexible work. The legislation would require employers to deal with requests for remote work within a fixed period and provide that remote work requests can be refused only on grounds of reasonable practicability. The Bill also provides that employers would be required to maintain a policy on flexible work that can be inspected by employees and the Workplace Relations Commission.

Selected Statutory Instruments 1 May–31 July 2022

No. 380 European Union (Preventive Restructuring) Regulations 2022

These Regulations amend the Companies Act 2014, transposing the requirements of Directive (EU) 2019/1023, the Preventative Restructuring Directive, not already provided for in Irish law. The Preventative Restructuring Directive sets out the minimum rules for Member State's preventative restructuring frameworks, for the purpose of enabling preventative restructuring of viable debtors in the EU, allowing these enterprises to continue to operate. Under these Regulations, Parts 5, 10 and 11 of the Companies Act 2014 are amended and a new Part 5A is inserted. Changes include providing for directors' common law duty to creditors in the period approaching insolvency on a statutory basis, procedural changes to the cross-class cram-down process and establishing an Early Warning System to allow companies to act to prevent insolvencies.

No. 337 Companies Act 2014 (Corporate Enforcement Authority) (Establishment Day) Order 2022

Under this Order, 7 July 2022 was appointed as the establishment day of the Corporate Enforcement Authority, provided for in the Companies (Corporate Enforcement Authority) Act 2021.

No. 335 Companies (Corporate Enforcement Authority) Act 2021 (Commencement) Order 2022

This Order provides for the commencement of the Companies (Corporate Enforcement Authority) Act 2021, other than s35. The Act establishes an agency called the Corporate Enforcement Authority and also gives effect to recommendations of the Company Law Review Group in relation to certain anomalies in the Companies Act 2014.

No. 316 Public Service Pay and Pensions Act 2017 (Section 20(4)) Order 2022

This Statutory Instrument provides that the annualised amount of the basic salary of a public servant remains at the amount at which it stood immediately before the enactment of s2 of the Financial Emergency Measures in the Public Interest (No. 2) Act 2009.

No. 306 European Union (Planning and Development) (Displaced Persons From Ukraine Temporary Protection) Regulations 2022

These Regulations give further effect to Council Directive 2001/55/EC of 20 July 2001 and give effect to Council Implementing Decision (EU) 2022/382 of 4 March 2022. They provide for certain classes of temporary accommodation, including residential developments, to be exempted from the provisions of the Planning and Development Act 2000 other than those dealing with environmental considerations where the purpose is to provide protection to displaced persons from Ukraine.

No. 304 European Union (Markets in Financial Instruments) (Amendment) (No. 2) Regulations 2022

These Regulations were implemented together with SI 302 and SI 303 (see below) to complete the transposition of Directive (EU) 2019/2034 (the Investment Firms Directive) (IFD) and the implementation of Regulation (EU) 2019/2033 (the Investment Firms Regulation) (IFR) into Irish law. The IFD and IFR put in place a new prudential framework for investment firms authorised under the Markets in Financial Instruments Directive (MiFID II).

Large investment firms will remain subject to the prudential requirements of the Capital Requirements Directive and Regulation, whereas Article 62(6) of the IFD requires Member States to impose an obligation on large systemic investment firms (Class 1 Firms) to apply for reauthorisation as credit institutions.

No. 303 European Union (Investment Firms) (No. 2) (Amendment) Regulations 2022

See 304 above.

No. 302 European Union (Investment Firms) (Amendment) Regulations 2022

See 304 above.

No. 296 Trust RACs (Disclosure of Information) (Amendment) Regulations 2022

The Regulations amend the existing Trust RACs (Disclosure of Information) Regulations 2007 (SI 182 of 2007). The Regulations follow on from disclosure-related amendments made in December 2021, and some of these changes are consequential to the transposition of Directive (EU) 2016/2341 (the IORP II Directive).

The main amendments include: (i) minor changes to the content of the annual report in relation to information required to accompany the audited accounts; and (ii) changes to signing requirements to reflect the two-trustee rule under s64AC of the Pensions Act 1990, as amended.

No. 295 Occupational Pension Schemes (Disclosure of Information) (Amendment) Regulations 2022

This Statutory Instrument implements the audited annual report requirements for occupational pension schemes. Trustees of one-member arrangements established on or after 22 April 2021 are required to produce an annual report and audited accounts for a scheme year ending on or after 31 July 2022. Small schemes with fewer than 100 members are required to produce an annual report and audited accounts for a scheme year ending on or after 31 July 2022.

No. 276 Charities Act 2009 (Section 33) (Relevant Regulator) Order 2022

This Order provides for the inclusion of two additional entities, "Approved Housing Bodies Regulatory Authority" and "Registrar of Companies", for the purposes of paragraph (a) of the definition of "relevant regulator" in s33(6) of the Charities Act 2009.

No. 272 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (Section 109B) (Certificate of Fitness) Regulations 2022

In accordance with s109A and s109B of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as amended, these Regulations implement the requisite Application for a Certificate of Fitness and Probity for persons who are ordinarily resident in Ireland.

No. 264 Employment Equality Act 1998 (Section 20A) (Gender Pay Gap Information) Regulations 2022

The Gender Pay Gap Information Act 2021 amended the Employment Equality Act 1998, requiring that certain employers publish their employees' remuneration information by reference to their gender, to show whether there are any differences in pay referable to gender.

These Regulations detail the reporting requirements and calculations under the Act.

No. 263 Gender Pay Gap Information Act 2021 (Commencement) Order 2022

This Order commences the Gender Pay Gap Information Act 2021. The Regulations will require organisations with over 250 employees to report on their gender pay gap in 2022.

The information that employers will be asked to include in their report includes: (i) the mean and median hourly wage gap, the former reflecting the entire pay range in an organisation and the latter excluding the impact of unusually high earners; (ii) data on bonus pay; (iii) the mean and median pay gaps for part-time employees and for employees on temporary contracts; and (iv) the proportions of male and female employees in the lower, lower middle, upper middle and upper quartile pay bands.

No. 262 European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2022

These Regulations will come into operation on 1 January 2023. They deal with the requirement for UCITS to prepare a PRIIPs (packaged retail and insurance-based investment products) KID (key information document) and for this document to satisfy the requirements under the UCITS Directive to prepare a KID.

No. 261 European Union (Market Surveillance and Compliance of Certain Products) Regulations 2022

These Regulations give effect to Regulation (EU) 2019/1020 of 20 June 2019, insofar as it relates to products that are subject to the EU harmonised legislation. They amend national rules on market surveillance due to changes in EU Regulation (EU) 2019/1020 on market surveillance and compliance of products (amending Directive 2004/42/EC and Regulations (EC) No. 765/2008 and (EU) No. 305/2011), adopted by the EU on 20 June 2019 and with effect from 16 July 2021. They aim to clarify the regulatory framework for market surveillance in the field of non-food products. For each of the three products, the Competition and Consumer Protection Commission is the relevant market surveillance authority.

No. 259 Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 7) (Treatment Benefit) Regulations 2022

The Regulations provide for an amendment to the amount payable in respect of medical appliance benefit under the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007.

No. 234 Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Minimum Competency) (Amendment) Regulations 2022

The Regulations apply to "consumers" as defined in the Consumer Protection Code 2012 and to motor or home insurance policies for consumers, including private car and principal private residence insurance. These new rules concern a "price walking" ban, a review of pricing policies and processes, and an automatic renewal process.

No. 232 European Communities (Electronic Money) (Amendment) Regulations 2022

The Regulations amend the European Communities (Electronic Money) Regulations 2011 (SI 183 of 2011), requiring all electronic money institutions to submit quarterly period-end financial statements to the Central Bank of Ireland by uploading a valid EIA XBRL Return file via the Central Bank's Online Reporting System.

No. 229 Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 (Commencement) Order 2022

The Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act brings a number of currently unregulated credit providers into the scope of the Central Bank of Ireland's regulatory remit. The Act expands the definition of a "retail credit firm" requiring a Central Bank authorisation under the Central Bank Act 1997 (as amended) to include any person whose business consists wholly or partly of (a) directly or indirectly providing credit to or (b) entering into a consumer-hire agreement or hire-purchase agreement with a "relevant person".

No. 225 National Oil Reserves Agency Act 2007 (Biofuel Obligation Buy-out Charge) (Amendment) Regulations 2022

These Regulations provide an increase in levies on obligated parties who discharge their blending obligation (a buy-out charge).

No. 220 Companies Act 2014 (Section 12A(1)) (Covid-19) Order 2022

The interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 has been further extended to 31 December 2022, specifically in relation to s3 to 9, s11, s13 to 16, and s18 to 25 of the Companies Act 2014.

No. 219 Industrial and Provident Societies Act 1893 (Section 14A(1)) (Covid-19) Order 2022

This Order provides for an extension to the interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 to 31 December 2022, specifically in relation to the Industrial and Provident Societies Act 1893.

Tax Appeals Commission Determinations

Tara Duggan
Tax Technical Author, Irish Tax Institute

Determinations of the Tax Appeals Commission Published from 1 May to 2 August 2022

54TACD2022 (CGT)

Application of four-year time limit to the forming of an opinion under s811 where a return contains a full and true disclosure of all material facts; whether taking professional advice constitutes reasonable care in the delivery of a tax return; and application of general anti-avoidance rule to a transaction involving the interaction of CGT rules on options and connected parties

s31, s549, s811 and s955 TCA 1997

Case stated requested: Yes

55TACD2022 (Income Tax)

Appeal regarding repayment in the context of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

56TACD2022 (Income Tax)

Appeal regarding exemption in relation to a foreign pensions and whether a foreign tax "corresponds" to Irish income tax

s200 TCA 1997

Case stated requested: No

57TACD2022 (VAT)

Appeal regarding assessment to VAT for Biologically Appropriate Raw Food (BARF) as supply of food fit for human consumption within the meaning of paragraph 8(1) of the Second Schedule to VATCA 2010

s119 VATCA 2010

Case stated requested: Unknown

58TACD2022 (Customs and Excise)

Appeal regarding a Binding Tariff Classification (BTI) issued by Revenue in relation to a product used for drilling water wells and monitoring (testing) boreholes

s949I TCA 1997; Council Regulation (EEC) No. 2658/87 of 23 July 1987; Common Customs Tariff ([1987] OJ L 256/1); Commission Implementing Regulation (EU 2018/1602 of 31 October 2018 amending Annex I to Council Regulation (EEC) No. 2568/87 ([2018] OJ L 273/1)

Case stated requested: Unknown

59TACD2022 (Income Tax)

Appeal regarding repayment in the context of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

60TACD2022 (VAT)

Appeal regarding charge to VAT on trade settlement discounts

s39 and s67 VATCA 2010

Case stated requested: Unknown

61TACD2022 (VAT)

Appeal regarding inaccurate record of VAT on sales and methodology used in calculating the additional VAT payable

s111 VATCA 2010

Case stated requested: Unknown

62TACD2022 (Income Tax – Seed Capital Relief)

Appeal regarding eligibility for income tax relief under the Start-Up Relief for Entrepreneurs (SURE) scheme

s488, s493 and s497 TCA 1997

Case stated requested: Unknown

63TACD2022 (Income Tax)

Appeal regarding amended assessments to income tax

Case stated requested: Unknown

64TACD2022 (Stamp Duty)

Appeal regarding reduction in the value of a property conveyed to reflect reserved burdens of maintenance and support

s18(c) SDCA 1999

Case stated requested: Unknown

65TACD2022 (Income Tax)

Appeal regarding refusal of application made to Revenue for exclusion from the mandatory electronic filing requirements

s917EA TCA 1997; SI 223 of 2011, Tax Returns and Payments (Mandatory Electronic Filing and Payment of Tax) Regulations 2011

Case stated requested: Unknown

66TACD2022 (Income Tax)

Appeal regarding tax treatment of increases in the State Pension (Contributory) that were paid on foot of a spouse being a qualified adult

s126 TCA 1997

Case stated requested: Unknown

67TACD2022 (Income Tax – PAYE)

Appeal regarding whether expense incurred by the appellant in bringing legal proceedings is deductible from Schedule E emoluments

s114 TCA 1997

Case stated requested: Unknown

68TACD2022 (VRT)

Appeal regarding the open-market selling price in respect of the calculation of VRT

s133 Finance Act 1992

Case stated requested: Unknown

69TACD2022 (VRT)

Appeal regarding the open-market selling price in respect of the calculation of VRT

s133 Finance Act 1992

Case stated requested: Unknown

70TACD2022 (CAT)

Appeal regarding an entitlement to deduct the value of consideration paid under the terms of a disclaimer from the non-agricultural assets of an estate in computing a liability to CAT

s12 and s28 CATCA 2003

Case stated requested: Unknown

71TACD2022 (Income Tax)

Appeal regarding a decision of Revenue to deny a credit for income tax deducted from the appellant's emoluments but not remitted to Revenue by a company in which the appellant held a material interest

s983 and s997A TCA 1997

Case stated requested: Unknown

72TACD2022 (Income Tax)

Appeal regarding whether certain payments received by the appellant after the termination of his employment were payments received in consideration or consequence of the termination of his employment or were instead payments arising from his employment

s123 TCA 1997

Case stated requested: Unknown

73TACD2022 (CRSS)

Appeal against a refusal to allow the appellant to avail of the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

74TACD2022 (Income Tax)

Appeal regarding entitlement to single person child carer credit for separated spouse

s1025 and s462B TCA 1997

Case stated requested: Unknown

75TACD2022 (Income Tax)

Appeal regarding reduced USC rate criteria

s531AN(3) TCA 1997

Case stated requested: Unknown

76TACD2022 (Local Property Tax, Income Tax)

Appeal regarding benefit of use of a car

s121 TCA 1997

Case stated requested: Unknown

77TACD2022 (Income Tax)

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

78TACD2022 (CGT)

Appeal regarding CGT liability where the appellant was divested of her beneficial interest in the property to her spouse under the terms of a Circuit Court Order

s1031 TCA 1997

Case stated requested: Unknown

79TACD2022 (Income Tax)

Appeal regarding tax treatment of increases in the State Pension (Contributory) that were paid on foot of a spouse being a qualified adult

s126 TCA 1997

Case stated requested: Unknown

80TACD2022 (Corporation Tax)

Appeal against surcharges imposed by Revenue for the late filing of financial accounts in the iXBRL format on ROS

s884 and s917EA TCA 1997

Case stated requested: Unknown

81TACD2022 (VAT)

Appeal considering a number of questions, including economic activity (as defined), whether the appellant was obliged to self-account for VAT on supplies of services received from suppliers established outside the State and the criteria for entitlement to VAT recovery

s2, s12, s33, s34, s59, s61 VATCA 2010; Articles 9(1), 43–5, 167–169, 173–175 and 196 of Council Directive 2006/112/EC of 28 November 2006; Regulations 19 to 21 of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011

Case stated requested: Yes

82TACD2022 (Income Tax)

Appeal regarding deduction claimed in respect of maintenance payments made by the appellant for the benefit of his child

s1025 TCA 1997

Case stated requested: Unknown

83TACD2022 (CRSS)

Appeal against a refusal to allow the appellant to register for and avail of the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

84TACD2022 (Income Tax, USC, VAT)

Appeal regarding assessment to tax after identification of inaccurate sales reports during audit

s111 and s113 VATCA 2010; s959U, s959AI and s959AC TCA 1997

Case stated requested: Unknown

85TACD2022 (CRSS)

Appeal against the base period to be used in calculating the amount payable to the Appellant under the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

86TACD2022 (VRT)

Appeal regarding the open-market selling price in respect of the calculation of VRT on a damaged vehicle

s133 Finance Act 1992

Case stated requested: Unknown

87TACD2022 (CRSS)

Appeal against a refusal to allow the appellant to register for and avail of the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

88TACD2022 (CRSS)

Appeal against a refusal to allow the appellant to register for and avail of the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

89TACD2022 (Income Tax)

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Yes

90TACD2022 (Corporation Tax)

Appeal regarding interest charged on a loan to a director, a participator in the Appellant close company, where the loan may have been contrary to company law and ultra vires the powers of the company

s438 TCA 1997

Case stated requested: No

91TACD2022 (PAYE, USC)

Appeal regarding treatment of an underpayment – considerations included whether the appellant was tax resident in the State for the tax year; whether Revenue was correct in deciding that the pension arrears received in 2016 were assessable in respect of the year they were earned rather than the year they were received; whether Revenue was entitled to offset any underpayment against the subsequent overpayment

s819 and s112 TCA 1997

Case stated requested: Unknown

92TACD2022 (Corporation Tax)

Appeal regarding entitlement to start-up company relief for a management service company providing management services to existing trading companies

s486C TCA 1997

Case stated requested: Unknown

93TACD2022 (Stamp Duty)

Appeal regarding a claim for young trained farmer relief in respect of the acquisition of agricultural land where qualification was not obtained within the four year time-limit

s81AA SDCA 1999

Case stated requested: Unknown

94TACD2022 (VRT)

Appeal regarding the open-market selling price in respect of the calculation of VRT

s133 Finance Act 1992

Case stated requested: Unknown

95TACD2022 (PAYE, USC)

Appeal regarding relief for tuition fees paid

s473A TCA 1997

Case stated requested: Unknown

96TACD2022 (Income Tax)

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

97TACD2022 (CAT)

Appeal regarding dwelling-house relief

s86 CATCA 2003

Case stated requested: Yes

98TACD2022 (CRSS)

Appeal against a refusal to allow the appellant to register for and avail of the Covid Restrictions Support Scheme (CRSS)

s484 and s485 TCA 1997

Case stated requested: Unknown

Tax Technology Update Autumn 2022

John Curry
Principal, Tax Transformation & Technology, KPMG

> "Automation applied to an inefficient operation will magnify the inefficiency"
> – Bill Gates

In our first article in this series we outlined how tax professionals can embrace the technology agenda to allow them to focus on their core competencies, add greater value to the business and spend less time in spreadsheets. A key challenge for businesses is to understand what types of technology opportunities are available to them and how these solutions can help them to reduce manual, standard and repeatable activities in tax with a view to spending more time on value-add activities. In this article we will take a deeper dive into the options available to businesses and some of the key considerations when building a business case.

Where are the technology opportunities?

Compliance

Compliance-related projects refer to those initiatives that help you to prepare and/or file tax returns more efficiently, accurately and/or in a more automated way. They may also help you to perform other functions (such as invoicing) more efficiently. These solutions can help either with specific taxes or with the full range of tax returns, from VAT filings (including invoicing) to corporate income tax filings and even transfer pricing. The efficient and accurate management of compliance activities is at the core of a tax professional's role; thus, compliance solutions are among the most commonly used by tax departments today. For corporate income tax, these tend to be local solutions (e.g. Alphatax and other solutions in Ireland and the UK), but more international coverage is available for taxes such as VAT and invoicing (e.g. Thomson Reuters, Avalara, Vertex, Sovos and Edicom). Of course, a key issue is the quality of the data and processes flowing into your compliance solution. This is discussed in more detail below under data management section below.

Insights and Risk Management

Insight-related solutions give you greater insights into the accuracy of your tax-related data, helping you to identify potential tax risks up front and/or enabling you to identify errors or inconsistencies in your tax filings. These solutions are most seen as part of Revenue interactions, whereby eAudit techniques allow Revenue to carry out sophisticated data analytics to identify potential errors in your tax reporting. However, businesses are increasingly using these solutions to prepare for Revenue audits or, indeed, to provide senior executives or the board of directors with reassurance on the robustness of the company's tax filings. In addition to identifying risks, these solutions can identify opportunities, in the form of costs that qualify for capital allowances, additional VAT recovery and other improvements to working capital. Companies are increasingly using visualisation tools not only to provide insights into historical tax data but also to model the impact of supply chain, structural or legislative changes on their business. Tools such as Microsoft Power BI and Tableau are typically used to support these activities and are often readily available within organisations.

Process Management and Automation

Process management solutions help to manage either a specific process or an end-to-end process in tax by making the right information available to the right person at the right time. More specifically, these solutions may help to manage workflow within your tax function, or possibly within your organisation. Historically, these tools were used to track the status of various tasks that flow into the tax process and to provide dashboard views of the status of these tasks, with limited support for completing the process itself. We are seeing increased use of tools such as Microsoft Power Automate and Alteryx to automate activities, including collating information from the business to complete corporate tax returns and operational tax returns such as VAT, as well as to provide an opportunity for practices to manage interaction with their clients. In addition to freeing up tax professionals, these types of solutions can lead to more structured engagement and partnering with the wider business.

Data Management

Data management covers a broad spectrum of areas ranging from creating automated extraction of data from Enterprise Resource Planning (ERP) systems to creating data lakes or warehouses whereby tax can leverage this data to support compliance and other activities. With the increased focus of Revenue on the data that supports tax returns, coupled with an acknowledgement that most inefficiencies and manual intervention by finance and tax teams to manage tax reporting are caused by poor data, companies are looking to understand how best to take remediating action to address these challenges. Data remediation can be undertaken using a number of different approaches, but a record-to-report approach, whereby a tax return is unpicked step by step to understand the upstream processes (e.g. accounts payable, accounts receivable and master data creation that feed into a set of reports or working papers), can be very effective. Once these processes and the associated system set-up is assessed, tax teams can look to work with the wider business on realising targeted improvements to how this data is recorded with a view to reducing manual work-arounds or interventions in tax reporting.

Enterprise Resource Planning (ERP)

The most common reason for inefficiencies in managing tax in a business is a poorly configured ERP or other core system. Although there are opportunities to take remediating actions as part of a data remediation exercise, as outlined above, the implementation of any new system is an ideal opportunity to ensure that tax is managed effectively from the outset. This principle applies to all systems that have an impact on tax, It is critical that tax has a seat at the table at outset of a significant ERP or IT system project to fully reap the efficiencies from the investment.

To progress any of these initiatives, a clear business case will need to be presented, and there are a number of factors that may influence this business case, including:

- Providing stronger governance and controls: This is especially important in organisations that may have recently been subject to Revenue audit outcomes, or self-reporting of unexpected tax liabilities. Redesigning processes or building effective or preventative controls can reduce the risk of future issues arising.
- Providing cost savings or efficiency gains to the organisation: this could be technology facilitating efficiencies in headcount, overcoming manual processes or freeing up resources to focus on high-value-added activities.
- Meeting new compliance challenges; This could be as diverse as country-by-country reporting, new R&D incentives or even an organisation’s internal audit requirements to enhance controls. In time, BEPS 2.0 will place significant pressure on existing tax processes and systems, technology could assist in easing some of the pressures.
- Moves by tax authorities to adopt greater real-time reporting:, This may necessitate investments in insights-based solutions to monitor data reporting.
- Measurement of Key Performance Indicators (KPIs): This could be within the tax function performance or even individual performance

It could be aligned with the successful deployment of value-creating tax technology solutions.

In addition to aligning tax technology investment decisions with the overall business strategies and objectives, consider a few tips that may help to get investment decisions "over the line":

- Do you really need to buy it? For many organisations, large capital investments may be subject to greater oversight and control than periodic expenditure. Solutions based on software as a service (SaaS) or those that are used "on demand" may help to bridge that gap.
- Do you really know the cost or value to the organisation? It is worth investing time in seeking to quantify the savings of any technology solutions, and this is equally important for tax technology. There is also an option to deploy the tax technology solution initially on a trial basis, which can help to validate and quantify the potential benefits to the organisation before committing to a longer-term investment decision.
- Whose budget should the investment come from? Although the cost of tax compliance solutions would logically fall within the tax budget, solutions providing insights into particular aspects of your business operations or a wider ERP or system implementation may result in these costs being met by other parts of the business. Tax will get the benefit of any company-wide investments only if they are used as an opportunity to make efficiencies in tax data, business processes and reporting.
- Can you get some "quick wins"? Tax technology solutions such as certain data and analytics solutions can initially be deployed as a quick win to find tax savings, which in turn justify the costs of deploying the technology solution. The flipside is to recognise potential "traps" or hazards, where significant investments can be made in made in the wrong solution or without buy in from key stakeholders.
- What is the cost of doing nothing? What are the allocated and opportunity costs associated with not taking any action and relying on more costly manual activities to manage tax in the business?

A key starting point to identify both the solution and the corresponding business case is to understand the issue at hand. This can include challenges with existing ERP systems, the amount of manual intervention into data or simply the amount of non-value activities that are required to manage compliance. By documenting the cost, the inherent risks and the desired outcomes, this can form the basis of a sound investment in more effectively managing tax in the business.

Customs Update Autumn 2022

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Introduction

With the UK officially leaving the EU, many businesses came to a shuddering start with their customs compliance in the run-up to 1 January 2021. Brexit was a first voyage into customs compliance for many, and the primary focus in the initial months after Brexit was the continued flow of goods, clearing customs and getting products into the hands of customers, all while navigating the challenges presented by the Covid-19 pandemic. In Ireland, the amount of customs duty collected by Revenue swelled from €273m in 2020 to €520m in 2021, representing a massive 90% increase in irrecoverable costs being absorbed by Irish businesses.[1] Now it can be said that businesses have steadied the customs compliance ship and are steering into the new reality of post-Brexit trade. As the fog clears, many are recognising the potential tax savings achievable with effective and timely customs management.

The removal of the VAT exemption for goods imported to the EU with a value of €22 or less came into effect from 1 July 2021. This, combined with Brexit and a surge in online e-commerce transactions since the start of the pandemic, contributed to the volume of customs declarations processed by Revenue rising from just over 1m in 2020 to over 29.8m in 2021., Of the declarations processed, 27.1m were import declarations.[1] Throughout 2021 we saw businesses encounter difficulties when coming to terms with new customs formalities between the EU and the UK. Most businesses had put in significant work into being "day 1 Brexit-ready" and ensuring that goods cleared customs after 1 January.

The global trade environment has always been a rapidly changing landscape for businesses; however, recent geopolitical and socioeconomic events have created a new set of obstacles to contend with. In coming to grips with the new trading relationship between the EU and the UK, businesses were faced with correctly interpreting the detailed provisions on preferential trade as set out in the EU/UK Trade and Cooperation Agreement (TCA) to avail of 0% duty rates. Political posturing over the Northern Ireland Protocol did not help businesses and only added to uncertainty, with ongoing negotiations between the EU and UK casting doubts over the continuance of the Protocol. Turbulence in UK politics came to a head with Prime Minister Boris Johnson announcing his resignation on 7 July 2022. It is not yet clear how this will impact the future of the Northern Ireland Protocol and EU–UK relations, and uncertainty remains regarding how the EU will react to any actions taken by the UK. Simultaneously, the EU and the US continue to negotiate retaliatory tariff measures arising from a disagreement over aircraft subsidies, agreeing in October 2021 to suspend their steel and aluminium trade disputes.[2]

The Forgotten Tax

It could be said in the past that customs duty was a "forgotten tax", often disregarded

1 Revenue Commissioners, Annual Report 2021.

2 European Commission, press release, 31 October 2021. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5721.

or ignored. Today, this is not the case, with customs duty being seen as a real cost of doing business and customs compliance as a critical facilitator of efficient and compliant supply chains.

Last year we saw a significant increase in the number of businesses carrying out import clearance procedures in Ireland, from 15,858 in 2020 to 46,256 in 2021.[1] This is not just an Irish phenomenon but a global trend. The EU's budgeted surplus increased from €1.8bn in 2020 to €3.2bn in 2021, which the EU's 2021 Annual Report[3] accredits to "higher than expected revenue from customs duties". This increase may be partly explained by the 23% growth in EU imports of goods in 2021 compared to 2020.[4] Customs duties alone provided annual revenue of over €19bn for the EU in 2021.[3] Yet despite the heightened prevalence of customs duty in today's global trade environment, businesses continue to underestimate the cost savings achievable with an effective strategy to manage customs compliance.

The "above-the-line" nature of duties and indirect taxes means that they usually fall outside the scope of most departments' roles and responsibilities. Logistics and supply chain often do not have responsibility for (or an interest in) customs other than where it links with moving merchandise from point A to point B as quickly and efficiently as possible to meet customer demands. Tax traditionally focuses on "below-the-line" activities relating to income and profits. There is currently a shortage of customs and international trade specialists in industry in Ireland and across the EU, meaning that industry is finding it difficult to fill customs and international trade roles (both strategic and compliance). Therefore, with the various functions focused on other priorities, customs, trade and indirect tax compliance, and planning opportunities may be ignored until problems develop.

Unsurprisingly, the EU has seen a recent uptake in applications for customs duty relief authorisations, as businesses try to reduce the costs incurred as a result of their import activities. The EU operates a centrally developed Customs Decision System, which allows traders to apply for and manage customs decisions, such as duty relief authorisations, through an online trader portal. According to EU statistics, around 32,000 applications for customs decisions were submitted over the three-year period to June 2020,[5] compared to around 39,600 in just one year from June 2020 to mid-2021.[6] Many large manufacturing businesses in Ireland, for example, will operate inward processing relief to reduce or eliminate the payment of import duties on their raw materials. Businesses may actually lose competitive advantage by not identifying opportunities to avail of the customs duty reliefs that their competitors are already benefiting from.

Surprisingly, unlike with other tax heads, many businesses do not track their annual customs duty spend and, furthermore, may have never undertaken a substantial review of how customs duties impact their business. For businesses that recognise the potential opportunities in reducing their customs duty bill, a strategic management approach to customs and trade issues can make a significant contribution to reducing the business's costs and risks associated with global trade. However, many struggle to understand the new reality of trade and how to calculate the potential impact of import duties, and they overlook the practical perspective of what it takes to realise duty savings.

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3 European Commission, Consolidated Annual Accounts of the European Union, 2021.

4 European Commission, International Trade in Goods – Statistics Explained. Available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International_trade_in_goods#The_three_largest_global_players_for_international_trade:_EU.2C_China_and_the_USA.

5 European Commission, 2020 UCC Annual Progress Report, Accompanying Commission Staff Working Document. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019SC0001.

6 European Commission, 2021 UCC Annual Progress Report, Accompanying Commission Staff Working Document. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0382.

A Real Cost of Doing Business

From an EU perspective, a customs duty liability arises when goods are imported to the EU from a non-EU country. Customs duty is referred to as a "traditional own resource" by the European Commission because it was one of the first taxes collected by Member States on behalf of the EU and has always existed as a direct source of revenue to the EU budget.[7] In fact, customs duty is one of the oldest systems of taxation, and it is often referred to as a "transaction tax". Despite its rich history, customs duty has become such an accepted embedded cost for businesses involved in international trade that it has become the "forgotten tax". Businesses have traditionally "baked it into" the cost of their goods without considering where, when and why they are incurring this duty in their supply chain.

The rates of customs duty are laid down in the EU's Common Customs Tariff. The rates for most industrial goods vary from 0% to 14%. Significantly higher duty rates may apply to agricultural products. Most duties are assessed *ad valorem* as a percentage of the cost, insurance and freight (CIF) value. However, the duty for certain products is calculated on the quantity, weight etc. of the imported products – these are known as specific rates. Example of customs duties are:

- Cotton dress – duty rate 12%,
- Vaccines for human medicine – duty rate 0%,
- Magnetic paint – duty rate 6.5% and
- Sweet biscuit – duty rate 9% + EA Max 24.20% + ADSZ.

The duty rate applicable to the import of sweet biscuits to the EU is based on three components. First, the importer has to pay *ad valorem* duty on the invoice value, which equals 9%. The remaining two parts of the calculation are based on specific rates: the second is based on an agricultural component and is measured in euro per 100kg; and the duty calculation also includes a duty on the sugar content (ADSZ) of the sweet biscuit, also measured in euro per 100kg.

The simplified formula for calculating customs duties is that duties are equal to the tariff (%) multiplied by the value (€). The tariff percentage is determined on the basis of classification (commodity code) and preferential duty rates (origin certificates). The value used is the "customs value" of the goods.

It can be very easy for a business to misunderstand its actual profit if it does not take its total customs duties into account. It may have budgeted for a profit but in actuality is making a loss. If this is extrapolated across a full year of imports, it is evident that a large gap may develop between a business's expected profit and actual profit. It is clear that customs duties are a real cost of doing business. Thankfully for businesses, there are mechanisms to take duty away, as provided for in the EU customs legislation, the Union Customs Code.

How to Import and Export

First, we should recap on the basics of how a business physically imports and exports goods in Ireland and the EU. To import to and export from Ireland in its own name (i.e. as "importer of record"), Company A must register with the Irish customs authorities, i.e. with the Economic Operators' Registration and Identification (EORI) system. This registration is generally a straightforward procedure, and it can be done before or after VAT registration.

If Company A decides to import to Ireland, the two main options to pay any customs duties and import VAT owed are to use a customs deferred payment account or a TAN account. Company A can obtain a deferred payment account with the Irish customs authorities, which allows a maximum of 45 days to pay the import duties and charges (i.e. customs duties and import VAT). This is useful for cash-flow purposes but requires an authorisation

7 European Commission, EU Budget – Customs Duties. Available at https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/revenue/own-resources/customs-duties_en.

and a Customs Comprehensive Guarantee (a "customs bond") to be put in place. The bond and guarantee limit will be based on anticipated import levels. Alternatively, Company A could elect to use a broker with a deferred payment account; however, this would be more costly and would not allow for as much visibility into own trade for both tracking and reconciliation purposes. The primary method that traders use to pay import duties in Ireland is a payment-on-account facility known as a TAN (Trader Account Number) account. The TAN account allows traders to deposit funds with Revenue before shipments are imported to Ireland. When a shipment is declared for import and import duties are calculated, the amount owed is taken out of the TAN account immediately.

Company A should also decide which external customs clearance broker will act on its behalf when importing/exporting. This may involve the completion of a "direct representation form". It will be necessary to provide this agent with the relevant details and instructions to enable customs compliance and clearance, e.g. details of the tariff classification, origin of the goods, the goods' value.

Duty Drivers

Customs duty will be assessed by calculations based on three "duty drivers": tariff classification (commodity code), customs valuation and country of origin. Incorrect assessments of the duty drivers could lead to under- or over-payments of duty, which may not be detected by Customs until an audit. Therefore, a comprehensive understanding of the duty drivers is key when a business is reviewing its customs duty bill.

Classification

Every product that is imported or exported requires a tariff classification (commodity code) to be assigned to it. Most imports require a ten-digit tariff classification, whereas most exports require an eight-digit code. The commodity code assigned to a product determines the rate of customs duty that applies. The responsibility for correctly assigning a commodity code to an imported product lies with the importer, and Revenue has clearly indicated in past cases that there is a low tolerance for commercial naivety when it comes to incorrectly determining classification of goods where it leads to an underpayment of tax.

Valuation

The customs valuation determines the value on which the customs duty is assessed. There are six different methods of customs valuation to arrive at the custom value (the primary one is known as the transaction value method).

Origin

Origin can be divided into preferential origin (e.g. free trade agreements) and non-preferential origin. With regard to preferential origin, the key benefit from a free trade agreement is the reduction or elimination of tariffs between trading partners (i.e. a preferential rate of customs duty). The non-preferential origin of a product is used to impose commercial policy measures such as quantitative restrictions/limits, anti-dumping or countervailing measures, and import or export restrictions.

Mechanisms to Relieve Customs Duty

Free trade agreements

International-level negotiations and EU free trade agreements (FTAs) represent tangible cost-saving opportunities for traders, as over one-third of EU trade took place under preferential trade agreements in 2020[8] (the proportion is likely to be higher in 2021 with the implementation of the EU–UK TCA). The EU has negotiated preferential trade agreements with around 70 countries, including Switzerland, Norway, Turkey, Mexico, Vietnam, Japan and Canada. It is also negotiating further FTAs with potential future partners, including Australia and the Mercosur bloc (Brazil, Argentina, Uruguay and Paraguay). There are also non-reciprocal preferential arrangements such as the Generalised Scheme of Preferences (GSP)

8 European Commission, 2021 Report on Implementation and Enforcement of EU Trade Agreements.

that provide benefits on import, mainly for developing countries.

These FTAs provide benefits to both EU importers and EU exporters. Often overlooked are the competitive and cost-saving benefits that EU exporters can obtain when availing of the provisions of FTAs for their products in export markets. EU importers can benefit from a reduced or 0% customs duty rate on imported goods from an FTA country. To benefit from the removal of tariffs on movements between the EU and an FTA country, the goods must meet the origin rules as laid out in the agreement. At a high level, the goods must either:

- be "wholly obtained" in the EU or the FTA country or
- have been substantially transformed in line with the product-specific rule.

The concept of "substantial transformation" can be a source of confusion for traders. Most FTAs will contain provisions stipulating that there must be significant processing or transformation of the goods that goes beyond "simple" processing, i.e. the processing must be substantial enough to confer origin and thereby qualify for preferential treatment on import. A practical exercise that businesses can undertake to identify the advantages offered by the EU's extensive range of FTAs is:

- Work with procurement and sourcing teams to assess whether any imported raw materials can be sourced from a country with which the EU has an FTA.
- Based on the customs tariff classification of the finished products, assess whether such exported products attract a positive rate of duty on import to your customers' markets. Based on this, determine whether the EU has an FTA with such countries.
- Assess whether the export products qualify as originating under the FTA.
- Determine documentary requirements and/or obtain approved exporter status for origin documentation simplification on export.

Although the EU–UK TCA provides for zero tariffs on all UK-origin imports to the EU, not all goods arriving from the UK qualify as UK-origin. This means that tariffs are payable on some goods coming from the UK.

Example 1

Consider Company A, importing Chinese-origin t-shirts to Ireland. A pallet of t-shirts is first shipped from China to the UK, where they are cleared through customs for free circulation in the UK. Some are taken off the pallet and sold to UK customers, and the rest of the t-shirts on the pallet are shipped to Ireland to be sold to Irish customers.

The Chinese-origin t-shirts imported to the UK and then Ireland by Company A will not likely to be considered to have an EU or UK origin. Therefore, Company A will not benefit from the elimination of import duty allowed for under the TCA, as the goods are of Chinese origin. Without any further customs management, Company A will be required to pay customs duties on two occasions in the supply chain. First, duties will be paid when the t-shirts are imported to the UK from China. Second, duties will be paid when the t-shirts are imported to Ireland from the UK. The movement of goods between the UK and Irish warehouses gives rise to a double duty payment.

There is no way of reclaiming these duties as customs duties are an irrecoverable cost. However, it is possible to plan ahead and mitigate duty in the first instance by implementing special customs procedures, as outlined below.

Special procedures

There are a number of special procedures set out under the EU's customs legislation, the Union Customs Code, that provide for importers and exporters to reduce or eliminate customs duty payable. The objective of these procedures is to stimulate economic activity in the customs territory of the EU, and they are the basis on which businesses can strategically plan their customs activities.

The special procedures generally require pre-authorisation from the relevant customs authorities, a Customs Comprehensive Guarantee, internal controls within the business (such as tracking through ERP systems) and ongoing reporting (e.g. the bill of discharge for inward processing relief). There are defined import/export procedures and procedure codes to be used when availing of the special procedures. Securing duty reliefs involves complying with the conditions set out in the authorisation, and businesses must remember that the authorisation to use such reliefs is a privilege and not a right. However, the compliance responsibilities should not be seen as a deterrent to the use of these reliefs, as good planning and strong internal controls create the best environment for the smooth running of the procedures.

The most commonly used customs special procedures are customs warehousing, inward processing relief and outward processing relief. Other special procedures, such as end-use and temporary import, are also available to traders.

Customs warehousing

If we return to our example of Company A, which imports Chinese-origin t-shirts to the UK and then to Ireland, under its current supply chain it will be liable to pay double duty on those products. This applies to any business that has originally imported from third countries to the UK or Ireland with such products being subsequently moved from Ireland to the UK or vice versa. A solution is available to mitigate this through a special customs procedure known as a customs warehouse. Applying for and operating a customs warehouse may increase the compliance burden for the business, but it is a mechanism that, if used correctly, will enable Company A to avoid double duty in the example provided.

Under this procedure, goods would be initially imported to the UK and placed under the customs warehouse procedure; customs duty and import VAT would be suspended at this point. The duty would crystallise only when the goods are removed from the warehouse to service the UK market – this would in practice result in one duty payment, as the goods would stay in the UK. For products that are moved to Ireland, the customs warehouse procedure would be discharged by way of export, and no duty payment would be made to HMRC in the UK. In this instance the only duty payment would be on import to Ireland. This procedure is also available in Ireland and would work in the same manner for goods that are imported directly to Ireland for later sale to the UK market.

Through the use of a customs warehouse it could be ensured that for all movements between the EU and the UK only one payment of duty would be required, to the customs authorities of the country where the goods are to be sold. There is usually no limit to the length of time that the goods can remain in the customs warehouse. Application for authorisation for a customs warehouse would need to be made to the relevant customs authorities in the EU and the UK. Additionally, a Customs Comprehensive Guarantee, underpinned by a bank guarantee, will be required to operate a warehouse in the EU. In the UK, HMRC has advised that a comprehensive guarantee may not be required when operating a customs warehouse, but this would be subject to HMRC confirmation as it is decided case by case.

Inward Processing Relief (“IPR”)

End-to-end duty planning for processing activities offers significant savings if implemented correctly. Inward Processing Relief (“IPR”) allows authorised businesses to import dutiable goods to the EU without paying duty. The goods must be for processing in a nominated premises. Either duty will be levied at the rate applicable to the finished products after the processing is completed when the goods are released into free circulation, or no duty will be levied if the finished products are re-exported outside the EU. The duty applicable to the finished product must be lower than that applicable to the imported goods. Many manufacturing businesses avail of this authorisation in Ireland. In particular, pharmaceutical manufacturers will use IPR to relieve the duty levied on the raw materials used to produce drug products, such as active pharmaceutical ingredients (API). For example, where API or other materials used in production are liable to duty on import (6.5%) and are used for processing into a finished medicament that attracts 0% duty on import, IPR would provide full duty relief for the API or other materials.

A trader must apply for an authorisation through the EU Customs Decisions System and, subject to complying with certain requirements, provide a bond/guarantee to reflect the duty potentially chargeable on the imported products. Traders must keep records of all goods from their point of import to their progress through the processing operations and eventual use in the finished product. They must supply Customs with records detailing stock on hand, stock used during the processing period and stock wasted or destroyed and must present a bill of discharge on a regular basis (to be agreed with Customs) to account for the customs duty (if any) due on the finished product and/or any due on raw materials outside the quantities provided for in the authorisations.

An authorisation to use IPR is usually granted for three years and can be applied for up to 12 months retrospectively in exceptional circumstances. It is important to note that this relief is an exception from the normal course of events and is subject to strict conditions and supervision by Revenue. However, the potential duty savings with IPR can far outweigh the associated compliance responsibilities, as shown in the example below.

Example 2

Consider Company B, a large pharmaceutical business based in Ireland that manufactures medicinal products that attract a duty rate of 0%. Company B either sells these products on the EU market by releasing them into free circulation in the EU or sells them further afield (e.g. to the US) by re-exporting the finished product. To produce this finished medicinal product, it must import raw materials that attract a duty rate of 6.5%. If it imports €25m raw materials per year for the production process, it would be subject to customs duties of €1.625m annually. There is an obvious incentive to try to reduce this duty bill as much as possible. An opportunity to reduce or eliminate this customs duty exists in the form of obtaining and operating an inward processing authorisation.

If Company B gets approval to avail of IPR, it will be authorised to import its raw materials and declare them into the IPR procedure at the point of importation on its customs declaration. Company B would therefore pay a customs duty rate of 0% instead of 6.5% by claiming the relief. Once the raw materials are processed into the finished products, they are "discharged" from the procedure. This means that Company B either exports the goods, therefore paying 0% customs duties as no duty is payable on export of goods, or discharges them by releasing the goods into free circulation and paying the customs duty rate applicable to the finished product, which in this case is 0% for the medicinal product.

The opportunity is relatively straightforward to identify in the case of Company B, but there are many more situations where businesses could apply IPR in their own supply chains if they are proactive in undertaking a customs duty and supply chain review.

Outward processing relief

Outward processing relief (OPR) is a duty-saving mechanism that allows businesses to export goods for processing/repair outside the EU where those goods are going to be later re-imported to the EU. For example, an EU manufacturer may have a product with a step in the manufacturing process that requires it to be sent temporarily to the US for a value-added service. Without OPR, the EU business would have to pay customs duties on the full value of the product when it is re-imported to the EU to be sold to customers. Where an OPR authorisation has been obtained, a business can re-import those goods and pay import duty only on the cost of the processing operation undertaken outside the customs territory of the Union.

It should be noted that OPR can be availed of only where it is possible to identify the exported goods in the imported "compensating products" – for example, through the provision of supporting documents relating to the OPR transaction (such as contracts, correspondence and invoices) showing that the "compensating products" are manufactured from the temporarily exported goods.

Returned goods relief

Returned goods relief (RGR) is available where goods that are located outside the EU but were originally EU goods that were exported are returned to the EU territory within three years. Such goods are eligible for relief from customs duty and potentially also import VAT (the conditions for reclaiming import VAT are slightly different). RGR can be used for goods exported temporarily from the EU, where it is known that the goods will be eventually returned to the EU, where an overseas customer needs to return the goods or where a business in the EU purchases goods abroad that were exported from the EU by others.

The relief from import duty shall be granted only if goods are returned in the state in which they were exported. The goods must have been in free circulation with all duties and taxes paid when they were exported from the EU. For example, a business imported goods to the UK from France and paid duty on those goods in the UK to release them into free circulation. Some of the goods are then imported to Ireland, and duties are paid again, meaning that the business will have paid duty twice on the same goods. That business can, subject to meeting the conditions below, apply for RGR to avail of relief from customs duties on import to Ireland.

To claim the relief, a trader must reference that the goods are returned goods on the import declaration in the EU. This must be accompanied by evidence of previous export from the EU (see below). It is important that the trader maintains accurate records and a comprehensive audit trail that enables one to track the movement of each item through the third country (e.g. the UK) and back into the EU.

To claim relief on re-import to the EU, the trader will need to provide evidence of export (and preferably the original import documentation). Examples of approved documents are:

- a document that proves the goods were previously in the EU,
- a copy of the export invoice from the third country (e.g. the UK) to the EU,
- a copy of the export airway bill or bill of lading,
- a commercial certificate of shipment prepared at the time of export,
- if applicable, a certificate of posting relating to the export of the goods, and
- a copy of the import invoice if it clearly shows that the goods are being returned.

In practice, providing the above evidence for the application for RGR has proved difficult for many businesses.

Other reliefs

The EU has established the "Community System of Reliefs from Customs Duty", which is a collective term for several different conditional reliefs designed to promote educational, scientific, social and cultural advancement in the EU by allowing certain goods to be imported free of import duties. For example, relief exists for capital goods and other equipment imported on the transfer of activities from a third country to the EU. There is also a relief for educational, scientific and cultural materials, and scientific instruments and apparatus. In the R&D space, importers can avail of relief from customs duty where certain products are imported for research purposes, such as laboratory animals, biological and chemical substances, and medical instruments and apparatus.

A relief that has proved very useful to those involved in e-commerce is the "consignments of negligible value" relief. This allows for the import free of customs duty of goods that have an intrinsic value of €150 or less (some goods are excluded, such as alcoholic products, perfumes and tobacco products). Importers claiming this relief must therefore correctly determine whether the intrinsic value of the goods is less than €150, including, where relevant, any additional costs, such as transport and insurance, which has proved challenging for some businesses.

Temporary duty suspensions are another relief from customs duty and can be used where certain goods are not available in the EU market. When applying for the creation of a duty suspension for a particular tariff code, a trader must demonstrate an economic need for the suspension of customs duties on that product, such that identical, equivalent or substitute products are not available in the EU. The applicant for the suspension must show that the goods are intended for further processing (such as raw materials, components, intermediate products). Once the suspension has been issued, it can be availed of by any trader or industry in any EU Member State.

Conclusion

Businesses have traversed the high seas of customs and global trade for many years; however, recent socioeconomic events have created rocky waters for today's international traders. With an increasing focus on customs at the global level, Irish businesses have started to take note where they incur increasingly large customs duty bills and are devising strategies to address this often-forgotten tax.

In today's economic climate, with inflation driving up the cost of most goods, any opportunities to relieve costs are welcomed by Irish businesses. Almost all businesses could benefit from even the most rudimentary internal customs review. Availing of one of the above customs duty reliefs provides an opportunity to mitigate input costs and potentially creates a tangible competitive advantage for any business that moves goods across borders.

Duty relief mechanisms are not without their own challenges, but with effective management and by integrating customs function best practices, businesses can capitalise on those duty reliefs available to them.

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Corporation Tax Return 2021: Focus on Disclosures

Introduction

From the introduction of aspects of ATAD 2 in Finance Act 2019 to the impact of Covid-19 Revenue supports and concessions, the busy compliance seasons for the past two years have largely been focused on these key changes to the Irish corporation tax regime and the associated impact on compliance. Although there are fewer significant legislative changes to be considered for tax periods ending during 2021, there are a number of changes to the 2021 corporation tax return, the Form CT1, that should be borne in mind by practitioners in the run-up to the busy September filing deadline. A number of changes and additions to the Form CT1 focus on areas of disclosure in the corporation tax return with a view to increasing the levels of information provided and are set out below.

Plant and Machinery Capital Allowances

Where capital allowances are claimed on plant and machinery by a company and during the taxable period there were excess capital allowances not claimed in respect of the plant and machinery, this excess must now be disclosed in the Form CT1.

Capital Allowances		
(a)Machinery and Plant (including motor vehicles and specified intangible assets), excluding amount claimed in respect of 'energy-efficient equipment' under Sec. 285A, 'childcare and fitness centre equipment' under Sec. 285B and 'gas vehicles and refuelling equipment' under Sec. 285C.	€	
(b)Machinery and Plant - 'energy efficient equipment' (section 285A TCA 1997)	€	
(c) Machinery and Plant - 'childcare and fitness centre equipment' (section 285B TCA 1997)	€	
(d) Machinery and Plant - 'gas vehicles and refuelling equipment' (section 285C TCA 1997)	€	
Plant & Machinery excess capital allowances not claimed in this period	€	

Transfer of a Trade

Where a transfer of trade has taken place and the conditions of s400 TCA 1997 are satisfied, the successor company may be permitted to carry forward any trading losses generated by the transferring company against future profits of the same trade. Where this relief was claimed during 2021, a new panel under Trading Results has been incorporated into the Form CT1 requiring the disclosure of losses obtained during the period as a consequence of s400 TCA 1997.

(a) Trading Losses Forward (from earlier accounting period(s))	€	
(b) Amount of losses at (a) above utilised in this accounting period	€	
(c) Amount of losses forward not used in this accounting period and available for carry forward to succeeding accounting periods	€	
(d) Section 400 losses obtained during the period	€	
Total Losses appropriate to this trade, before Capital Allowances, in this accounting period	€	

Extracts from Accounts

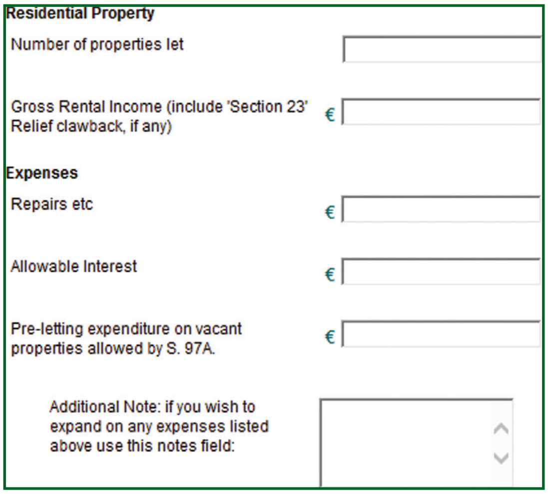
One area of notable change is in respect of the Extracts from Accounts section of the Form CT1, which will be particularly relevant for companies that are not dealt with by the Large Corporates Division (LCD) in Revenue or are otherwise exempt from preparing and filing iXBRL tagged financial statements. The table below provides a summary of the changes to the Extracts from Accounts in the Form CT1.

Changes to Extracts from Accounts
Expenses and deductions
Staff expenses has been expanded, with the new requirement to disclose "staff costs" separately from salaries and wages.
The Form CT1 has split the sub-contractors field into two disclosures and now requires a disclosure of fees paid to sub-contractors that are within the scope of the relevant contracts tax (RCT) regime and fees paid to sub-contractors that are not within the scope of RCT.
An additional panel has been included to disclose rent paid during the period.
A panel has been included in respect of other expenses that are negative figures in the accounts, and a field to disclose further details of once-off or unusual expenses has been incorporated into the return.
Balance sheet
The debtors panel has been split in two, with a requirement to disclose "other debtors and prepayments" separately from trade debtors, and there is a corresponding amendment with respect to creditors.
Adjustments made to profit/loss per accounts
A box to confirm whether any adjustments were required to the profit/loss account for tax purposes has been included.
The previous panel "Light, Heat and Phone" has been updated to include "Depreciation / Amortisation, Goodwill/Capital write-off".
A panel has been added to disclose the amount of any deduction taken for stock relief under s666 TCA 1997.

A panel has been added to disclose deductions taken for carbon tax under s664A TCA 1997.
Two panels with respect to “other deductions” and “other add backs” have been added.

Rental Income

For companies generating Schedule D, Case V, income from Irish rental properties, additional fields have been included in respect of expenses incurred in connection with both residential and commercial properties. These fields allow taxpayers to include additional information on rental property expenses disclosed in the Form CT1 for both residential and commercial properties.



Residential Property

Number of properties let

Gross Rental Income (include 'Section 23' Relief clawback, if any) €

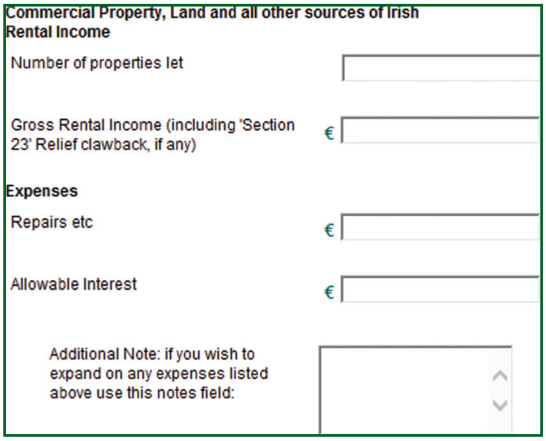
Expenses

Repairs etc €

Allowable Interest €

Pre-letting expenditure on vacant properties allowed by S. 97A. €

Additional Note: if you wish to expand on any expenses listed above use this notes field:



Commercial Property, Land and all other sources of Irish Rental Income

Number of properties let

Gross Rental Income (including 'Section 23' Relief clawback, if any) €

Expenses

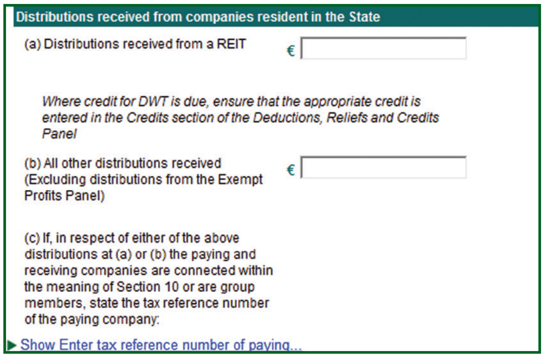
Repairs etc €

Allowable Interest €

Additional Note: if you wish to expand on any expenses listed above use this notes field:

Distributions Received from Irish-Resident Companies

The 2021 Form CT1 has been expanded to include additional disclosures where a distribution is received from an Irish-resident company and/or from a REIT. Where either is considered “connected” to the recipient in accordance with s10 TCA 1997 or is part of an Irish tax group with the recipient, in these cases, the tax reference number of the company making the distribution must now be disclosed, along with an indication of whether the paying company is a REIT.



Distributions received from companies resident in the State

(a) Distributions received from a REIT €

Where credit for DWT is due, ensure that the appropriate credit is entered in the Credits section of the Deductions, Reliefs and Credits Panel

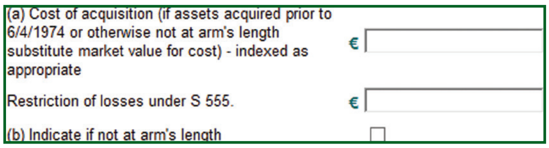
(b) All other distributions received (Excluding distributions from the Exempt Profits Panel) €

(c) If, in respect of either of the above distributions at (a) or (b) the paying and receiving companies are connected within the meaning of Section 10 or are group members, state the tax reference number of the paying company:

▶ Show Enter tax reference number of paying...

Capital Gains Tax

Where a company has made a chargeable disposal of an asset for CGT purposes and a loss arises on such, the loss may be restricted under s555 TCA 1997 where capital allowances were claimed on the asset disposed of. The Form CT1 now requires a disclosure of the amount of CGT losses incurred during the period that were restricted by virtue of capital allowances having been claimed on the asset.



(a) Cost of acquisition (if assets acquired prior to 6/4/1974 or otherwise not at arm's length substitute market value for cost) - indexed as appropriate €

Restriction of losses under S 555. €

(b) Indicate if not at arm's length

Close Company Surcharge

Where entities are considered close companies for Irish tax purposes, changes to disclosures for elections made under s434 TCA 1997 should be borne in mind when completing the return for 2021. The provisions of s434 TCA 1997 permit two close companies jointly to elect for a distribution being paid between them to not be treated as undistributed investment and estate income and thus not to be subject to the close company surcharge.

Additional panels in the Form CT1 have been included where an election under s434 TCA 1997 is made, which now require the disclosure of the amount of the distribution covered by the election, the tax reference number of the other company and the date of the distribution.

It is worth highlighting that as the election under s434 TCA 1997 is a joint election, these disclosures will need to be made by both the company making the distribution and the recipient of such in their respective tax returns.

Surcharges (Section 440 and Section 441 TCA 1997)	
If you are making an election under Section 434(3A)(a), please tick the box	☐
The tax reference number of the other company	
The date of the distribution	
The amount of the distribution covered by the election	€

Dividend Withholding Tax

Additional disclosures have been included with respect to distributions made by companies during the taxable period. The tax reference number and the amount of the distribution paid must be disclosed where the distribution is paid to a connected person within the meaning of s10 TCA 1997 or to a beneficial owner of or a participator in the company. This adds to the existing requirement in the Form CT1 to disclose the date of the distribution, the gross value of such and the amount of DWT, if any, deducted.

Practitioners should be cognisant that a DWT return is required to be filed by the 14th day of the month following that in which a distribution was made by virtue of s172K TCA 1997.

Dividend Withholding Tax - Details of Distributions	
Details of Distribution - 1	
Date of Distribution (dd/mm/yyyy)	
Gross Value of Distribution	€
Value of DWT deducted, if any	€
Where the distribution is made to a connected person as defined in Section 10 TCA 1997 or to a beneficial owner or participator, state:	
The tax reference	
The amount paid	€

Other Areas

Although not specifically changes to the 2021 Form CT 1, practitioners should also be mindful of the areas of transfer pricing (around SME exemption, local file and master file documentation), controlled foreign company disclosures and anti-hybrid mismatch considerations under Company Details in the Form CT1.

Closing Comment

Revenue appears to have used the 2021 return to increase disclosures in certain areas with a view of ensuring compliance across a number of areas. Practitioners should be aware of these changes to ensure that appropriate disclosures are made where applicable and, importantly, ensure that the relevant information is available from clients to facilitate completion of the Form CT1.

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Grid Connections: A Capital Allowances Conundrum

Introduction

Few would argue against the view that capital allowances are a complex area of taxation that require careful and detailed consideration. Add further complexity to the mix with the inclusion of advanced, strategically important electricity-generating assets, and you have the recipe for a very interesting argument and a compelling read.

The decision in the 2021 Tax Appeals Commission (TAC) case (94TACD2021), primarily on capital allowances, is a significant one. The direct subject matter – the development of a power station – will affect relatively few businesses, but some of the principles and lessons emerging from the case are of much wider interest.

The case, considered whether grid connection costs pertaining to a power station should qualify for capital allowances (called wear-and-tear allowances (WTA)) as being expenditure incurred on the provision of plant or machinery (P&M). Ultimately, the TAC held in favour of the taxpayer. The published 82-page decision, summarised below, makes for interesting reading.

Plant: An Essential Starting Point

It has been over 130 years since the non-tax case of *Yarmouth v France* [1887] 19 QBD 647 defined the term plant as "whatever apparatus is used by a business man in carrying on his business – not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business". Yet despite this and numerous subsequent cases dealing with the same subject matter, in many instances uncertainty prevails with regard to a taxpayer's entitlement to claim WTA on certain expenditure.

Background to the Case

In the early 2000s the taxpayer developed a power station that required connections to the national grid for both electricity (input/demand user and output/generator) and gas (input/demand user only). It contracted with the Electricity Supply Board (ESB) and Bord Gáis Energy (BGE) and paid them for building and commissioning these connections.

The taxpayer capitalised these connection costs in its accounts and, along with claiming WTA on elements of the power station itself, claimed WTA on expenditure on the grid connections on the basis that it was on the provision of P&M pursuant to s284 of the Taxes Consolidation Act 1997 (TCA 1997).

The large capital allowance deductions caused the taxpayer to incur significant tax adjusted losses in the period ending 31 March 2003, which eradicated its tax liabilities for several years after the construction of the power station.

The Dispute

In 2009 Revenue conducted an audit, after which it raised Notices of Assessment for a number of years that reflected a clawback of losses based on the taxpayer's claiming WTA on the grid connection costs. The taxpayer appealed on a number of grounds, the one relevant to this article being that the connection costs were relievable as ancillary expenditure on the provision of P&M or, alternatively, were revenue expenditure and therefore fully deductible.

About the Power Station

During the two-day hearing a number of expert witnesses gave testimonies that included providing details on the power station, the regulatory regime pertaining to grid connections and the infrastructure involved in grid connections. Some of their noteworthy contributions were:

- The power station is a combined-cycle gas turbine (CCGT) plant that utilises gas turbine and steam turbine technology to produce electricity.
- The power station is connected to the national grid by means of a dedicated electrical connection consisting of an underground 220kV transmission cable and a transmission switching station.
- When in operation, the power station exports electricity to the national grid. In the start-up phase after shutdowns (which are frequent and normally scheduled), it is necessary to import electricity.
- Gas is supplied via a dedicated connection between the power station and the high-pressure gas network operated by BGE (now known as Gas Networks Ireland).
- Without the dedicated connections, it would not be possible to operate the power station to generate electricity.
- In Ireland, all of the costs of any new assets required to connect a generator facility to the existing electricity system must be paid before the generator is allowed to connect.
- In addition to paying all of the cost of the connection works, the generators must pay for the occupation, operation, maintenance and council rates for the connection assets.
- CCGTs are essentially factories that efficiently convert gas to electricity and put this energy into the electricity transmission system for the use of electricity customers. For the technical and commercial viability of the business, the connection works to the electricity networks are as essential as the CCGT equipment itself.

About Grid Connections

Regulatory obligations

Because grid connections are considered to be strategically important infrastructure, there is a statutory and regulatory requirement that ownership of these assets is transferred to licensed transmission asset owners (such as the ESB and BGE). Consequently, although the land on which the grid connections is situated was owned by the taxpayer at the time of construction, on completion the legal title was transferred to the transmission asset owners.

The assets constructed

The electrical connection works comprised the construction of a 200kV outdoor transmission station, the laying of 1.35km of underground transmission cable, remote station works, and the installation and commissioning of equipment.

The gas connection works comprised the construction of a gas pipeline between the power station and the gas network.

Although the taxpayer did not maintain the ownership of the grid connections, the cost of construction and of subsequent maintenance and operations was/is fully borne by it.

Treatment of the Expenditure in the Financial Statements

One expert witness provided evidence on the treatment of the expenditure in the taxpayer's accounts. He advised that, on completion of the power station, the costs were capitalised and held as fixed assets. He further advised that:

- The fixed asset accounting policy in the taxpayer's statutory financial statements was that "all fixed assets are initially recorded at cost. In accordance with FRS 15, the cost of a fixed asset comprises its purchase price and any costs directly attributable to bringing it into working condition for its intended use".
- The taxpayer's power station was clearly a tangible fixed asset as defined by FRS 15. He stated that it was an asset that "has physical substance and is held for use in the production or supply of goods" (this meant the generation and sale of electricity).
- In his view, the gas and electricity connection charges were costs that were directly attributable to bringing the asset into working condition for its intended use. The power station would not be operational without the gas connection, which supplies fuel for energy production. The power station would also not be operational without the electricity connection, which enables the power station to start the process of generating electricity and which further provides the power station with the outlet to export the energy generated to the grid.

Taxpayer's Submissions

The taxpayer contended that, in accordance with s284 TCA 1997, the connection fees that it paid to the ESB and BGE constituted ancillary expenditure necessary for the "provision of plant and machinery" (P&M was in the form of turbines and related equipment in the power station).

The taxpayer maintained that entitlement to claim ancillary expenditure is well established in case law, which asks whether the expenditure was required to bring the P&M into operation. It was argued that, given that the connections to the electricity and gas networks were necessary to allow the power station to operate for the intended trade purpose of generating electricity, the connection fees, which it paid, were precisely the type of ancillary expenditure that should be relieved by way of capital allowances.

Case law cited included:

- *IRC v Barclay Curle & Co. Ltd* [1969] 1 WLR 675 – This is an important case on the question of allowable ancillary expenditure. A dry dock was held as plant (including excavations, the concrete basin and other works). In this case Reid LJ stated: "In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed: until then it is of no use for the purpose of the trade."
- *Cooke (Inspector of Taxes) v Beach Station Caravans Ltd* [1974] 1 WLR 1398 – A swimming pool, together with all of the attendant apparatus for purifying and heating the water, was held as plant. In this case the High Court stated: "the pools should be considered not on their own but in relation to the business carried on by the Company, namely, running its caravan park.

It is plain that the pools were provided in order to attract custom to the caravan park of which they form part...The purpose of the pool is to provide and retain a suitable body of water which is circulated, cleansed and heated, and so will provide a medium in which the visitors to the caravan park can safely disport themselves, affording them a pleasurable and safe buoyancy. I do not think that the water that the pool is designed to contain can be divorced from the structure of the pool and its apparatus."

- *Ben-Odeco Ltd v Powlson* [1978] 52 TC 459 – Wilberforce LJ made the following comments: "The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant – not limiting it necessarily to the bare purchase price, but including such items as transport and installation, in any event not extending to expenditure more remote in purpose."

Revenue's Submissions

Revenue made submissions on a number of fronts, as follows.

Ownership

- Revenue submitted that it was very clear that for a claim for capital allowances to be allowable, the expenditure concerned must relate to the provision of plant. That plant must "belong" to the taxpayer. It submitted that there is no authority for the proposition that capital allowances are allowable, whether in respect of plant or ancillary expenditure, in respect of items that do not belong to a taxpayer.
- Revenue cited *Stokes v Costain Property Limited* [1984] 1 WLR 763, which held that a lessee could not claim capital allowances because it did not own the items concerned.
- Revenue further contended that the taxpayer had agreed that ownership of, and responsibility for, the relevant structures was to rest with ESB and BGE. It submitted that the mere fact of payment or benefit does not and cannot equate to ownership. This was particularly so where ownership was the subject of specific agreements. The contract with BGE stated that "at all times Bord Gais will own and operate the Works". Furthermore, Revenue submitted that it was clear from the contract that use of the connection was not limited to the taxpayer and that each provider reserved the right to allow others access. The taxpayer could not object as it had no control.
- Revenue also cited case law, namely, *Revenue Commissioners v O'Flynn Construction* [2013] 3 IR 533 and *Texaco v Murphy* [1991] 2 IR 449, which concerned the principle of statutory interpretation that the language used in the legislation is the fundamental consideration.

Ancillary expenditure

Revenue cited the above-mentioned *Ben-Odeco Ltd v Powlson* [1978] case, which held that commitment fees were too remote from the P&M. Revenue contended that, just as the commitment fees were essential to purchase the oil rig, so too the sums paid to the ESB and BGE were essential to run the power station. It contended that, like in the *Ben-Odeco* case, these costs were too remote from the P&M.

Access to a system

Revenue made the point that, similar to the ruling in the *Bridge House (Reigate Hill) Ltd v Hinder (HM Inspector of Taxes)* [1971] 47 TC 182 case, the payments were merely for access to the ESB (and BGE) systems, and that there can be no credible suggestion that the taxpayer was providing P&M itself.

Findings

In delivering his determination, the Appeal Commissioner said that:

> "I am satisfied on the evidence before me that the electricity and gas connections the subject matter of this appeal are a necessary and integral part of the Appellant's Power Station. The connections were necessary to bring the

plant and machinery which constitutes the Power Station into operation and they continue to be necessary to allow the Power Station to operate for the intended trade purpose of generating electricity. In reaching this conclusion, I believe that the decision in *Cooke v Beach Station Caravans* is apposite and of assistance. I believe that the Power Station and the connections the subject of this appeal cannot properly be said to be independent of one another; rather they should be considered as comprising a unit which operates as part of the business carried on by the Appellant."

Key points

- The taxpayer was obliged to enter agreements with the ESB and BGE to connect the power station to the grids and, on completion, was also obliged to transfer ownership of the grid connections. The TAC was of the view that but for this statutory obligation, ownership would have remained with the taxpayer.
- The TAC found that from a capital allowance perspective, consistent with the *Cooke v Beach Station Caravans* case, the power station and grid connections could not be considered independently; rather, they should be considered as comprising a unit that operates as part of the business carried on by the taxpayer.
- The TAC advised that it had considered the *Ben-Odeco Ltd v Powlson* [1978] case and rejected Revenue's argument that the expenditure on the electricity and gas connections is too remote to come within the parameters of s284 TCA 1997.
- The TAC concluded: "I accept as correct the Appellant's [taxpayer's] argument that its expenditure on the connection fees paid to BGE and ESB constituted ancillary expenditure necessary for the provision of the machinery and plant used to generate electricity at the Power Station. That machinery and plant belongs to the Appellant." Therefore the taxpayer was correct to claim the expenditure on grid connection as P&M within the meaning of s284 TCA 1997.
- The TAC stated that "[i]n light of the foregoing finding, it is not necessary... to consider...whether the expenditure thereon could be said to constitute revenue expenditure".

Conclusion

The TAC determination has not been appealed and given the number of power generation and other infrastructure projects that require grid connections that are in planning, design stage or are under construction, and the significant costs involved, this ruling provides useful guidance on the entitlement to claim WTA on this expenditure.

However, this case is also of wider interest as it provides a useful insight (and from an Irish perspective) into the intricacies of capital allowance claims and offers a snapshot of Revenue's position when it comes to expenditure falling near the dividing line – a position that is open to challenge. As noted at the beginning of this article, capital allowances are a complex area of taxation, where reasoned and robust arguments can be made by both sides of the claim. Successful capital allowance claims need to be built on firm foundations, and it is recommended that entitlement matters are considered as early as possible in the development process.

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Interest Limitation Rules: Interpretation and Guidance

Introduction

The Interest Limitation Rule (ILR), which takes effect for accounting periods beginning on or after 1 January 2022, transposes into Irish tax legislation Article 4 of the EU Anti-Tax-Avoidance Directive (ATAD). In the previous two Issues of *Irish Tax Review* the key provisions of the ILR, including areas to watch and key issues for SMEs, were addressed. This article provides an overview of important areas of interpretation, including relevant Revenue guidance issued in August 2022 (Tax and Duty Manual Part 35D-01-01, "Guidance on the Interest Limitation Rule").

Revenue's guidance on the ILR runs to 65 pages and includes a detailed practical example applying the interest limitation rules to an interest group with different sources of income taxed at different corporation tax rates. As companies continue to consider the impact of the ILR on their tax position, the Revenue guidance may be a helpful tool to assist businesses interpret the legislative provisions. Even with this guidance, the legislation is complex, and uncertainty remains.

The ILR legislation mandates that a word or expression that is used in the Irish provisions and is also used in the EU ATAD has, unless the context otherwise requires, the same meaning in the Irish legislation that it has in ATAD. With Article 4 of ATAD running to two pages, the scope of additional guidance from the Directive for interpreting the Irish legislation will be limited. However, any interpretation of the Irish ILR legislation must be aligned with ATAD.

Worldwide Group

To be in a worldwide group, the company must be included in the consolidated financial statements of the Ultimate Parent Company. The Revenue guidance confirms that an entity is still considered to be part of a worldwide group even where it is excluded from the consolidated financial statements solely on grounds of size or materiality.

Regarding ICAVs (Irish collective asset-management vehicles), a helpful example confirms that an ICAV does not form part of a worldwide group where only the results of a sub-fund are included in the investor's financial statement.

Interest Groups

ICAVs

Although it is not stated explicitly in the guidance, an ICAV can form part of the interest group. Section 835AAK TCA 1997 requires the company to be within the charge to corporation tax. Where the ICAV is an Irish-tax-resident company under s23A TCA 1997, it is within the charge to corporation tax under s21. Subsequently, it is its "relevant profits" (income and gains) that are exempt from tax under s739C TCA 1997.

Elections

Helpful clarification was given in the guidance on how to be a member of an interest group and how to withdraw that election. Companies completing a Form CT1 can make the election via the CT1. For companies not completing a CT1, an election can be made via MyEnquiries.

Although a company may have nine months after the end of the accounting year to make this election, preliminary tax taking into account the ILR must be paid within six months of the end of the accounting year. It would be prudent for companies to have made the decision before the preliminary tax deadline to avoid the risk of paying (non-deductible) interest.

Operating ILR for an interest group

In applying the ILR rules to an interest group, with the exception of the equity ratio, all calculations should "comprise" the results of all members of the interest group. The guidance provides welcome clarification that "comprise" can be interpreted to mean either:

- aggregating (summing together each company's component amount to arrive at the interest group equivalent) or
- consolidating (which will eliminate intra-interest group amounts to arrive at the interest group equivalent).

For most businesses, summing together each company's exceeding borrowing costs and EBITDA will simplify compliance, whereas for others, such as those that have only intra group interest expense and income, preparing the ILR amounts through consolidating results may be preferable.

It is important to note that preparing a set of consolidated tax-adjusted ILR results will be a far from simple task and not one to be untaken lightly. Whichever method is chosen, it will be necessary to apply that approach on a consistent basis, as an election to join an interest group cannot be changed for three years. Thus, interest groups should consider the impact of their choice with regard to future years.

Reporting

Interest groups will be required to nominate a reporting company. The reporting company will provide details of the ILR in respect of the group in its Form CT1. Separately, companies in the group will be required to provide abridged information via their Form CT1. Details of the information that will need to be reported are outlined in *Irish Tax Review* issue 1 of 2022.

Reporting

Where a company is availing of the *de minimus* or equity ratio exemption, it will be optional for the company to provide certain information (e.g. the components of the ILR calculation). However, companies may choose to report certain information so as to carry forward spare capacity for use in later periods.

Partnerships

The application of the ILR to groups with partners/partnerships is a complex area. The Revenue guidance provides commentary on this in two separate sections. It is important to remember that it is only companies chargeable to corporation tax that come within the scope of the ILR in the first instance.

Nonetheless, where a partner or a partnership is considered an associated entity of a company in scope of the ILR, it can have consequences, namely, no longer qualifying as a standalone company (the ILR does not apply to a standalone company) or impacting the group and equity ratios.

The Revenue guidance provides an analysis of a tax-transparent Irish partnership. It indicates that, for the standalone entity test, a company that is owned 25%+ by a partnership is an associated enterprise of every partner irrespective of the size of their partnership interest. However, in determining whether a partner is an associated enterprise of the partnership, the guidance indicates that this will be the case only where the partner has a 25%+ partnership interest. It follows that, for example, if five unrelated partners had equal shares in a partnership that had a wholly owned subsidiary, they would be associated enterprises of the subsidiary but not of the partnership. However, the guidance appears to suggest that, in that example, the partnership would not be an associated enterprise of the subsidiary.

For the group/equity ratio, the wider definition of associated enterprises applies, which includes where entities are "acting together". Two companies may be in a partnership together, but the guidance illustrates by way of example that these companies may not necessarily be considered to be "acting together". Where the partnership is included in the consolidated group financial statements, all entities that are fully included in the consolidated group financial statements will be "associated enterprises" of each other (including the partnership).

Aspects for further consideration

Foreign tax credits

One area where further clarity would be welcomed is the interaction of the ILR with double taxation credit relief under Schedule 24 TCA 1997. Paragraph 4 of Schedule 24 provides for the calculation of the foreign tax credit allowed against corporation tax, limiting the credit to the Irish corporation tax attributable to "that income" (relevant income). P in the PxI/R formula is the profits of the trade before a deduction under paragraph 7(3)(c) (i.e. Case I income). Where interest expense is disallowed under the ILR, this could potentially increase the P amount, which in turn may impact the amount of foreign tax credit/deduction available.

Section 835AAO TCA 1997 comments that this Part (being the ILR provisions) shall apply after all provisions of the Tax Acts and the Capital Gains Tax Acts, other than s811C. One interpretation is that this means that P in paragraph 4 of Schedule 24 is not revised where interest expense is denied under the ILR. Another interpretation is that although the ILR is to be applied after applying all other rules, this does not preclude a further recalculation to take account of the impact of the ILR. This interpretation would be consistent with, for example, s835AAD(7), which effectively deems disallowable amounts to be losses where the restricted interest would otherwise have created or augmented a loss. The presumption underpinning this rule is that without it, ring-fenced losses could be effectively converted into universally deductible disallowable amounts; this proposition is, itself, predicated on the supposition that those ring-fenced losses could be used to shelter additional taxable profits arising due to the application of the ILR (which requires loss claims to be increased after the ILR has been applied). Confirmation of that point would be welcomed.

Group loss relief

A similar point arises with regard to group loss relief. If additional group loss relief (which does not arise from interest expense) can be offset against higher taxable income due to a disallowance under the ILR, can additional group loss relief be claimed? Again, one interpretation would suggest not, but another would seem to allow it.

Conclusion

Whilst the Revenue guidance provides clarity on certain aspects of the ILR, the legislation is complex, and uncertainty remains. This article, alongside the articles in the two previous issues of the Irish Tax Review, will be a helpful place for businesses seeking to understand how the ILR works. Engaging early with the ILR legislation will be key for businesses so as to understand the choices available and how these choices will impact on their tax liability.


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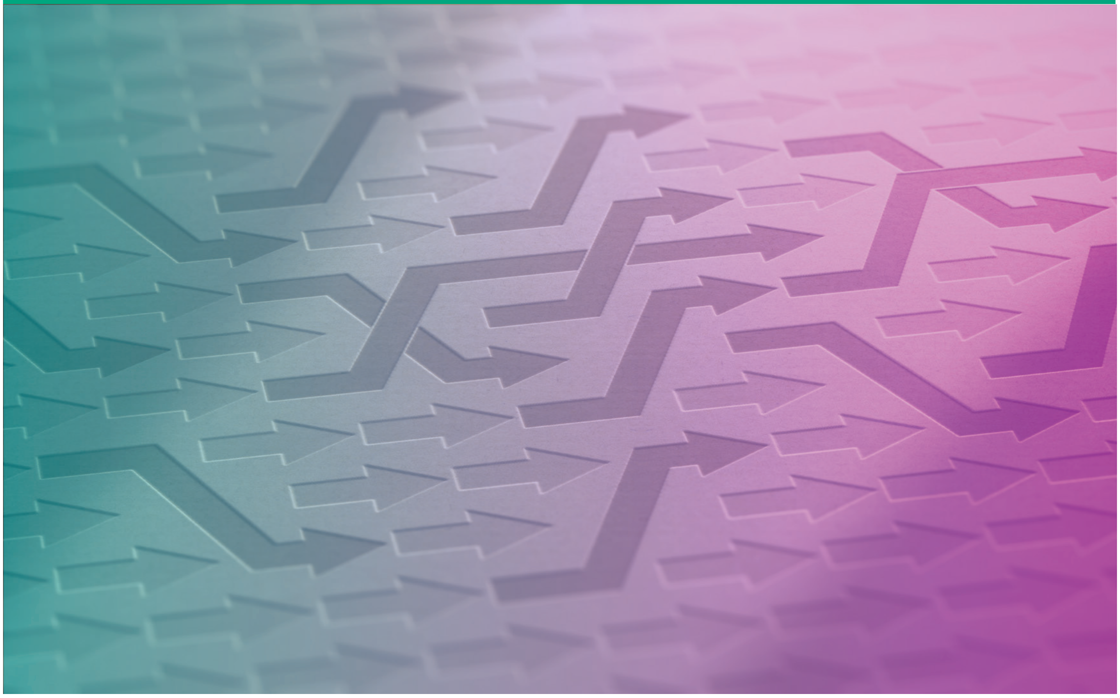
Group Rationalisation Post-Acquisition: Part 1



Introduction

With the increased activity in the M&A market in the last couple of years, there has been a corresponding rise in group restructurings/ group rationalisations due to the addition of companies and assets to the purchaser's group. Although a structure may be preferred for the purposes of acquiring the target entity, it may not align with the rest of the purchaser's group post-acquisition for operational reasons.

A deal-specific acquisition strategy may be required to complete an acquisition in order to facilitate a vendor's tax-management requirements; however, it may result in a misalignment of the target within the purchaser's group or a misalignment within the purchaser's group going forward. This was evident in a recent determination of the Tax Appeals Commission (81TACD2022), which mainly concerned VAT recovery on certain costs but highlighted the practical reasons for a post-acquisition restructure. As part of his evidence, a witness for the Appellant explained the rationale for the post-acquisition restructure:

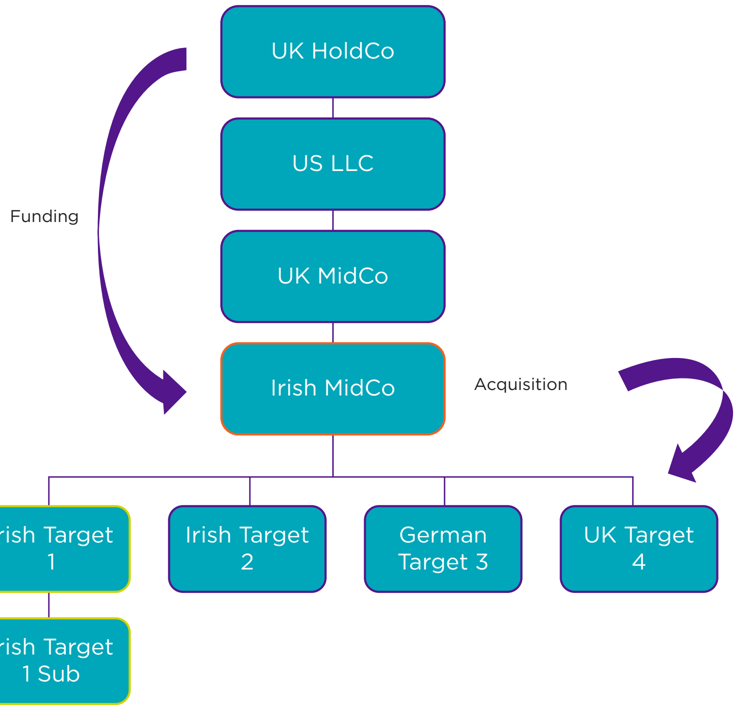
> "He stated that as a result of the Appellant's Board's decisions [to place

the business up for sale and subsequently, when no suitable purchaser emerged, to spin off the business into a company of its own], significant work was undertaken in order to get the business ready for sale and/or spin-off. He stated that the Group's tax function worked with the finance, HR and legal functions to develop a plan which would allow either a sale or spin-off to occur at very short notice. He stated that an enormous amount of work was undertaken to restructure the Appellant Group because all of the business was intertwined in terms of sales entities and manufacturing entities, whereby some of the manufacturing entities were manufacturing both [redacted] and other core products. This meant that an extremely complicated process of separating out the business from the Appellant Group core business needed to take place, irrespective of whether the ultimate decision was to sell the business or to spin it off. This, he stated, needed to be done in as cost effective manner as possible, and one of the relevant considerations was tax, which was a large part of the cost of the exercise."

This extract from the determination reflects a common position of businesses post-acquisition, which often requires that some additional steps be taken to realign the business interests to ensure that the group continues to operate in an efficient manner or to fit in with the group's governance policies, including its ESG (environmental, social and governance) agenda. Depending on the situation, the post-acquisition "tidy-up" may have broader tax and legal implications than originally intended.

As set out below, in certain circumstances (where time permits) it would be preferable to agree the ultimate chosen structure for the purchaser group before any new acquisition. It is acknowledged, however, that it is not always possible to achieve this commercially.

Case Study: Group Rationalisation



In this scenario, the purchaser is a large US entity that has been on an acquisition drive to expand its operations into the Irish and European market for the last few years. It now wishes to get rid of some of the entities by moving trades/companies to certain areas of the group so as to align interests within the group.

There are a number of key issues to consider when completing a group rationalisation:

- Does it change the treatment of interest where the holding companies may have borrowed to fund the acquisitions?
- How will the acquiring group entity pay for the trade/shares if being moved intra-group?
- What taxes may arise and reliefs may be available, particularly where moving between Irish and European entities?
- Are there employee concerns?
- VAT concerns and whether there may be a VAT clawback particularly where assets are being transferred intra-group
- Transfer pricing issues?
- Are all entities required, or can some be removed by completing an intra-group transfer first followed by a liquidation/merger?
- Post group rationalisation – can losses/excess charges/excess capital allowances be utilised?

Post-acquisition, it is the purchaser group's preference to consolidate the Irish businesses in order to have just one Irish company, one German company and one UK company as subsidiaries of Irish MidCo. The client has suggested the following steps to achieve this structure:

- Irish Target 1 acquires the business of its subsidiary, Irish Target 1 Sub, by way of a merger by absorption. This would leave two Irish companies at that level of the group: Irish Target 1 and Irish Target 2.
- The trade assets and liabilities of Irish Target 2 may be transferred to German Target 3 by way of an intra-group transfer. Post-transfer, Irish Target 2 may be liquidated.

The tax implications of each of the steps set out above are considered below. If implemented correctly, group reliefs may be available, that would result in the reorganisation of the group being implemented in a tax-neutral manner. However, certain steps set out above may have additional implications, depending on the form of funding used for the original acquisition of each entity or the final destination of the transferring assets.

Funding Considerations

On acquisition

The form of funding used to finance the acquisition of the target entity/entities should be reviewed before any post-acquisition rationalisation to maintain interest relief.

Interest as a charge

Section 247 of the Taxes Consolidation Act 1997 (TCA 1997) provides that a tax deduction is available for interest costs incurred in respect of certain loans, the monies of which are used for a "qualifying purpose" such as acquiring trading or rental companies (or holding companies of trading/rental companies) or, alternatively, lending to the aforementioned companies for the purposes of their trade/rental activity. This is an important consideration in any group rationalisation policy due to the conditions of the relief and what will happen where certain movements in a group occur.

To qualify for this tax relief and claim the interest as a non-trade charge, the following conditions must be satisfied:

- the investing company holds more than 5% of the ordinary share capital in the target companies when the interest is paid;
- during the period taken as a whole from when the loan is drawn down until it is repaid, there is a common director between the investing company and the target company; and
- there is no recovery of capital (actual or deemed).

It is important to note that the relief is deductible only on a paid basis.

If relief in accordance with s247 TCA 1997 is claimed in the target company in respect of a previous transaction, a merger would automatically result in the loss of the interest relief as the condition to have two common directors is no longer satisfied. Accordingly, should a merger be implemented without regard to the source of funding and relief position, it could have a very costly impact in the form of a loss of s247 relief.

In relation to the case study above, a merger of, say, Irish Target 1 with Irish MidCo would therefore result in a loss of s247 relief, if it had been claimed. A merger of Irish Target 1 Sub with Irish Target 1 should not, however, impact the claim for s247 relief if it was claimed, as there should continue to be a common director between the investing company (Irish MidCo) and the target (Irish Target 1).

Post-acquisition

As set out below, the post-acquisition "streamline" may involve intra-group transfers of assets and/or of shares. In such cases, the consideration payable by the transferee should be considered. The requirement for funds in one group entity may require the group to consider the flow of funds from a particular group entity to the transferee in order to satisfy any inter-company debt. Some of the options available to the group are outlined below.

Funding method	Description/requirements	Tax impact
Capital contribution	Equity injection into company by way of a non-refundable gift. Designated as "surplus" or as "capital" on the balance sheet. Needs to be an actual cash or an asset movement with the terms that it is not repayable/no loss available.	There should be no tax impact for Irish entity receiving the capital contribution. Will need to check whether the company making the capital contribution is authorised/permitted to do so. In Ireland, the company constitution may be amended to enable a capital contribution to be made.
Loans	Loan agreements. Transfer pricing considerations.	There should be no tax impact on company receiving the loan or making the loan. Potentially a tax impact when writing off the loan, depending on the purposes of the loan and whether any tax deductions have been claimed. Interest may need to be charged on the intra-group loan – need to check transfer pricing agreement. Different tax implications if cross-border interest
Management charges	Agreement put in place between the group entities to provide a service – what is the commercial rationale for the charge?	Any income received under the management charge will be taxed at 12.5% where received in a trading company. A trading deduction can be taken for any expenses/costs paid under the management agreement where being paid as part of a trading company.

Funding method	Description/requirements	Tax impact
	Cannot be a once-off management charge to cover the specific debt arising unless part of the normal inter-company management charges.	VAT will need to be considered – consider VAT group. Transfer pricing considerations again will need to be considered.
Dividends	Can only be paid upstream in a group.	Require sufficient distributable reserves to pay dividend at time of making dividend if coming from an Irish company. Consider withholding tax obligations Different implications if cross-border dividends. There should be no tax implications if Irish companies receive dividends as tax-exempt income.

Distributions to Irish or other companies

Distributions between two Irish companies are regarded as franked investment income and therefore are exempt from corporation tax. These distributions should be exempt from Dividend Withholding Tax (DWT); however, the requirement to file a DWT return remains, despite it being a nil return.

In relation to groups comprising non-Irish companies, the position differs. If the borrowings of the acquiring company are to be repaid out of distributions received from a non-resident subsidiary, such distributions would be chargeable to tax under Case III of Schedule D.

Section 21B TCA 1997 provides for certain dividends received by an Irish-resident company out of the trading profits of a non-resident company that is resident in an EU Member State or in a country with which Ireland has a double taxation treaty in force[1] to be charged to tax at the 12.5% rate of corporation instead of the 25% rate.

Trading profits of non-resident companies may pass up through tiers of companies by way of dividend payments so that, when they are ultimately paid to a company within the charge to corporation tax in the State, that company will be taxed on the dividends received by it at 12.5%. Where dividends do not qualify to be charged at the 12.5% rate, they will continue to be charged at the 25% rate.

Means of Achieving the Preferred Group Structure Post-Acquisition

Depending on the purchaser's group structure, the following may be options to achieve the desired structure as part of an overall plan for group rationalisation.

Intra-group transfer

Assets (including shares) may be transferred between group companies without incurring tax liabilities, subject to the following reliefs being available.

1 It also applies to companies in a country with which Ireland has signed a double taxation treaty that has yet to come into force, a country that has ratified the Joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters or a non-treaty country where the company is owned directly or indirectly by a quoted company.

Capital gains tax – s617 TCA 1997

Section 617 TCA 1997 provides that the disposal of a chargeable asset (other than trading stock) within a group of companies is to be treated for the purpose of corporation tax on chargeable gains as having been for a consideration of such amount that neither a gain nor a loss accrues to the company making the disposal. A number of conditions must be satisfied for the relief to apply:

- Both companies are members of a CGT group (as defined in s616 TCA 1997 – a company is an effective 75% subsidiary of another company if the latter is beneficially entitled to not less than 75% of any profits available for distribution to equity holders of the company and beneficially entitled to not less than 75% of the assets of the company available for distribution to its equity holders on a winding-up).
- The company making the disposal is resident in Ireland at the time of the disposal or the asset is a chargeable asset in relation to the company immediately before that time.
- The other company is resident in Ireland at the time of the disposal or the asset is a chargeable asset in relation to that company immediately after that time, and the company is not:
  - an authorised investment company,
  - a real estate investment trust (REIT) or a member of a group REIT or
  - an authorised ICAV (within the meaning of s2 of the Irish Collective Asset-management Vehicles Act 2015).

Section 617 was amended by s31 of Finance Act 2017 to provide that a “group of companies” includes companies that are resident for tax purposes in an EU Member State or another territory with which Ireland has a double taxation treaty.

The relief may be clawed back under s623 TCA 1997 where:

- a company that is a member of a group acquired an asset from another member of the group;
- the company ceases to be a member of the group within 10 years after the acquisition;
- the company was resident in Ireland at the time of the acquisition or (in the case of a company not so resident) the asset was a chargeable asset in relation to the company immediately after that time; and
- the group company from which the asset was acquired was resident in Ireland at the time of the acquisition or (in the case of a company not so resident) the asset was a chargeable asset in relation to that company immediately before that time.

A charge to tax is imposed where a chargeable company ceases to be a member of a group and the chargeable company, or an associated company of the chargeable company (which is also leaving the group), at that time owns an asset to which s623 applies. The charge to tax is imposed by deeming the chargeable company effectively to have disposed of and immediately reacquired the asset at market value at the date when the asset was acquired from the other group company.

Despite the fact that no chargeable gain or loss occurs on an intra-group transfer of a trade, Revenue has stated, in Part 42-03-01 of its Tax and Duty Manual, that for transfers of assets to which s617 applies, the consideration is deemed to be the original cost incurred by the vendor company in acquiring the asset. Revenue has specifically clarified that this is also to be regarded as the consideration for such transfers for the purposes of s980, and where this does not exceed €500,000 (or €1m for residential property), the requirement under that section to deduct 15% from the purchase price in respect of CGT or to obtain a tax clearance certificate does not apply.

An intra-group transfer of assets may not always be the ideal option, especially where there are large groups with a number of European/international entities, due to the fact that s617 will not apply where the asset does not remain a chargeable asset after the intra-group transfer. In the example above, the transfer of the assets and liabilities of Irish Target 2 to German Target 3 may not therefore satisfy the conditions of s617 TCA 1997. In that instance, subject to commercial considerations, it may be better from a tax perspective to transfer the assets and liabilities of Irish Target 2 to Irish Target 1 in order to qualify for group relief from CGT.

Stamp duty – s79 SDCA 1999

Section 79 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) provides for relief from stamp duty on the intra-group transfer of assets, which includes the transfer of a trade within a corporate group. To benefit from the relief, both the transferor and the transferee must be a 90% group, whereby:

- one party to the transaction is at least 90% owned by the other party or
- both parties are owned by a common body corporate parent either directly or indirectly.

There are certain additional technical conditions to be satisfied, including:

- consideration for the transfer must not be received from or provided by a third party that is not associated with the transferor or the transferee;
- the beneficial interest being conveyed must not have been previously conveyed or transferred by any such third party; and
- the transfer must not be part of an arrangement under which the transferor and transferee were to cease to be associated with each other.

As this is a relief and not an exemption, a stamp duty return must be filed to claim it. The return must be submitted to Revenue via ROS within 30 days (extended to 44 days by Revenue concession) of the execution of the instrument of transfer.

Certain practical difficulties can arise where not all parties have an Irish tax number. Where a non-Irish-incorporated company is involved in the transaction and it is not resident in Ireland for tax purposes, it will need to apply for a temporary stamp duty number. Revenue has a process in place to issue temporary stamp duty numbers to such entities. The application can be sent to stampduty@revenue.ie. The application for a tax reference number should be made before the execution of the instrument.[2] The position is similar for companies that are incorporated in Ireland but are not resident in the State.

Both companies may remain members of the group if only some of the assets of the first are transferred to the second. Alternatively, the first could be liquidated post-acquisition if no longer required.

The relief may be clawed back where the association between the transferor and the transferee is broken within two years of the transaction. In many cases, an intra-group transfer of assets takes place as part of an overall group restructuring or rationalisation. In such instances, the company making the transfer may be liquidated after the transfer has taken place. Revenue has confirmed in its Stamp Duty Manual “Section 79: Associated Companies Relief” that “a clawback of relief does not arise where the required association ceases because a transferor is liquidated or is automatically dissolved without going into liquidation resulting from a merger by absorption” (see comments below in relation to mergers). Section 79(7A) SDCA 1999 imposes the following conditions that must both apply for the two-year period following the transfer:

- the beneficial interest in the transferred property continues to be held by the transferee and
- the holding of the ordinary share capital of the transferee that satisfied the qualifying condition for the relief remains unchanged.

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2 Revenue Tax and Duty Manual, “Filing and Paying Stamp Duty on Instruments”.

Merger

It is often the case that post-acquisition the purchaser wishes to consolidate some of the recently acquired companies within the existing group. The Companies Act 2014 (CA 2014) provides the legal framework under which company mergers may be carried out. The three forms of merger provided for are outlined below.

Merger by absorption

This occurs where an existing company acquires all of the assets and liabilities of its wholly owned subsidiary (s463(2) CA 2014) and the subsidiary (being the transferor company) dissolves without going into liquidation. The tax implications of a merger by absorption are as follows.

Capital gains tax

- The transfer of assets by a subsidiary to its parents would constitute a disposal for CGT purposes.
- On the basis that the parent holds at least 75% of the issued share capital of the subsidiary, s617 TCA 1997 group relief should apply. The relief conditions are set out above in the context of intra-group transfers and, if satisfied, should result in a no gain/no loss situation for the transferor.
- It is important to remember that the s623 TCA 1997 clawback does not apply where the group relationship is broken owing to one of the companies being "dissolved".

Corporation tax

- A cessation of trade arises as a result of the merger as all assets and liabilities are transferred from the subsidiary to its member. Accordingly, balancing charges may arise and trading losses may be restricted.
- Section 400 TCA 1997 provides that the right to capital allowances, liability to balancing charges and relief for losses are to be carried over from one company to another following a transfer of trade where there is at least 75% common identity in the ownership of the trade both before and after the change.

Stamp duty

- The acquisition by the parent entity of assets of its subsidiary would be within the charge to stamp duty at the current rate of 7.5%.
- As set out above in more detail, s79 SDCA 1999 applies where both companies are "associated". Sub-section 7A specifically extends the application of s79 SDCA 1999 to mergers by absorption.
- Section 87B SDCA 1999 provides for cross-border mergers involving companies governed by the law of different Member States, irrespective of whether an Irish company is involved.

Merger by acquisition

This occurs where one company ("the transferor") is dissolved without going into liquidation and its assets and liabilities transfer to a successor company in exchange for the issue of shares to the members of the transferor company (with or without a cash payment) (s463(1) CA 2014).

Capital gains tax

- As a merger by acquisition also involves the transfer of assets of one company to another, the CGT consequences are as set out in respect of a merger by absorption, i.e. s617 TCA 1997 may also apply.

Corporation tax

- As the transferor will be dissolved post-transfer, this should result in a cessation of trade with s400 relief available, similar to a merger by absorption.

Stamp duty

- The acquiring entity should be entitled to relief in accordance with s79/80 SDCA 1999 on acquisition of the assets and liabilities from the transferor. The applicable relief will be determined by the relationship between the companies pre-transfer.
- Although s79(7A) SDCA 1999 applies specifically to a merger by absorption,

Revenue also accepts its application in the context of a merger by acquisition.[3]

Merger by formation of a new company

This occurs where two or more companies (the target companies) transfer all of their assets and liabilities to a third company formed for that purpose in exchange for the issue to the shareholders of the target companies of shares in the acquiring company (s463(3) CA 2014).

Capital gains tax

- As a merger by formation of a new company also involves the transfer of assets of two or more companies to the newly formed entity, the CGT consequences are as set out in respect of a merger by absorption and merger by acquisition, i.e. s617 TCA 1997 may also apply.

Corporation tax

- The position is as set out in respect of mergers by absorption and mergers by acquisition.

Stamp duty

- Relief under s79 or s80 SDCA 1999 may apply, subject to conditions.

Finance Act 2017 clarifications

Finance Act 2017 (FA 2017) clarified the position in respect of the following in the context of mergers:

(a) Debts – A successor company will be deemed to be the original creditor in respect of a debt where that debt is transferred as a result of a merger under CA 2014 and the transferor company was the original creditor in respect of that debt.

(b) Company reconstructions and amalgamations to which s587 TCA 1997 applies – In this instance, a company issues shares to the shareholders of another company in respect of and in proportion to their existing holdings in shares, those shares being retained by them or cancelled, and the transaction is treated as an exchange of shares. FA 2017 clarified that reference to shares being cancelled in s587 TCA 1997 includes shares that are extinguished as a result of a merger or division under CA 2014.[4]

(c) Company reconstructions and amalgamations to which s615 TCA 1997 applies – The transferor company is treated as if it transferred the whole of its business and as if all of its liabilities were the liabilities of the business where, immediately before the merger or division, it carried on a business.

(d) Shares in subsidiary member of a group to which s625 TCA 1997 applies – There are specific anti-avoidance provisions to target the misuse of s586 and s587 TCA 1997 to transfer a company out of a group without the increase in its value being caught for capital gains. Section 625 TCA 1997 re-imposes the charge to CGT deferred by s586 and s587. The change made to s587 TCA 1997 in respect of mergers (set out at (b) above) was also carried through in respect of s625 TCA 1997.

Liquidations

Section 79(7A) SDCA 1999 provides that where a transferor is liquidated/dissolved as a result of a merger by absorption (or, by concession, a merger by acquisition), the transferor and the transferee shall not be regarded as ceasing to be associated where for a period of two years from the date of the conveyance or transfer:

- the beneficial interest transferred continues to be held by the transferee and
- the beneficial ownership of the ordinary share capital of the transferee remains unchanged.

3 Revenue Stamp Duty Manual, "Section 79: Associated Companies Relief".

4 Revenue Tax and Duty Manual, Part 19-04-11.

However, there may be a situation as part of a group realignment where the transferee rather than the transferor is to be liquidated. In this instance, Revenue provides that an alternative condition to the above may apply, i.e. the property is retained within the corporate group for the two-year period following the transfer but not necessarily held by the transferee. This applies irrespective of how many group companies the property is transferred through in the series of transfers.[5] This alternative condition does not apply to property that, by its nature, ceases to exist over time, such as book debts and loans. This Revenue practice also applies to liquidations and mergers governed by foreign law where their effect is that the liquidated or dissolved company ceases to have a legal existence, thereby breaking the association between the two companies.

Other Considerations

To give effect to a domestic merger, the process must be validated by the summary approval procedure or a court. There are commercial elements to be considered in this respect, given the level of detail to be made publicly available as part of a summary approval procedure.

Obligations under the Transfer of Undertakings Directive and Regulations (TUPE) should also be considered before implementing a merger.

Distribution in specie

Section 130 TCA 1997 imposes a charge to tax on distributions received by members of a company. This treatment also applies where assets/liabilities are transferred for consideration less than their market value (s130(3) TCA 1997).

Although distributions received from a subsidiary are usually exempt from corporation tax as franked investment income, s130(3) TCA 1997 specifies that where the company and the member receiving the assets/liabilities are both Irish-resident companies and either the former is a subsidiary of the latter or both are subsidiaries of a third company, the benefit is not treated as a distribution under s130 TCA 1997.

The transfer of such assets/liabilities between group companies would therefore be taxed as an intra-group transfer of assets for which the companies involved would need to satisfy the conditions of CGT relief (s617 TCA 1997) and stamp duty relief (s79 SDCA 1999).

Conclusion

As is evident from the above, it is important to plan carefully from a commercial, legal and tax perspective when considering a tidy-up of a group or a group rationalisation policy. This is particularly important where there are a number of cross-border entities, as reliefs that one considers to be applicable in cases involving all Irish-resident companies may not be available. In addition, interest deductions and surrender of losses, may be lost due to the movement of shares/assets in the group. Careful management is required, consideration of all of the key issues within the group, including the myriad of anti-avoidance provisions, which may apply to the reliefs discussed above. Part two will consider these provisions in more detail in a later issue.

5 Revenue Stamp Duty Manual, "Section 79: Associated Companies Relief".


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Institute Responds to Consultation on Implementing Pillar Two Minimum Tax Rate

Introduction

In October 2021 the Government took the momentous decision, with more than 130 other countries, to join the international tax reform agreement on a Two-Pillar Solution to address the tax challenges arising from digitalisation and globalisation. Since the landmark October Statement, member countries of the OECD Inclusive Framework on BEPS have continued to advance the technical details of the two pillars.

On 20 December 2021 the OECD published the Pillar Two Global Anti-Base Erosion (GloBE) Model Rules, defining the scope and key mechanics of the global minimum tax rate, which has been set at 15%. The European Commission quickly followed suit and published a proposed EU Pillar Two Minimum Tax Directive before Christmas to enable the coordinated implementation of the GloBE Model Rules across all EU Member States. The OECD provided further clarity on the operation of the Model Rules with the publication of its Commentary in March of this year, and in April it held a public consultation on the development of the Implementation Framework for the Pillar Two GloBE Rules. The GloBE Implementation Framework will address administration, coordination and compliance-related matters and is expected to be presented by the end of this year.

At the same time, throughout 2022, the OECD has been undertaking a rolling consultative process to advance the technical work on Pillar One.

In July the OECD published a Progress Report on Amount A of Pillar One, summarising the different building blocks of the new taxing right in the form of domestic model rules. It plans to hold a public consultation meeting on the report in September. The Progress Report does not include the rules on the administration of the new taxing right, including the tax-certainty-related provisions. These will be released before the OECD/G20 Inclusive Framework on BEPS meeting in October 2022.

After this, the Inclusive Framework aims to finalise a new Multilateral Convention (MLC) by mid-2023, for entry into force in 2024. The new MLC will establish the legal obligations to implement Amount A in a coordinated and consistent manner by members of the Inclusive Framework. Work on the overall design and the framing of individual provisions of the MLC is under way at the OECD, pending finalisation of the substantive rules. It is intended that the MLC will include provisions requiring the withdrawal of all existing digital services taxes, as well as a commitment not to enter into such measures in the future.

Implementation of Pillar Two Minimum Tax Rate in Ireland

Like in other EU Member States, the implementation of the 15% global minimum tax rate in Ireland will be based on the proposed EU Directive. The Directive put forward by the Commission closely follows the OECD GloBE Model Rules but extends their scope to include large-scale purely domestic groups to ensure compliance with the EU fundamental freedoms.

Unanimous agreement on the Pillar Two Minimum Tax Directive has yet to be reached at EU level. Hungary, having previously supported the proposed Directive, stated that it could no longer support its adoption at a meeting of the Economic and Financial Affairs Council (ECOFIN) in June, referencing the unfavourable geopolitical situation arising from the war in Ukraine and the impact of increasing energy prices and inflation on economic growth.

The Czech Republic, which took over the Presidency of the European Council at the beginning of July, has identified the implementation of the Two-Pillar Solution as one of the priorities for its Presidency. It is working to have final agreement reached on the implementation of the Pillar Two Minimum Tax Directive by October 2022. The current compromise text of the Directive proposes a deadline of 31 December 2023 for transposing the Pillar Two Minimum Tax Directive into the national laws of Member States.

Even though the final text of the Pillar Two Minimum Tax Directive has not yet been agreed by all Member States, Ireland is supportive of the proposal, and the Department of Finance decided in May to consult stakeholders on its implementation into Irish law. While work continues to reach a political consensus at EU level, the current expectation is that Ireland will introduce legislation in Finance Bill 2023, to apply from 2024.

Institute Submission to Department of Finance on Pillar Two Implementation

The Department of Finance sought views on a number of technical aspects of the Pillar Two Minimum Tax Directive, including the four key elements to transposition: the Income Inclusion Rule (IIR), the Undertaxed Profits Rule (UTPR), a Qualified Domestic Top-up Tax (QDTUT) and the Subject to Tax Rule (STTR).

The implementation of Pillar Two in Ireland may have implications for existing Controlled Foreign Company (CFC) provisions, which could interact with the IIR under GloBE. However, the proposed EU Directive confirms that, in practice, CFC provisions will apply first and any additional taxes paid by a parent company under a CFC regime in a given tax year will be considered when computing the jurisdictional effective tax rate (ETR) of a low-taxed entity for GloBE purposes.

In our response to the consultation in July, we emphasised the need to have an iterative process of consulting with stakeholders as the Irish legislation transposing the Directive is drafted and the administrative guidance developed, to help minimise the complexity involved and ensure the successful practical implementation of the Directive into the Irish corporation tax code.

We urged policy-makers to align the Irish legislation with the minimum standard required in the Pillar Two Minimum Tax Directive, noting that if the application of a provision or definition in the Directive is unclear in practice, an Irish taxpayer should be able to rely on the OECD GloBE Model Rules and related Commentary to obtain further clarity, where possible.

We also set out detailed recommendations in response to the questions raised in the consultation paper and identified the following key matters that Irish policy-makers should consider when transposing the Directive into Irish law.

Key considerations

- The Directive permits Member States to elect to apply a QDTUT to meet the required 15% minimum effective tax rate, which can be recognised as a safe harbour. If Ireland wishes to collect a top-up tax arising in respect of businesses operating in Ireland, it should elect to introduce a QDTUT that is fully aligned with the OECD Model Rules. This would likely have a positive impact on the Exchequer as any top-up tax payable would be payable in Ireland rather than being collected elsewhere.
- As the QDTUT safe harbour currently applies only in EU Member States and does not form part of the Model Rules, we urged Irish policy-makers to make representations at OECD level for it to be recognised as a safe harbour in the development of the GloBE Implementation Framework. This would ensure a consistent application of Pillar Two across all jurisdictions adopting the global minimum tax rate.
- The filing of the QDTUT should form part of the top-up tax information return, and the maximum 15-month period in which to file it that is provided by Directive should be incorporated into Irish legislation. For in-scope companies, a single return should be required, which would be in addition to their corporation tax return. It is essential that any top-up tax payable under the Model Rules would not impact the preliminary corporation tax obligations of a company.
- Ireland should also advocate for the introduction of broad safe harbours that would remove the need to calculate a jurisdiction's ETR and top-up tax where it is likely that an effective tax rate of greater than 15% already applies under domestic provisions. Such safe harbours will play a crucial role in reducing both the administrative burden on in-scope groups and the likelihood of disputes arising between taxing authorities.
- Under the Model Rules, the accounting standard used in preparing the consolidated financial statements must be used to determine the GloBE income or loss. For US-headquartered groups, this means that the computation of the Irish jurisdictional top-up tax liability will be computed based on the GloBE income or loss as determined under US GAAP, notwithstanding that the Irish subsidiaries may prepare their statutory accounts under FRS 101 or FRS 102 and pay their Irish corporation tax based on those accounts.
- Unintended consequences may arise where US GAAP applies different treatment to arrangements and transactions between group members compared with what would

apply under IFRS/FRS 101/FRS 102. In such circumstances the tax base on which the Irish jurisdictional top-up tax would be computed may differ from the tax base on which the same Irish subsidiaries would be subject to Irish corporation tax. This could potentially result in double taxation applying, under GloBE at 15% and Irish domestic law at 12.5%, on the same income in the same period.

- Currently, the US Global Intangible Low Tax Income (GILTI) rules will not be considered a qualified IIR for the purpose of the Directive. If GILTI is not amended in the US to align with Pillar Two, clarification will be needed to confirm that GILTI may be considered a CFC tax regime for the purpose of the Directive. Otherwise, failure to recognise GILTI as a CFC tax charge for the purpose of Pillar Two could result in double taxation. If GILTI is not considered a qualified IIR, because it continues to apply on a global rather than a jurisdictional basis, taxpayers will need clarity on the methodology to use to determine how GILTI should be allocated between various jurisdictions.
- Ensuring that the R&D tax credit is considered a "Qualified Refundable Tax Credit" under the Pillar Two Minimum Tax Directive is of the utmost importance. Condensing the current three-year R&D tax credit refund to one year for all businesses would not only provide valuable assistance to smaller companies, which tend to be cash constrained, but also clearly demonstrate that the R&D tax credit is a "qualified refundable tax credit" under the Model Rules. Accelerating the refund of the R&D tax credit in this way would also help to address concerns arising from recent changes to the US Foreign Tax Credit Regulations.
- When transposing the Directive into Irish law, care must be taken to ensure that any tax payable under the IIR, the UTPR or a QDTUT would be considered foreign tax paid or accrued for foreign tax relief purposes under the US Foreign Tax Credit Regulations.
- The tax treatment of foreign branches and dividends in the Model Rules is more aligned with a territorial system of taxation. Moving from a worldwide system of taxation in Ireland by adopting a participation exemption for dividends and a foreign branch exemption in tandem with the implementation of Pillar Two would help to reduce the administrative burden for Irish companies with international operations and simplify how double taxation relief is available in Ireland on such foreign earnings.
- When introducing a participation exemption for dividends, Irish policy-makers should consider aligning the capital gains tax exemption in s626B TCA 1997 with the Pillar Two Minimum Tax Directive, which does not require a minimum holding period or a trading requirement and provides that the exemption applies to all jurisdictions. However, Ireland should retain the 5% shareholding test for businesses outside the scope of the Pillar Two Rules.
- It will be critical for a pragmatic approach to be taken by Revenue to interest and penalties in the initial period after the implementation of the Pillar Two Minimum Tax Directive into Irish law. An appropriate lead-in time and grace period will be necessary to allow businesses to become familiar with the practical application of these very complex new rules.

Conclusion

While efforts continue at OECD and EU level to finalise certain aspects of the Pillar Two GloBE Rules and to reach political consensus, the current expectation is that Ireland, along with other EU countries, will introduce legislation in 2023 to apply the agreed 15% minimum effective tax rate from 2024. No doubt, there will be further opportunities to provide feedback to the Department of Finance in the coming months before the Irish legislation is finalised.

The UK has also signalled that it will implement Pillar Two from 2024, publishing draft legislation in July for consultation with stakeholders. Other large OECD countries, such as Australia, Canada and Japan, have been strong advocates for the global minimum rate and are considering implementation issues at present.

Uncertainty continues to surround the pathway for implementation of the Two-Pillar Solution in the United States. Although attempts in the Build Back Better Plan to reform GILTI and align it with the Pillar Two Model Rules were defeated by the US Senate earlier this year, the recent passing of the Inflation Reduction Act by both Houses of the US Congress can perhaps be considered a positive development. The Inflation Reduction Act imposes a 15% Corporate Alternative Minimum Tax (AMT) on certain large US corporations and is expected to be signed into law by President Biden in August.

The final interaction of the new Corporate AMT and GILTI, which both purport to impose a minimum level of corporate taxation in US domestic legislation, with the GloBE Rules remains unknown at present. Therefore, the corresponding impact of Pillar Two for US MNEs operating in Ireland must continue to be closely monitored in the months ahead.

However, overcoming Congressional opposition to Pillar One in the United States remains an extremely challenging prospect. Pillar One would involve the US ceding some of its tax base to other market jurisdictions, and it would require a super-majority of 67 Senate votes for treaty ratification to be implemented. Only time will tell what the outcome may be for Pillar One adoption in the US after the mid-term elections in November. In the meantime, the EU has indicated that it will move to introduce its own legislative proposal if the Pillar One initiative does not come to fruition.

The Two-Pillar Solution – in a nutshell

The *Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,* which Ireland joined in October 2021, is a historic agreement to reform the international tax framework as it applies to large corporate groups. As the name suggests, the Two-Pillar Solution consists of two parts, with Pillar One dealing with the reallocation of profits and Pillar Two seeking to ensure that large corporate groups pay a minimum effective tax rate on the income arising in each jurisdiction in which they operate.

Pillar One envisages a reallocation of a proportion of profits to market jurisdictions, and involves the calculation of two new Amounts:

- ‘Amount A’ seeks to determine a value for ‘excess profits’ to allow for the reallocation of a proportion of the worldwide profits of an MNE to market jurisdictions, i.e., countries where the end-consumers and users of products and services are based, irrespective of whether an MNE has a physical presence in those jurisdictions.
- ‘Amount B’ is intended to standardise payments to related party distributors that perform “*baseline marketing and distribution activities”* in a market jurisdiction.

Pillar Two primarily consists of two interlocking domestic rules, together known as the Global Anti-Base Erosion (GloBE) rules. The GloBE rules, which seek to apply a minimum effective tax rate of 15% for in-scope businesses, include:

- A primary Income Inclusion Rule (IIR), which imposes top-up tax on a parent company in respect of the low taxed income of a constituent entity; and
- A backstop provision, the Undertaxed Payments Rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR. The UTPR is referred to as the Undertaxed Profits Rule in the proposed EU Pillar Two Minimum Tax Directive.

Pillar Two also contains a treaty-based rule, referred to as the Subject to Tax Rule (STTR). The STTR is intended to apply to certain intra-group cross-border payments, such as interest and royalties, where the payment is subject to a nominal corporate income tax rate on receipt below the 9% STTR minimum rate. The STTR will be incorporated into bilateral treaties between countries at the request of the developing country member of the Inclusive Framework.

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DEBRA: The Proposed Debt-Equity Bias Reduction Allowance

DEBRA's Part in a Wider Plan for the Future Taxation of Business

In 2021 the European Commission released its "Communication on Business Taxation for the 21st Century".[1] The Communication set out the Commission's long-term vision and short-term legislative agenda and demonstrated the aim of aligning EU Member State tax frameworks in a globalised, digital and post-Covid economy to meet the needs of public financing as well as achieving a green and digital transition.[2] (See also article by Caroline Austin, "Legal Monitor" in this issue).

1 Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century, COM(2021) 251 final, 18 May 2021; available via this link.

2 For further analysis of this package of proposed measures, see the related article "European Union: Update on Tax Reform Landscape", Irish Tax Review, Issue 2 2021, available via this link.

Five key actions were outlined in the Communication:

- Table a legislative proposal for the publication of effective tax rates paid by large companies, based on the methodology under discussion in Pillar Two.
- Table a legislative proposal setting out Union rules to neutralise the misuse of shell entities for tax purposes (Anti-Tax-Avoidance Directive (ATAD) 3).
- Adopt a recommendation on the domestic treatment of losses.
- Make a legislative proposal creating a debt–equity bias reduction allowance (DEBRA).
- Table a proposal for BEFIT (Business in Europe: Framework for Income Taxation), moving towards a common tax rulebook and providing for fairer allocation of taxing rights between Member States.

The DEBRA proposal[3] was released on 11 May 2022 in the form of a Council Directive concerning "laying down rules on a debt–equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes". The purpose of introducing such a rule would be to address the bias in most tax regimes towards using debt as a financing option, i.e. a company is generally entitled to deduct interest costs attached to debt financing in arriving at tax-adjusted profit whereas costs related to equity financing are largely disallowed. This asymmetry is one of the factors that result in companies using debt as a financing option instead of equity.

A request for feedback[4] and an impact assessment report[5] were released alongside the proposal. The impact assessment report notes a number of issues that give further insight into the Commission's concerns and the objectives it is trying to achieve. One such issue is the overall debt levels in the EU. The total indebtedness of non-financial corporations in the EU was 111% of GDP.[6] It is clear that the Commission is acutely concerned about companies' abilities to manage such debt levels in precarious economic circumstances and the negative knock-on effects of insolvency, e.g. social costs in the form of redundancies. For this reason, the Commission would rather see growth and investment in the Single Market that favours higher equity ratios, thereby reducing systemic risks associated with high levels of debt.

Another concern is the availability of debt financing to new and younger companies, particularly those that are active in the green and digital space and could help the EU to move towards a climate-neutral and digital economy. The impact assessment report notes that young and innovative businesses are often "deemed risky as investments by commercial banks and other traditional credit providers"[7] and therefore require scarcer equity financing.

DEBRA would also play a role in achieving a related aim of the Commission, under the remit of the European Commissioner for Financial Stability, Financial Services and the Capital Markets Union, Mairéad McGuinness, namely, establishing a Capital Markets Union (CMU). The EU's ambitions for a CMU would see the CMU offering a fully integrated market for capital that would allow for the free flow of capital across the EU, benefitting investors, companies and ultimately EU consumers. The

3 Proposal for a Council Directive on Laying Down Rules on a Debt–Equity Bias Reduction Allowance and on Limiting the Deductibility of Interest for Corporate Income Tax Purposes, COM(2022) 216 final, 11 May 2022; available via this link.

4 Debt–Equity Bias Reduction Allowance (DEBRA) Request for Feedback; available via this link.

5 Commission Staff Working Document Impact Assessment Report, Accompanying the Document Proposal for a Council Directive on Laying Down Rules on a Debt–Equity Bias Reduction and on Limiting the Deductibility of Interest for Corporate Income Tax Purposes, 11 May 2022; available via this link.

6 European Commission's own calculations based on Eurostat's financial national accounts (online data code: NASA_10_F_BS). Debt is the sum of debt securities, loans and financial derivatives, and employee stock options. Non-consolidated data. Only non-financial corporations were considered.

7 Commission Staff Working Document Impact Assessment Report, Accompanying the Document Proposal for a Council Directive on Laying Down Rules on a Debt–Equity Bias Reduction and on Limiting the Deductibility of Interest for Corporate Income Tax Purposes, 11 May 2022; available via this link.

establishment of a CMU requires numerous steps to be fully realised. DEBRA can be viewed as complementary to the CMU Action Plan[8] as it encourages equity financing and indirectly nudges companies towards using capital available within the EU. This ties in directly with Action 4 of the CMU plan, which aims to incentivise institutional investors to make more long-term investments and thus support re-equitisation in the corporate sector, with a view to fostering the sustainable transition, and specifically calls for the debt bias in taxation to be addressed to remove undue fiscal incentives for debt financing. It also broadly calls for measures that support more stable and long-term financing for companies and infrastructure projects, in particular those contributing to the objective of smart, sustainable and inclusive growth.

Scope of DEBRA

The DEBRA proposal applies to all taxpayers that are subject to corporate tax in one or more Member States, including a permanent establishment located in one or more EU Member States of an entity that is tax resident in a third country. It does not, however, apply to "financial undertakings" as defined in the proposal. The list of financial undertakings in DEBRA differs from the list of financial undertakings provided for in the ATAD interest limitation rules (ILR). Accordingly, some businesses may find that they are subject to the ILR under ATAD but are unable to claim an equity allowance under this proposal. Examples are payment institutions, electronic money institutions, crypto-asset services providers and crowdfunding service providers.

Proposal Overview

In essence, the DEBRA proposal contains two separate measures that apply independently:

- an allowance on equity and
- a limitation to interest deduction.

An allowance on equity

The first part of the proposal allows a company to deduct an allowance on equity from its taxable base for ten consecutive periods where the company increases its equity from one tax period to the next. It is proposed that the allowance be calculated by multiplying the increase in year-on-year equity with a notional interest rate, which is based on a medium- to long-term risk-free rate. Accordingly, the applicable interest rate is the currency-specific risk-free rate for ten-year debt. This rate is combined with a risk premium rate of 1%, with a higher risk premium rate of 1.5% for SMEs.

The allowance is limited to 30% of EBITDA (earnings before interest, taxes, depreciation and amortisation). If the allowance exceeds the taxpayer's net taxable income, the part of the allowance on equity that would not be deducted in a tax year due to insufficient taxable profit may be carried forward indefinitely to future periods. Any unused allowance capacity (which would arise where the allowance exceeds 30% of EBITDA) may also be carried forward and used for a maximum of five years. The underlying policy reason for this limitation is to reinforce parity with the ILR, which also limits interest deductibility to 30% of EBITDA.

Where equity is reduced after the taxpayer obtains the allowance on equity, this will result in taxation of the negative allowance on equity over ten years, unless the taxpayer can demonstrate that the negative equity is either a consequence of accounting losses incurred in the period or due to a legal obligation to reduce capital.

Limitation to interest deduction

To reinforce further parity between debt and equity, the allowance for notional interest on equity is accompanied by a limitation on the tax-deductibility of debt-related interest payments – a DEBRA ILR. A proportional

8 Capital Markets Union 2020 Action Plan: A Capital Markets Union for People and Businesses; available via this link.

restriction will limit the deductibility of interest on debt financing to 85% of exceeding borrowing costs (as defined in ATAD Article 1(2) but broadly meaning interest expense less interest received). This restriction applies before applying the ATAD ILR to impose a permanent restriction on the amount of interest eligible for relief in the EU.

If the result of applying the ATAD ILR is an amount lower than 85% of exceeding borrowing costs, the taxpayer will be entitled to carry forward (or back) the difference between 85% of exceeding borrowing costs and the amount of deductible interest under the ILR, in accordance with the ILR. For example, if a company has exceeding borrowing costs of 100, it should:

(1) Under the DEBRA ILR, apply a limitation to deductibility of 85% of the exceeding borrowing costs of 100, giving 85 and a non-deductible amount of 100 – 85 = 15.
(2) Compute the amount that would be deductible under the ILR – e.g. 80, with a non-deductible amount therefore of 100 – 80 = 20.
(3) The difference in the deductibility (i.e. the additional non-deductible amount under the ATAD ILR) is 85 – 80 = 5, which would be carried forward (or back) in accordance with the ATAD ILR.

Although the ATAD ILR allows both carry-back and carry-forward of the non-deductible amount, the Irish transposition of the ATAD ILR allows only carry-forward.[9] Therefore, in an Irish context, the non-deductible amount of 5 could only be carried forward.

The outcome for the company is that 15 (100 – 85) of interest borrowing costs is non-deductible (on a permanent basis) and a further 5 (85 – 80) of interest borrowing costs is carried forward or back (a temporary restriction). In the absence of the DEBRA ILR, the taxpayer would be in a better position as the 20 calculated in step (2) above could be carried forward indefinitely.

Interaction with ILR

For taxpayers that make use of the equity-escape carve-out such that the ATAD ILR does not apply to restrict interest expense deductibility, the DEBRA ILR will result in a restriction of the deductible amount to 85% of the exceeding borrowing cost, whereas previously there was no restriction. Furthermore, in the case of businesses that use the group ratio rule to increase the deductibility of interest beyond 30% of EBITDA, their subsidiaries will face (permanent) non-deductible interest restrictions of 15% of the exceeding borrowing costs. SMEs and other groups who use the other ATAD ILR exclusions or carve-outs will face a new restriction on interest where none previously existed:

- There is no provision in the DEBRA ILR to grandfather existing or legacy debt financing, whereas the ATAD ILR provided that loans concluded before 17 June 2016 that had not been modified since then could be regarded as legacy debt and an exclusion from the ATAD ILR would apply to interest on these loans.
- Under the ATAD ILR, a taxpayer may fully deduct exceeding borrowing costs to the extent that the taxpayer is a standalone entity. No such provision is made with regards to the DEBRA ILR.
- Unlike the ATAD ILR, no *de minimus* threshold applies to interest restricted under the DEBRA ILR. The *de minimus* threshold, which many Member States have allowed in their domestic implementation, usually up to €3m, is an important device for SMEs, start-ups and scale-ups and reduces the compliance burden of applying the ATAD ILR in full.
- The DEBRA ILR does not provide for an exemption for interest related to debt financing of a long-term public infrastructure

9 Section 835AAD Taxes Consolidation Act 1997, “Carry forward of disallowable amount”.

project within the EU. This exemption is available under the ATAD ILR and demonstrates the importance of investing in key infrastructural projects in the EU.

Interaction with ATAD 2

There is no comment or guidance on the interaction between ATAD 2 and DEBRA in the DEBRA proposal. Therefore it is not clear how DEBRA interacts with the ATAD 2 financial instrument rule.[10] ATAD 2 prescribes that the financial instrument rule is applicable to payments under a financial instrument. The allowance under DEBRA does not seem to be connected with any payment, and therefore we would not expect it to remain a hybrid mismatch. This is supported by the OECD BEPS Action 2 report,[11] under which taxpayers are entitled to a unilateral tax deduction for equity invested without being required to make a payment, such that regimes that grant deemed interest deductions for equity capital are economically closer to a tax exemption or similar taxpayer-specific concessions and do not produce a mismatch in tax outcomes in the sense contemplated by Action 2.

Irrespective of the above, it would be contrary to DEBRA's aims if the ATAD 2 rules, which are aimed at anti-abuse, would interact with the rules set out in the Commission proposal. Nonetheless, country-specific implementation of anti-hybrid rules may differ, and therefore explicit clarification that the allowance should not be considered as leading to a "deduction/non-inclusion" scenario under the financial instrument rule would be welcome.

Interaction with Pillar Two GloBE Rules

DEBRA equity allowance

Financial statements will not account for an equity allowance under DEBRA as the allowance is a tax construct that would not be reflected in the accounting profit before tax number.

As financial statements and profit after tax are the starting point for determining GloBE income under the Pillar Two calculations, any equity allowance available under DEBRA for groups within the scope of Pillar Two may not be as valuable or welcome as initially expected.

If a business avails of the DEBRA equity allowance (ignoring the interest limitation), it should have less local tax payable, whereby it will have a lower GloBE effective tax rate as a direct result of the lower amount of covered taxes. The use of the DEBRA equity allowance may therefore ultimately increase any top-up tax payable under the GloBE rules.

DEBRA ILR

A DEBRA ILR restriction to 85% of exceeding borrowing costs may mitigate the knock-on GloBE impact of an equity allowance, but the exact impact will differ from company to company. In many cases the DEBRA denial of interest deduction will increase a company's GloBE effective tax rate.

Anti-abuse provisions

Article 5 of the DEBRA proposal covers anti-abuse and stipulates that the base of the allowance on equity does not include the amount of any increase resulting from:

- granting loans between associated enterprises;
- a transfer between associated enterprises of participations or of a business activity as a going concern;
- a contribution in cash from a person resident for tax purposes in a jurisdiction that does not exchange information with the Member

10 Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries; available via this link.

11 OECD, "Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report", 5 October 2015; available via this link.

State in which the taxpayer seeks to deduct the allowance on equity.

These provisions should not apply if the taxpayer provides sufficient evidence that the relevant transaction has taken place for bona fide commercial reasons and does not lead to a double deduction of the defined allowance on equity.

Furthermore, the proposal states that where an increase in equity is the result of a contribution in kind or investment in an asset, Member States shall take appropriate measures to ensure that the value of the asset is taken into account for the calculation of the base of the allowance only where the asset is necessary for the performance of the taxpayer's income-generating activity.

The Commission notes that this rule aims to prevent the overvaluation of assets or purchase of luxury goods for the purpose of increasing the base of the allowance. In the case where an increase in equity is the result of a reorganisation of a group, the increase in equity shall be taken into account only to the extent that it does not result in converting the equity (or part thereof) that existed in the group before the reorganisation into new equity. The Commission states that this re-categorisation of old capital as new capital could be achieved through a liquidation and the creation of start-ups.

Existing Equity Allowance Regimes

Six Member States currently have equity allowance regimes: Belgium, Cyprus, Italy, Malta, Poland and Portugal. Those Member States may postpone the application of the DEBRA rules for a period of up to ten years for taxpayers already benefiting from the local rules as at 1 January 2024 and in no case for a period longer than the duration of the benefit under national law.

The six aforementioned countries broadly apply a notional interest deduction (NID) regime, which varies in design, optionality, scope, rates and upper limits. For example, the Polish regime caps the amount of tax-deductible costs at PLN250,000 (approx. €52,000) per annum,[12] whereas the Portuguese regime provides for a deduction from the taxable profit of an amount corresponding to 7% of the contributions, up to €2m.[13] None of the regimes has an interest limitation element associated with it.

These Member States will likely review DEBRA in light of their existing regimes to compare the economic costs of both sets of rules (also factoring in the interest limitation element in the DEBRA ILR), the impact on their competitive offering and the overall interaction of DEBRA with their domestic tax code, and on that basis will make a decision on whether to defer implementation of DEBRA.

As Ireland has no existing allowance for an equity-related deduction, such an exemption would not be applicable. Ireland would therefore need to transpose and enact the rules in accordance with the timelines proposed in the draft Directive.

Legislative Path

As with all draft Directives that relate to direct tax, for this proposal to progress, unanimity is required from the 27 EU Member States. If it is adopted, Member States will be required to implement the provisions of the Directive by [31 of December 2023] such that they take effect and apply from [1 January 2024]. The dates are presented in square brackets in the draft Directive, indicating that they may be subject to change. A consultation on BEFIT, which DEBRA would ultimately be a part of, is scheduled for Q3 2022. We should see at the time of the BEFIT consultation launch what direction the DEBRA proposal takes.

12 PwC Worldwide Tax Summaries: Poland; available via this link.

13 PwC Worldwide Tax Summaries: Portugal; available via this link.

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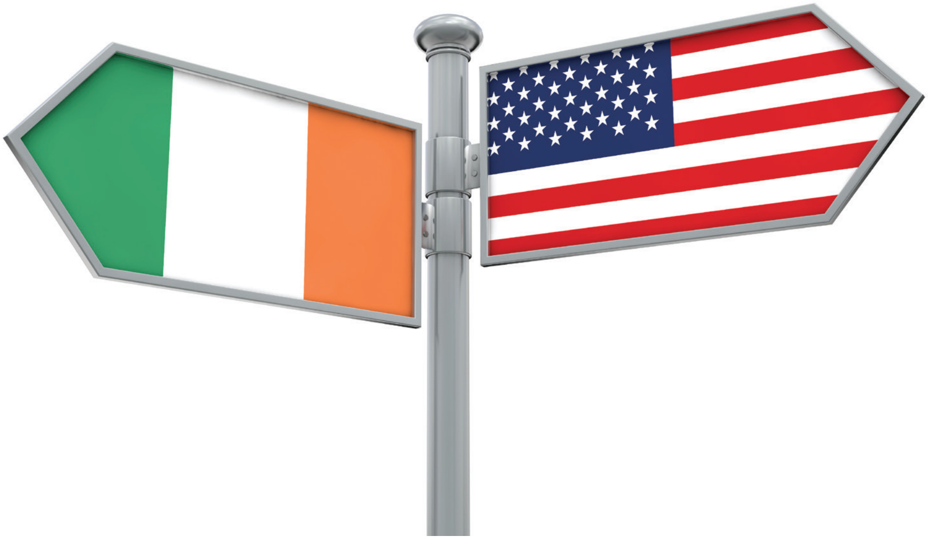
The Mobile US Private Client



Introduction

Although Covid-19 shut down vast swathes of the planet for sustained periods of time over the last few years, intermittent lockdowns do not appear to have slowed down the migration of private clients across international borders. With the surge in remote working having opened up opportunities for relocation, the pandemic restrictions have somewhat paradoxically resulted in increased worker mobility. Although this has the potential for several tax issues, this article focuses on the personal tax aspects associated with migration from the US to Ireland for private clients.

Irish history tells us many tales of the one-way ticket to the US in search of a better life. Modern-day migration between Ireland and the US is a choice for most, and given Ireland's position as a native-English-speaking EU country on the western edge of Europe, much of that migration now is to Ireland from the US.

This article looks at the personal tax issues to be considered by:

- private clients moving to Ireland with no pre-existing Irish links (e.g. US nationals domiciled in the US) and
- Irish nationals returning to Ireland from the US having spent a number of years working there.

Time in the US may have been relatively short (e.g. working on a visa), but it may also have been longer term, and a Green Card or US citizenship may have been acquired. Although the Irish tax issues for an Irish-domiciled individual returning to Ireland will be largely the same regardless of the status in the US, the US tax issues associated with leaving the US can vary significantly depending on that status. US natives moving to Ireland permanently may need to consider similar issues, and any US citizen that acquired citizenship as a result of being born in the US can also be impacted by the US tax rules even if the individual lived there for only a short period of time.

Expatriation

US citizens and long-term residents can run into significant issues from a US tax perspective when moving from the US, and it can be a process that requires very careful advance consideration, and expert advice. Although a detailed overview of US tax implications and US tax law is beyond the scope of this article, the expatriation of certain individuals from the US can give rise to significant tax liabilities if not properly managed, so it is worth noting at a high level some of the potential pitfalls and how these can interact with the tax position in Ireland.

A US tax adviser should always be consulted on the US tax position when an individual leaves the US, as the expatriation rules and concepts such as long-term residence may need to be explored in detail.

Given the reach of the US tax authorities with respect to those that maintain US links and some of the complications that US citizens can run into with investment houses in Europe, an individual moving from the US may have good reason to seek to release their US ties. However, steps such as giving up US citizenship or long-term residence should be carefully considered, as leaving the US tax net can result in exit tax, or expatriation tax, which can be costly. It is also important to note that specialist advice from a US immigration lawyer may be required in relation to retaining a Green Card, if relevant.

Example 1

Mary is an Irish national who has worked and lived in the US for 20 years. She has assets of USD3m, and her US tax adviser has told her that she would be within the scope of exit tax if she expatriates from the US. The US exit tax cost has been estimated at USD500,000, so although Mary will still have US tax compliance obligations if she does not expatriate, she has decided that this exit tax cost would be prohibitive.

An alternative to exit tax can involve opting out of the double taxation treaty between Ireland and the US from a US federal income tax perspective. This can result in US taxes that are not in accordance with the treaty. In such circumstances there may be no entitlement to double taxation relief in Ireland for any US tax in excess of that allowed for under the treaty. Section 826 and Schedule 24 of the Taxes Consolidation Act 1997 (TCA 1997) provide for relief only in respect of tax charged in accordance with a recognised treaty (paragraph 2(3) of Schedule 24 TCA 1997 refers).

However, a deduction should be available under s71(1)(b) TCA 1997, which, while affording some relief for the US tax, is not as valuable as a tax credit for the US tax, so both Irish income tax and US federal income tax are likely to increase when an individual waives treaty benefits for US tax purposes. Given the potential for increased tax costs, it is important to estimate the additional tax cost over a number of years to compare it with the exit tax saving achievable by opting out of the treaty from a US federal income tax perspective.

Mary's US adviser has indicated that she will be subject to exit tax unless she chooses to opt out of the double taxation treaty between Ireland and the US for the purposes of US federal income tax. The increased tax cost associated with this has been estimated at USD15,000 per annum across both Ireland and the US. Given that it would take more than 33 years for the accumulated additional annual tax cost to match the exit tax cost of USD500,000, the adviser recommends that Mary opt out of the treaty in the US.

It is important to note that individual states in the US can levy taxes in addition to the federal taxes, and although these may also qualify for a deduction in calculating Irish income, any state taxes paid in the US would not qualify for relief under the double taxation treaty.

Income Tax for the US Citizen

A US citizen coming to live in Ireland will need to be advised on the specific treatment of US citizens contained in paragraph 4 of Article 1 of the double taxation treaty between Ireland and the US. This provision sets out that the US retains taxing rights over the worldwide income of US citizens (with some minor exceptions).

The main effect of this provision is that where a US citizen is resident in Ireland, the US will retain taxing rights on worldwide income and gains (including from Irish sources). Although withholding taxes may be payable in the US, Ireland has primary taxing rights, and the US should allow for a tax credit for any Irish tax paid.

Paragraph 4 of Article 1 of the double taxation treaty is also relevant in the expatriation context. This is because for the purposes of this paragraph a US citizen includes a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax. This applies for a period of ten years after losing citizenship.

Example 2

Mike is an Irish-domiciled US citizen moving back to Ireland in the next few months. He will be resident in Ireland in 2023 and holds an investment portfolio that has equity investments located across the globe (including the US and Ireland). Dividends arise on the investment portfolio each year.

The dividends will need to be returned in Mike's Irish tax return for 2023, and he will be entitled to a tax credit in his Irish tax return for a certain level of withholding taxes in the various jurisdictions where shares are located. This includes the US, where withholding tax can be applied at 15% under the double taxation treaty between Ireland and the US. Mike may be advised to file a W-8 BEN with the US authorities to prevent the withholding tax exceeding this.

Mike's US tax return will also include the same investment income, and he will be entitled to a tax credit in the US for the Irish tax paid on the investment income when he completes his US tax return. This is provided for in paragraph 3(b) of Article 24 of the double taxation treaty between Ireland and the US.

Although the tax administration involved with both US and Irish tax filings can be cumbersome, the higher Irish tax rates generally mean that federal income tax is not payable in the US, particularly where there is a significant level of income.

US Federal Estate Tax

Given the high federal estate tax (FET) threshold of USD12.06m in 2022, many wealthy US individuals (including US citizens) do not currently need to be concerned with FET in the US. All individuals with assets at this level and higher do, however, need to plan for FET, and care needs to be taken when spouses do not have the same FET status in the US because there is no general spousal exemption, as there is for Irish inheritance tax. As with Irish inheritance tax thresholds, the FET threshold is subject to change, and there has been some expectation that it will move downwards, so this should be watched carefully.

Although the estate of a US individual who is subject to FET on worldwide assets (e.g. a deceased US citizen) can avail of a threshold of USD12.06m, an Irish-resident and Irish-domiciled non-US citizen will generally be subject to FET on assets located in the US only but will be able to avail of a threshold of just USD60,000.

The estate of an Irish-domiciled non-US citizen living in the US may be subject to US FET on worldwide assets, in which case the USD12.06m threshold would be available. This can change if the individual moves back to Ireland, and if US-located assets are worth more than USD60,000, the estate can be liable to FET.

Example 3

Irish-domiciled Maureen is returning to Ireland in the next few months having spent four years working in the US. She worked for a US multinational and has built up a holding of US shares currently valued at USD2m through her employment. If she died while living in the US, her death would not trigger a US FET liability if her worldwide estate was subject to FET with a threshold of USD12.06m. However, if she returned to Ireland, the USD2m of US shares would trigger a FET charge if she died, as the USD60,000 threshold would apply.

The upper FET rate is 40%, so even where double taxation relief is available on a cross-border inheritance, the US FET is often higher than the Irish inheritance tax (currently 33%), so there is generally a tax cost if FET bites. Where US citizens moving from the US are considering relinquishing citizenship for other reasons, the possible FET implications of a loss of citizenship should be carefully considered.

Irish Inheritance Tax

Like UK inheritance tax, FET is charged on an estate, whereas Irish inheritance tax is assessed on the beneficiaries of an estate. Notwithstanding the significant fundamental differences in the operation of the tax, there is a double taxation convention between Ireland and the US that aims to prevent double taxation that may otherwise arise on the death of an individual. Some of these provisions are reviewed below.

Irish-domiciled disponers and beneficiaries

From an Irish inheritance tax perspective, and subject to some exclusions for non-domiciled disponers and beneficiaries, a beneficiary will be within the charge to Irish inheritance tax if:

- the disponer is Irish resident or ordinarily resident,
- the beneficiary is Irish resident or ordinarily resident or
- the asset inherited is located in Ireland.

Before moving to Ireland it may be worth considering whether gifts could be made before the move (with gifts also falling within the above territoriality rules), to manage the potential tax and other consequences. This point is generally worth exploring to some extent with a client before a move to Ireland, either in planning the client's estate or in planning for receipt of a possible future inheritance.

This can be particularly relevant if the purchase of assets in Ireland (e.g. a new family home) could allow for the use of the asset as a family home during the lifetime of the client and/or a spouse and to pass it on to a beneficiary thereafter.

US-domiciled disponers and beneficiaries

A US national coming to Ireland needs to consider the Irish inheritance tax position, especially if assets would not be within the charge to FET, given the USD12.06m threshold that may be available. Under the Irish tax rules, a non-Irish-domiciled beneficiary living in Ireland will not be subject to Irish inheritance tax as a beneficiary of a US estate if:

- the disponer is non-Irish resident and non-ordinarily resident,
- none of the assets inherited are located in Ireland and
- the beneficiary was non-Irish resident for any tax year within the five years before the year in which the inheritance is taken.

Similarly, if a non-Irish-domiciled individual living in Ireland dies, the beneficiaries of the estate will not be subject to Irish inheritance tax if:

- the beneficiaries are non-Irish resident and non-ordinarily resident,

- none of the assets are located in Ireland and
- the deceased individual was non-Irish resident for any tax year within the five years before the year in which the inheritance is taken.

These rules alone mean that Irish inheritance tax will not generally be a significant issue for US nationals coming to Ireland for a relatively short period of time, either as beneficiaries or in considering their own estates.

In addition to this, Article IV paragraph (2) of the inheritance tax double taxation convention between Ireland and the US provides that the death of a US-domiciled disponer will not trigger inheritance tax in Ireland unless the assets inherited are located in Ireland. Therefore, even if a disponer or beneficiary has been in Ireland for more than five years, there is no Irish inheritance tax charge if the disponer is US domiciled and the assets are located outside of Ireland. This can apply even if the disponer is tax resident in Ireland, as the double taxation convention looks at the domicile position of the disponer and the location of the assets.

Example 4

Jane was a US citizen and US domiciled but moved to Ireland seven years ago to work for a US multinational. She rented the apartment in Dublin that she lived in and had no significant Irish assets, but she held US shares and some Irish-located shares. She let out her old family home in the US and retained ownership of the house.

Jane died in a car accident last July, and the assets are to pass to her US-based family. Although she was Irish tax resident for more than five years before the year she died, the only assets subject to Irish inheritance tax are the Irish shares. Jane's estate is not subject to FET as the USD12.06m threshold is available and her assets total approximately EUR3m.

There are specific rules for determining the location of assets for the purposes of the double taxation convention, which are set out in the convention.

For US-domiciled individuals moving to Ireland, the main aspects to be considered from an Irish inheritance tax perspective are often:

- the ownership of Irish-located assets and how these assets would pass on death and
- whether it is likely that the individual would inherit Irish-located assets that could be subject to Irish inheritance tax.

In certain circumstances, if a US-domiciled individual acquires Irish-located property (e.g. a family home), it may be possible for the ownership to be held indirectly to manage the Irish inheritance tax position.

Revocable Trusts

Although the inheritance tax double taxation convention between Ireland and the US will generally eliminate an Irish inheritance tax charge if the disponer is domiciled in the US and the assets inherited are located outside of Ireland, complications can arise if a will or revocable trust provides for assets to pass into a discretionary trust before passing on to the beneficiary.

A discretionary trust can allow for flexibility and improve the Irish inheritance tax position in some cases by allowing for Irish-located assets to be sold by trustees, or by waiting for a beneficiary to move from Ireland, before assets are appointed from the trust. However, a benefit taken from a discretionary trust may not be able to avail of the double taxation convention exemption set out above, as benefits must be taken "on the death" of the disponer to qualify for the exemption. If the inheritance is not taken until the trustees have exercised discretion and appointed assets from the discretionary trust to beneficiaries, then there is an argument that the exemption would not be available as the Irish inheritance tax charge is not triggered by the death – it is the appointment of the assets from the trust that triggers the Irish inheritance tax.

Revocable trusts are commonplace in the US and can be used as well as, or instead of, a will. Revocable trusts generally include provisions setting out how trust assets should pass on death, and in advising on the Irish inheritance tax position of private clients moving to Ireland from the US it is important to explore the existence of wills and revocable trusts and their provisions. It is also important that the legal effect of any trust or will is clearly set out by suitably qualified lawyers as the Irish tax treatment will follow the legal position. Both revocable and irrevocable US trusts are generally bespoke instruments with specific provisions and powers tailored to the circumstances of individual clients.

In addition to inheritance tax for beneficiaries, discretionary trust tax issues could arise if a revocable trust provides for a discretionary trust on the death of the disponer and the disponer is tax resident in Ireland when he or she dies.

Example 5

Peter set up a revocable trust in the US a number of years ago and returned to Ireland in 2021. The trust is in place when Peter dies in 2022.

A discretionary trust provided for under the revocable trust takes effect, and as the beneficiaries of the trust are Peter's children – who are all over 21 – and Peter was tax resident in Ireland when he died, discretionary trust tax is triggered on his death (6% of the value of the trust on the valuation date, which may reduce to 3% if all assets are appointed within five years of Peter's death).

CGT for Foreign Estate (Including US)

A point to consider for individuals living in Ireland and inheriting from disponers who are non-Irish resident and non-ordinarily resident is that gains on assets sold in the course of administration of the estate will not be within the charge to Irish CGT (on the increase in value between the date of death and the date of sale) unless the assets are specified assets as set out in s29(3) TCA 1997. This is because s573(4) TCA 1997 provides that an estate is treated as having the deceased's residence, ordinary residence and domicile for CGT purposes.

Remittance Basis

Any US-domiciled individual with investments outside of Ireland should take advice on the remittance basis of tax in Ireland before moving here. This is relevant not just for US-domiciled individuals moving to Ireland but for any individual domiciled outside of Ireland doing so. It is possible to limit the tax exposure in Ireland for foreign-source income or gains that do not need to be brought into Ireland to fund day-to-day living expenses, but it is very important that the structure for ownership of investments and bank accounts is considered in advance.

Advisers need to take care in identifying certain investment funds ("good offshore funds") that do not qualify for the remittance basis of taxation on gains subject to tax under Schedule D, Case IV, and are subject to eight-year deemed disposal rules.

In 2021 we saw updated guidance on US exchange-traded funds (ETFs) from Irish Revenue that has applied since 1 January 2022; this revoked previous Revenue guidance indicating that US ETFs would not generally be treated as "good offshore funds". It is important to note that it is open to advisers to review the nature of individual US ETFs to determine if an ETF constitutes a material interest in an offshore fund, so there can be merit in exploring the detail of these funds to determine whether the offshore fund rules apply or the funds do in fact qualify for the remittance basis.

The recently published Report of the Commission on Taxation and Welfare has recommended limiting the remittance basis to a three-year period. This would be a significant change and it is perhaps worth noting that the Commission on Taxation 2009 Report previously made a recommendation to abolish the remittance basis.

US Pensions

Similar to the Irish pension system, pensions in the US take various guises. Two of the more common pension structures in the US are the 401(k) and the individual retirement account (IRA).

The taxation of lump sums drawn down from foreign pensions that were accumulated by an individual while non-resident in Ireland has been discussed between Revenue and practitioners in recent years. Notwithstanding the historical Revenue Precedent 28, which set out that tax-free lump sums in commutation of foreign pensions were not taxable in Ireland, the Revenue approach has moved in recent years and careful consideration must be given to the taxation of lump sums drawn down from foreign pensions.

Section 200 TCA 1997 provides for an exemption from Irish income tax for certain foreign pensions that are not subject to tax in the source country but there are a number of conditions to be met, some of which are relatively subjective. Notwithstanding a recent Tax Appeals Commission determination that found in favour of the taxpayer (56TACD2022), the prudent approach overall may be to crystallise pension benefits before becoming tax resident in Ireland, if this is practical and efficient from a US tax perspective.

Outside of the income tax position, crystallising US pensions for non-US citizens that are domiciled in Ireland and returning home, and moving the funds out of the US, can limit or eliminate exposure to FET. This is because uncrystallised benefits are likely to be located in the US, and the USD60,000 FET threshold would apply.

Conclusion

As with any situation involving a change of location and consideration of the potential associated tax consequences, timing is key. The tax consequences in both the US and Ireland should be carefully managed and considered before a move to Ireland to arrive at the optimal position in both jurisdictions. Collaboration between Irish and US tax advisers is essential. Each client's factual background is unique and optimising the tax position requires detailed consideration of both Irish and US elements.

Many of the above issues arise with other jurisdictions, but the ambit of the US authorities with respect to US citizens is significant. We are likely to continue to see significant migration between the US and Ireland, and a 2018 initiative to offer Americans aged between 55 to 75 Irish visas in exchange for US immigration reforms to benefit Irish people who want to live in the US (E3 Visa Program), has recently been revived.

All of this means that there will be an ongoing need to keep abreast of developments and law changes in both Ireland and the US that may impact the migrating private client.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The Analysis of Employees and Contractors in Ireland "Pizzas, Elephants and Uber"

Introduction

On 31 May 2022 the judgment of the Court of Appeal was delivered in the case of *Karshan (Midlands Limited) Trading as Domino's Pizza v The Revenue Commissioners* [2022] IECA 124. By a two-to-one majority, the Court of Appeal overturned the decisions of the Tax Appeals Commission (TAC) and the High Court in relation to the status of pizza delivery drivers for a Domino's Pizza franchise, finding that the drivers were in fact contractors and not employees, as had previously been decided. (The decisions of the TAC and the High Court were considered by Pat O'Brien in *Irish Tax Review*, 33/2 (2020).)

In addition to being of interest as one of the first cases to be heard in this jurisdiction regarding the employment status of workers in the "gig economy", this decision is a very significant one for many businesses in Ireland. In particular, before the publication of the judgments (which remain unapproved at the date of writing), the outcomes from the TAC and the High Court had the potential to cause much uncertainty for businesses about the use of contractors in respect of short-term and even once-off engagements, not least from a tax perspective.

Background

Overview

Like most cases in this area, the background to this case is quite fact-heavy, but it can be summarised as follows:

- The appellant (Karshan) manufactured and delivered pizzas and ancillary food items to customers, who placed orders by telephone, the internet and attending its stores.
- Karshan engaged drivers to deliver the pizzas to its customers.
- Each driver entered into a written agreement with Karshan, which outlined the company's aim to sub-contract the delivery of pizzas, as well as the promotion of its brand logo, and that the driver (referred to in the agreement as the "contractor") would be willing to provide those services.
- The agreement stated that the driver would be retained as an "independent contractor" and that the company had "no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [he/she] may receive under this agreement".
- Each driver was required to provide his/her own delivery vehicle in a roadworthy and safe condition and to insure same with a reputable insurance company in Ireland for business use. Alternatively, the driver could rent such a vehicle from Karshan, with the agreement stating that the company was also prepared to offer third-party insurance at a predetermined rate (although the Tax Appeals Commissioner ("the Commissioner") found that no company vehicles were in fact available for rent).
- Drivers were also required to wear a fully branded uniform (subject to checks by managers), with a deposit requested by Karshan from the drivers for same.
- In addition to payment based on the number of successful deliveries undertaken by the driver, a payment was made by Karshan for brand promotion for the wearing of company-supplied clothing and/or the application of temporary company logos to the driver's vehicle.
- The legal agreement between Karshan and the driver explicitly stated that the company did not warrant any minimum number of deliveries and that the driver was entitled, subject to some restrictions, to engage with a similar contract delivery service with other companies.
- The driver could engage a substitute provided that the substitute could undertake all of the driver's contractual obligations, with the substitute being paid by Karshan (as opposed to by the original driver).
- In practice, the drivers would fill out an "availability sheet" indicating their availability for the week, with a roster drawn up by the store manager based on the completed availability sheets received.
- On a shift, drivers clocked in and out using a computerised system located in Karshan's business and were given a cash float by the company, which was returned at the end of the shift. Drivers were required to use their own phones when contacting customers. The company also limited the number of pizzas that could be delivered to two per time, and some drivers folded boxes while waiting for deliveries (often at the request of the store manager).
- Karshan would prepare invoices for many (but not all) of the drivers that would then be signed by the relevant driver.

The Revenue Commissioners (Revenue) asserted that the drivers were employed under contracts of service. Therefore, they contended that Karshan should have operated payroll taxes in respect of the relevant payments made to the drivers and raised estimates in accordance with s990 of the Taxes Consolidation Act 1997 (TCA 1997).

Determination of the Commissioner

In her determination (23TACD2018) in respect of the appeal of the estimates raised, the Commissioner found that the drivers worked under multiple contracts of services and were therefore taxable in relation to the emoluments arising from their service with Karshan in accordance with s112 and Schedule E TCA 1997. In doing so, the Commissioner adopted the approach outlined by Edwards J in *Minister for Agriculture & Food v Barry & Ors* [2008] IEHC 216 (which related to veterinary inspectors engaged by the Minister) by posing the following legal questions in sequence.

Was the relationship subject to just one contract or did each shift undertaken form part of a series of individual contracts or engagements?

On this question, and relying on the English decision of Briggs J in *Weight Watchers (UK) Limited & Others v Revenue & Customs Commissioners* [2011] UKUT 433, the Commissioner concluded that there was an overarching "umbrella" contract that was supplemented by multiple individual contracts in respect of each assignment of work involving one or more shifts. These individual contracts were found to result from the drivers notifying Karshan of his/her availability for work and Karshan placing his/her name on the roster in respect of a specific shift or series of shifts.

Did mutuality of obligation exist between the company and the drivers?

Answering this question in the affirmative, and again quoting from the *Weight Watchers* decision, the Commissioner accepted Revenue's argument that the fact that a driver could exercise a choice in respect of the shifts for which he/she was available did not alter the fact that the relationship between Karshan and the driver was governed by the individual contracts and that mutuality of obligation was present for the duration of those individual contracts.

Were the contracts in question contracts of service or for services?

Applying a number of tests including substitution, control and integration, the Commissioner concluded that the contracts the drivers worked under were contracts of service.

High Court decision

On appeal by way of case stated ([2019] IEHC 894), O'Connor J in the High Court endorsed the Commissioner's approach and her finding that there was a "hybrid arrangement" that involved an overarching contract (being the written "umbrella" agreement) supplemented by a series of individual engagements (being the shifts undertaken by the relevant driver).

On the issue of mutuality of obligations, the court referred to the practice whereby Karshan would draw up a roster for drivers who had indicated that they were available to work in any given week and found that, once rostered, there was a contract that retained mutual obligations. Furthermore, the ability of drivers to cancel a shift at short notice did not relieve them of work-related obligations owing to the requirement to engage a substitute, provide advance notice to Karshan and work out the remainder of the shifts that had been agreed. Accordingly, O'Connor J was satisfied that the Commissioner had not erred in finding that mutuality of obligations existed between the company and the drivers.

Finally, the court then considered whether there was a contract of service or for services. On this point, the judge held that the Commissioner had not erred in determining that the absence of an ability to genuinely sub-contract was a factor that indicated that the drivers worked under contracts of service as opposed to contracts for service. Accordingly, the court dismissed the appeal, rejecting Karshan's arguments that the Commissioner had failed to have adequate regard to the terms of the written agreement.

Court of Appeal Decision

Mutuality of obligation

There are several tests used by both the Irish courts and Revenue to analyse whether an individual is more appropriately deemed an employee or a self-employed contractor. Traditionally, the control test was the most important. In other words, how much control did the master exert over the servant? If the company was not in direct control of the worker, then he/she could not be an employee. Over time, this test became less applicable, as the methods in which employees did their work became less subject to day-to-day control of their employer.

The test that is currently most relied on is that of mutuality of obligation – namely, is the company required to provide work and is the individual required to carry out the work?

In *Minister for Agriculture v Barry* Edwards J stated that:

> "The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service."

In essence, this means that unless there is mutuality of obligation, there cannot be a contract of employment. Accordingly, if this hurdle is not surmounted, then no further analysis is needed, as the individual cannot be an employee. However, if this hurdle is overcome, then other factors must be considered to further determine the nature of the relationship (such as control, integration into the business and ability to make profit in their own right).

Although the question of mutuality of obligation has been considered by the High Court on a number of occasions since *Minister for Agriculture v Barry*, the judgments of the Court of Appeal in the Domino's Pizza case represent a useful summation of the law in this regard.

As mentioned above, in the initial analysis, the Commissioner and the High Court decided that although there was no mutuality of obligation in the overarching written agreement, such obligation arose each night that the drivers opted to work. This was notwithstanding that the overarching written agreement was clear that there was no obligation to work and that the drivers could indicate when they were available and Karshan would then roster the driver for work accordingly. Furthermore, when the drivers arrived at the company's business, there was no guarantee of available hours; it depended on how many pizzas were ordered that night. Once the drivers indicated that they were available, they could still decide not to turn up on the night or to send someone else in their place, and there was no evidence offered that the drivers suffered any setback for not coming to work after they indicated that they would.

In her analysis of the mutuality of obligation, Costello J concluded:

> "Counsel submitted that the Commissioner and the High Court erred in merely looking at the obligations between the parties as they arose at the moment when 'the [driver] turns up in the depot [of the appellant] and is assigned a particular delivery job'. At that point, there was an obligation on the driver to deliver the pizza and on the appellant to pay the agreed fee. Counsel submitted that these obligations were not the obligations that are necessary to satisfy the mutuality of obligation test in this context. If that were so, then every contract for services would be converted into, and treated as, an employment contract because even in a contract for services, both parties assume obligations to each other. I agree."

The Court of Appeal held (Whelan J dissenting) that the requirement of mutuality of obligation was absent from the delivery arrangements. It was, therefore, not necessary to consider whether the further tests of a contract of service were satisfied, Costello J remarking that:

> “Irish authorities on mutuality of obligation are unambiguous in requiring an ongoing reciprocal commitment to provide and perform work on the part of the employer and the employee respectively.”

This is a very helpful summary and conclusion by the Court of Appeal. Based on the previous conclusions by the Commissioner and the High Court, it had become very difficult to find a key difference between, at one end of the spectrum, a window cleaner who is genuinely self-employed but who may turn up to clean the windows of a company’s office every six months and, on the other, a graphic designer who may blur the tests from time to time when they are used by the company for bespoke projects.

Over-reliance on English authorities

In Ireland, we have watched with interest how the *Deliveroo* and *Uber* cases proceeded through the English courts. As mentioned, in her determination, the Commissioner relied heavily on the decision in the *Weight Watchers* case. The Court of Appeal found that the arrangements in the present case differed significantly from those in *Weight Watchers*, noting the importance of bearing in mind the observations of Keane J in *Henry Denny & Sons (Ireland) Limited v Minister for Social Welfare* [1999] 1 IR 34 that each case must be determined in light of its particular facts and circumstances.

Furthermore, the Court of Appeal was critical of the over-reliance on the *Weight Watchers* case and made it clear that neither the Commissioner nor the High Court was entitled to adapt the law to modern means of employment practices and certainly was not entitled to do so by following English law rather than established Irish precedent to the contrary. In particular, Costello J sounded a note of caution in observing that there has been significant statutory intervention in England and that many of the English authorities turn on the statutory definition of a “worker”, an intermediate category between an employee and an independent contractor and one that does not exist in Irish law. Therefore, the application of English cases in this area are not as relevant to those in Ireland.

Conclusion

The decision of the Court of Appeal in the Domino’s Pizza case is a welcome reset of the mutuality of obligation test in determining employment or self-employment status. It is clear, then, that there must be an ongoing and reciprocal commitment to provide and perform work in order to overcome the first hurdle to establish an employment relationship, something that was lacking following the initial analysis by the Commissioner and the High Court. The decision is also a timely reminder of the pitfalls of relying on non-Irish authorities in this area, even those that might be considered as having persuasive authority in the Irish courts, where there is established Irish authority.

Readers will be familiar with the often severe tax implications and economic exposure that can follow where an individual has been misclassified as an independent contractor. This includes a potential liability in respect of any unpaid PAYE (up to 40%) and USC (up to 8%), together with interest and penalties. Revenue may also seek to recover unpaid PRSI (both employer and employee), although credit will typically be given for VAT and income tax paid by the contractor. In an M&A sphere, even in the absence of a compliance intervention by Revenue, the classification of individuals as employees or contractors is often a key focus for the tax due diligence exercise, where relevant. This can lead to the prospective acquirer of the business insisting on a full suite of legal protection in the event of a successful Revenue challenge, which may be difficult for the seller(s) of the business to resist from a commercial perspective. Accordingly, business owners who are preparing to sell their business in the short to medium term will be well advised to undertake a review of any arrangements involving the supply of services by contractors.

The question for employers now is how the decision impacts the use of contractors in their business going forward. The short answer is that the decision is decidedly more supportive of the use of contractors in certain circumstances. Although the employee-or-contractor conundrum is likely to remain a vexed issue for businesses to deal with from a practical perspective, the decision of the Court of Appeal is to be welcomed. It is hoped that the decision, together with an ongoing review of published guidance in this area (including the updates to the Code of Practice on Determining Employment Status in July 2021), will provide some certainty to businesses in terms of the correct classification of their employees and contractors. This will be particularly the case for those businesses that operate a novel operating structure or model, in terms of applicable tax and social security obligations for the employer as well as associated employment law protections in the case of individuals classified as employees.

Considerations for Employers

- Consider the specific facts of the arrangement – Even a slight difference in the fact pattern could mean that an individual is more correctly classified as an employee rather than a contractor (or vice versa).
- Continually review contracts – The legal agreement is not definitive on its own, but it should ideally reflect the relationship between the parties in practice. If the relationship is moving away from what the contract outlines, that is a strong indicator of a need to consider the relationship again.
- Minimal integration – contractors are not usually integrated into the business and do not have their own email addresses or business cards affiliated with the business, their LinkedIn should reflect their correct business status , etc.
- Multiple clients – Contractors should be able to work with multiple other companies and have the ability to make profit in their own right. They should have no need to restrict who they work with in addition to the business.
- Obligation to provide work – Finally, if there is an obligation to give a certain amount of work (even on a part-time or short-term basis) and the individual is obliged to do it once offered, then they may be more akin to employees than contractors.
- Remember the “elephant test” –elephants: they are very hard to describe but easy to spot when you see one!


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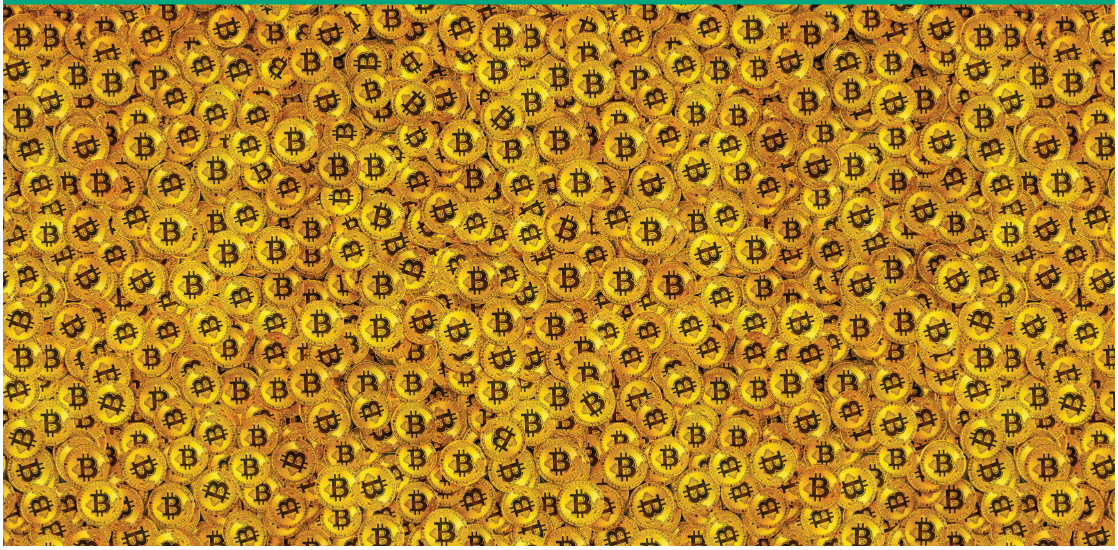
The Legal Framework for Crypto-Assets



Introduction

The law is playing catch-up with the world of crypto-assets. Traditional legal concepts of "property" do not reflect the pseudonymised world of crypto-markets. In broad terms, crypto-assets fall into two categories: crypto-currencies and other crypto-assets (such as non-fungible tokens (NFTs)).

Traditional legal concepts of "money" and "currency" do not fit easily with crypto-currencies. A crypto-currency often has no State-backed issuing entity – as with fiat currency. Wild fluctuations in value mean that it is doubtful whether many crypto-assets are a store of value, a crucial feature of money. The fact that many crypto-currencies are not widely used for everyday payment transactions calls into question whether they can be viewed as "money" in the traditional legal sense. Similarly, other crypto-assets such as NFTs present definitional challenges with regard to traditional concepts of what "property" is in legal terms.

Although crypto-markets continue to be largely unregulated, policy-makers across the world are working to construct appropriate structures to regulate issuers of crypto-assets, and those who provide services in the crypto-markets – such as exchanges and digital wallet service providers. Furthermore, in Common Law jurisdictions around the world, courts are moving incrementally and steadily to recognise crypto-assets as a new form of intangible property. (See also article by Susan Roche, Nicola Sheridan & Ruth Maloney, "The Tax Framework for Crypto-Assets" in this issue).

The Common Law in Ireland: Where Are We Now?

To date, there are no reported Irish cases that have analysed the nature of crypto-assets as a form of property. Property is an important fundamental concept because its resolution dictates whether a person who has lost, or been defrauded of, crypto-assets can invoke the powerful array of equitable proprietary remedies developed over centuries by Common Law courts by reference to traditional types of asset such as chattels, money, shares and intellectual property. There are now a number of cases from jurisdictions other than Ireland showing that the Common Law is adapting to these new types of asset.

There is, accordingly, an emerging consensus that crypto-currencies are a new form of intangible asset. Two cases are of note in this regard. The first is the decision of the Singapore courts in *Quoine Pte Ltd v B2C2 Ltd.*,[1] and the second is the decision of the New Zealand High Court in *Ruscoe v Cryptopia (in liquidation)*.[2] In both cases the court held that, in principle, crypto-currency was a form of intangible property over which a trust could be created. Furthermore, important work has been carried out by a legal practitioner taskforce in the UK that has been influential in getting judges in England and Wales comfortable with the concept of crypto-currency as a new form of intangible asset.[3] The consensus that has emerged is that crypto-assets (including crypto-currencies) meet the criteria of "property" at Common Law[4] – namely (in brief), something that is capable of definition and identification, can be assumed by third parties and has a degree of permanence.

Having achieved the status of "property" for the purposes of the Common Law definition, crypto-currencies that have been digitally stolen are in principle capable of being traced and recovered using existing legal and equitable techniques. These include disclosure orders against exchanges and other service providers to disclose the identity of wrongdoers who have availed of established facilities to carry out wrongdoing. They also include asset-freezing orders to prevent wrongdoers transferring assets to make themselves judgment-proof. Common Law causes of action are readily adaptable to meet the new realities of the crypto-markets. Furthermore, cases can be brought against "persons unknown" – provided that some degree of specificity can be provided in defining the class of wrongdoer against whom remedies are sought.

However, this is not to say that mounting a successful claim to recover stolen crypto-assets is not a hugely challenging exercise. The pseudonymous nature of the markets, the rapid manner in which crypto-assets can be "off-ramped" from a distributed ledger into other assets, and technical procedural challenges around issuing proceedings against entities that are not in the European Economic Area all mean that these claims can be difficult to bring home.

Regulation in Ireland: Where Are We Now?

Financial services regulation is carried out by the Central Bank of Ireland (CBI). The CBI takes its lead from EU legislation, EU institutions, and regulatory agencies such as the European Central Bank, the European Banking Authority and the European Securities and Markets Authority.

EU policy-makers are in the process of designing a regulatory framework for the regulation of crypto-markets, including issuers of crypto-currencies and related service providers. Right now in Ireland, crypto-assets themselves are not subject to any regulatory oversight aside from

1 [2019] 4 SLR 17 (High Court), [2020] SGCA (1) 02 (Court of Appeal).

2 [2020] 2 NZLR 809.

3 LawTech Delivery Panel, *UK Jurisdiction Taskforce Report* (November 2019); *AA v Persons Unknown* [2020] 4 WLR 35 and (as regards NFTs) *Osbourne v Persons Unknown and Ozone* [2022] EWHC 1021 (Comm).

4 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247–8.

the extent to which they might be used to evade the EU sanctions regime imposed on Russian entities.

However, virtual asset service providers (mainly businesses that provide exchange services between crypto-currencies and fiat currencies and businesses that provide digital wallet services) are required to register with the CBI for the purposes of the existing legislative framework for the prevention of money laundering and the financing of terrorism.[5] They must also comply with certain other regulatory requirements.

However, the EU plans to have in place by 2024 its new regime for the regulation of the crypto-asset industry in the form of a dedicated Regulation on Markets in Crypto-Assets (MiCA).[6] MiCA identifies three crypto-asset sub-categories:

- asset-referenced tokens, which maintain stability by referring to fiat currencies, commodities or other crypto-assets;
- electronic-money tokens, which maintain their value by referring to a fiat currency; and
- utility tokens, which provide digital access to a good or service using distributed ledger technology.

When enacted, MiCA will be directly applicable in EU Member States. It addresses the regulation of so-called "stablecoins", which, depending on their characteristics, can be either asset-referenced tokens or e-money tokens, which will need to become authorised by competent authorities in the EU (such as the CBI) in order to be traded in the EU. Specific additional regulatory requirements will also apply, which, for asset-referenced tokens includes requirements for robust governance arrangements and the maintenance of own funds. Furthermore, issuers of crypto-assets to the public will be obliged to publish a "crypto-asset white paper" for each issued crypto-asset token, which may, depending on the asset type, include information on the underlying technology and standards met by the issuer and the rights and obligations attaching to the tokens. The draft text also sets out other requirements that would apply to certain issuers and crypto-asset service providers in respect of acting honestly, fairly and professionally, and providing certain information to clients.

Crypto-asset service providers will also require authorisation and will be subject to a range of regulatory requirements, including prudential and internal control requirements and requirements concerning the safekeeping of client assets. MiCA will also prohibit the granting of interest or any other benefit related to the length of time during which asset-referenced or e-money tokens are held.

However, although MiCA sets out the overall shape of the impending regulatory structure for the crypto-markets, the precise content and implications of the Regulation will be known only once detailed level 1 and level 2 texts are finalised.

Conclusions

Although the valuation of crypto-assets has proven to be highly volatile, the sheer scale of funds invested by professional and retail investors in these markets, together with the impending regulation of the sector, mean that it is reasonable to expect that they will represent an important asset class in terms of the overall economy. In the meantime, law – in terms of regulation and Common Law – is steadily catching up so that before long there will be legal structures for the regulation of crypto-markets and the resolution of disputes with regard to crypto-assets.

5 Pursuant to the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2021.

6 Proposal for a Regulation on Markets in Crypto-Assets, and amending Directive 2019/1937, COM (2020) 593 final.

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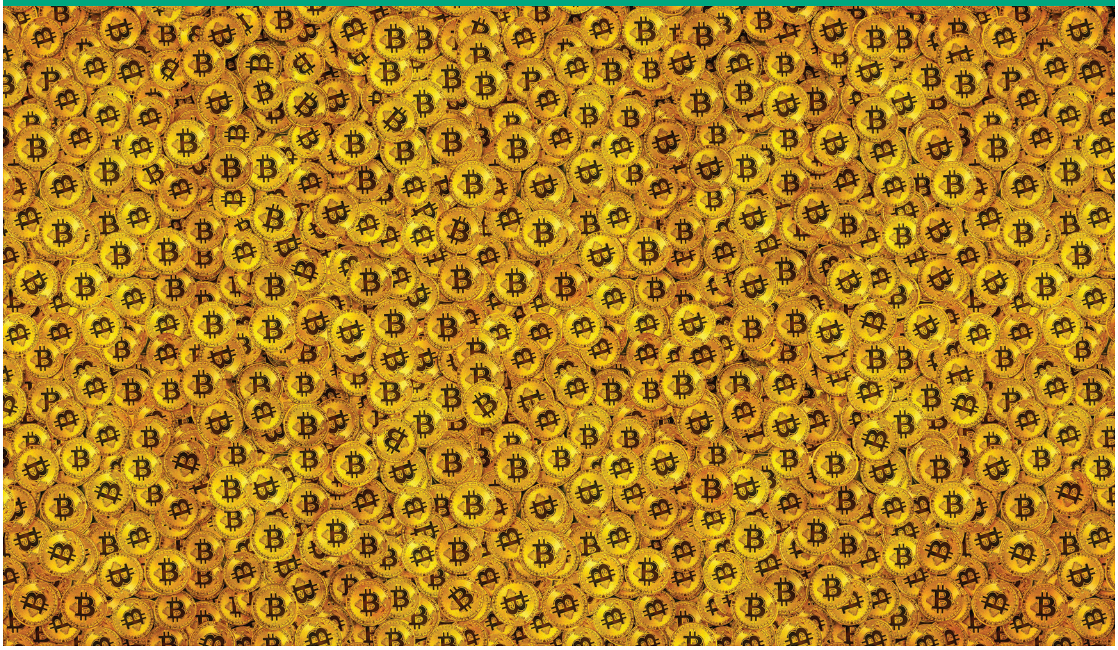
The Tax Framework for Crypto-Assets



Background[1]

Innovation in the crypto-asset[2] sector continues to happen at a pace unseen in many industries. Key drivers of this innovation include the rapid introduction and development of new blockchain technologies, which allow the development of new crypto-currencies, as well as non-fungible tokens (NFTs). At the time of writing, there are estimated to be 18,000 crypto-currencies traded over approximately 460 exchanges. NFTs are a multi-million-dollar market, and decentralised finance (DeFi), which aims to allow participants to undertake transactions directly with each other through the use of blockchain technologies, has revolutionised the world's reliance on traditional central financial intermediaries to provide financial services.

1 (See also article by Susan Roche,

2 Crypto-assets predominantly comprise crypto-currencies and other assets such as non-fungible tokens (NFTs). Please refer to the article "The Legal Framework for Crypto-Assets" by John Breslin and David Sweetman in this issue of *Irish Tax Review* for more details.

With this rapid pace of evolution, both regulators and tax authorities are having to react and adjust to new forms of assets and transactions and a business environment that has developed over a short period. Traditional taxing and reporting models did not foresee these types of transactions and therefore in some areas need updating to be able to deal with the complexities that can arise. From a legal, tax and regulatory perspective, the legislation and guidance in this sector are in their infancy, as lawmakers and regulators get to grips with markets, a range of transactions and a range of assets that are evolving and sometimes are not directly comparable to anything that has been seen previously. Although many jurisdictions have now developed some form of guidance on the tax treatment of crypto-currencies and other crypto-assets, in many cases it is not sophisticated enough to cover more than the very basic direct and indirect tax principles applicable to the holding and trading of crypto-currencies. The more complex and new concepts such as staking and mining are, in many cases, not dealt with. PwC's Annual Global Crypto Tax Report 2021[3] outlined a varying level of sophistication of tax rules across multiple jurisdictions, and 2022 so far has shown an increase in the pace of development of specific rules and guidance across many jurisdictions. The strong expectation is that regulators and tax authorities will increasingly legislate in this space over the coming years to ensure a robust system that will mitigate any gaps in tax legislation and minimise any risk to Exchequer tax returns. The body of case law related to these transactions will also develop as time progresses and tax authorities review transactions and their treatment. Whereas VAT has some specific case law on point, to date there have not been as many cases from a direct tax perspective from which we can draw precedence.

The OECD and the EU have made progress in developing a framework for the taxation of crypto-assets, as discussed below, and although no legislation or finalised Directives have yet been issued, their overall intent to expand the reporting frameworks is clear. MEPs recently adopted a non-binding resolution calling for better use of blockchain to fight tax evasion and for EU Member States to enhance coordination on the taxation of crypto-assets. The US and the UK have also been working to enhance their frameworks for taxing crypto-assets. HMRC launched a consultation at the beginning of July on the tax treatment of DeFi lending and staking, as part of the UK Government's FinTech Sector Strategy, which has the aim of turning the UK into a "crypto asset technology hub". In the US, the Biden Administration has proposed extending certain tax rules relating to securities to cover crypto-currencies and other digital assets, as well as introducing new digital asset reporting requirements.

The sophistication of local rules across jurisdictions and the level of coordination are likely to increase in the coming years as territories seek to protect their tax base. In this article we detail the current guidance issued by Irish Revenue on the tax treatment of crypto-asset transactions, provide an overview of the OECD- and EU-led proposals for a broader reporting framework, and outline the specific case law and guidance on how transactions and crypto-currency-related activities such as mining should be treated from a VAT perspective. (See also article by John Breslin & David Sweetman, "The Legal Framework for Crypto-Assets" in this issue).

Irish Tax Guidance

Revenue first issued guidance on the tax treatment of crypto-assets in 2018. This was updated earlier this year.[4] The updated manual notes that "[w]hile referred to as a currency by many, [crypto-currencies] are best referred to as assets...Therefore, throughout this document the term 'crypto-asset' is used, which includes cryptocurrencies, crypto-assets, virtual currencies, digital money, or any

3 See https://www.pwc.com/gx/en/insights/pwc-annual-global-crypto-tax-report-2021.pdf.

4 Revenue, Tax and Duty Manual Part 02-01-03, April 2022.

variations of these terms." The guidance in this sense is broadly applicable to all crypto-asset transactions.

Trading or capital return?

The updated guidance reiterated (in line with the original, 2018 guidance) that, in Revenue's view, no special tax rules should apply to crypto-asset transactions. The taxation of income received from, or charges made in connection with, crypto-assets will depend on the nature of the activity and the parties involved. Therefore, parties must apply general tax principles when assessing the taxation of crypto-assets, and each case must be considered on its own individual facts and circumstances and by looking at the broader relevant legislation and case law. Therefore, the tax treatment of individuals and companies transacting in crypto-assets will depend on whether a trade of dealing in crypto-assets exists. Revenue states that a trade in crypto-assets would be similar to a trade in shares, securities or other assets. It has published guidance on trading in shares, securities and other assets that is drawn from extensive case law, and this guidance should be consulted when deciding whether the activity of buying and selling crypto-assets constitutes a trading activity. The threshold for trading treatment as set out in Revenue guidance is high, and taxpayers should be in a position whereby they can clearly support trading treatment and should consider factors such as level of activity and intent amongst other factors when analysing the position.

Where a trade does not exist, capital gains tax (CGT) rules should be applied, and the updated manual provides several worked examples of how to calculate the CGT due on the disposal of a crypto-asset that is not held for trading purposes. An important consideration for individuals undertaking transactions in crypto-assets is that PAYE employees, who may not otherwise have an obligation to file a tax return, could trigger such an obligation where they acquire and then "dispose of" crypto-assets. This may also trigger the requirement to make tax payments in line with the CGT payment deadlines.

The manual does not make any reference to the direct tax treatment of staking income (i.e. where certain blockchain network participants purchase and lock away a certain amount of tokens and earn a return for doing so) or mining income, although the VAT treatment of mining income is included. Based on observations from other jurisdictions, this area of guidance is likely to evolve over time – for instance, HMRC has recently issued guidance on the tax treatment of staking income.[5]

Valuation of transactions

Valuation plays a key role in tax transactions, in particular for related-party transactions that do not involve third parties. Given the incredibly volatile nature of the valuations of crypto-assets – particularly evident in recent weeks and months – and the potential for differing values to apply on different exchanges, the process of valuation may be challenging. The manual provides that taxpayers should make a "reasonable effort" to "use an appropriate valuation" for transactions. As referenced above in the context of related-party transactions, valuations are required for tax purposes, thus potentially requiring complex valuation support.

Given the current market, many taxpayers may seek to utilise losses triggered by the recent drop in value of Bitcoin and many other crypto-currencies against other gains; however, it should be noted that, in line with normal CGT rules, losses that arise on transactions between connected parties can be used only against gains that arise on transactions between the same parties and not more widely. There is no limitation on the use of capital losses that arise in a third-party context.

5 HMRC, Cryptoassets Manual, CRYPTO21200, 30 March 2021.

The manual further highlights that companies currently cannot prepare their financial statements in crypto-currency as crypto-currencies are not a functional currency for tax purposes.

Treatment of employee benefits

The updated manual notes that where crypto-assets are provided to an employee or director free of charge or for a reduced amount, normal benefit-in-kind rules will apply.

It is also noted that where an employee or director is given a right or option to acquire assets by their employer, which may include crypto-assets, Revenue's view is that "the tax treatment of such options should be similar to the tax treatment of the right or option to acquire share options" (including in respect of the tax and reporting obligations for both the employee and the employer).

Employees receiving remuneration in the relevant crypto-currency are taxable on the Euro equivalent on the date of payment, so in a scenario where the value of the crypto-currency has fallen, the Euro value on conversion may be much lower than the award on which the tax liability is calculated.

Remittance basis of taxation and assets "on the cloud"

With regard to the remittance basis of taxation and the situs of crypto-assets, the manual suggests that non-domiciled individuals will need to consider the Irish tax implications where they dispose of a crypto-asset and the location of that asset cannot readily be identified as being outside of Ireland.

Record keeping and crypto-assets

The manual notes that the general record keeping provisions apply to transactions involving crypto-assets as they apply to all other records relating to tax. Where these records are stored in a wallet or vault on a device such as a personal computer or mobile phone, the records must, when requested, be made available to Revenue, and the standard six-year retention period applies to this.

The manual does not address whether transaction records/information being contained on a blockchain would, in Revenue's view, constitute sufficient record keeping for crypto-asset transactions. Given the move to digital record keeping, this is an issue to monitor.

Significant Developments at OECD Level

While developments are happening at a local level, more broadly, the OECD took a significant step forward in developing a transparency framework for crypto-assets in March of this year, when it published a consultation on the framework it proposed to introduce, known as the Crypto-Asset Reporting Framework (CARF). The main aim of the CARF is to align the transparency and reporting requirements around crypto-assets with those for other, more traditional financial instruments under the Common Reporting Standard (CRS). The European Union is looking to implement the CARF through the drafting of DAC 8.[6] Until the development of this framework, tax authorities had no mechanism for visibility of transactions in crypto-currencies due to the gaps in the existing reporting frameworks, which focus on financial assets and as a result do not cover the decentralised nature of crypto-currencies and blockchain-based finance.

Overview of proposals

The CARF provides for a mechanism for the collection and exchange between tax authorities of tax information from persons facilitating and participating in the exchange of crypto-assets. The proposed legislation will apply to intermediaries such as wallet providers, crypto exchanges, brokers and crypto-asset service providers. As a consequence of the

6 European Commission, Tax Fraud & Evasion – Strengthening Rules on Administrative Cooperation and Expanding the Exchange of Information .

proposals, these providers will have new due diligence procedures to follow when onboarding clients, similar to those under the US FATCA (Foreign Account Tax Compliance Act) and the CRS. The proposals also involve a requirement to prohibit transactions where tax residence is not self-certified, and similar to the FATCA and the CRS, there will be a requirement to report on an annual basis to the local tax authorities. The local tax authorities will be responsible for enforcement of the rules once they are introduced.

The annual reporting arising from the CARF will involve a requirement to report the aggregate value of transactions per counterparty carried out during the calendar year. This goes beyond the requirements under the CRS and may be significantly more burdensome for intermediaries. The current draft proposals would require reporting on transactions using digital assets for goods and services (e.g. buying a car, paying for a coffee), and there are requirements for certain transactions to be reported at fair market value, which could prove challenging in some cases. Some potential exceptions may be introduced around *de minimus* thresholds and low-risk transactions/products, although further clarity will be required in this regard.

Expected implementation

In terms of timing of the advancement of these proposals, the consultation period for input from stakeholders closed at the end of April 2022. At that stage the OECD's Working Party No. 10 ran a session for industry input, and the intention is that it will provide feedback on this session and the consultation submissions by October of this year as part of the G20 meeting. There is currently no specific timeline for the introduction of these proposals, but the expectation is that the rules would come into effect possibly from 2024 or, more likely, 2025.

Taxpayers operating as intermediaries in the crypto-asset space or processing payments accepting crypto-currencies may be in scope of these rules and should start to consider the impact on their business and operating model, given that there may be a requirement to build new reporting systems and data collection mechanisms.

VAT Treatment of Crypto-Currency Transactions

There are interesting questions to be answered on the VAT treatment of crypto-currency transactions, and similar to the tax information reporting systems mentioned above, it remains to be seen whether the current VAT system for financial services is adequate to address these questions.

Case law

The VAT treatment of crypto-currency has thus far been considered in a single case before the Court of Justice of the European Union (CJEU) – *Skatteverket v David Hedqvist* C-264/14*.* This was a referral from Sweden, and the CJEU was requested to consider whether the exchange of Bitcoin for fiat (or vice versa) was a supply of services for consideration and, if this were the case, whether it was VAT exempt in accordance with the VAT exemptions for financial services contained in Council Directive 2006/112/EC ("the VAT Directive"). In particular, it was requested to consider whether the exemption contained in Article 135(1)(e) of the VAT Directive was applicable (i.e. the VAT exemption for transactions concerning currency, bank notes and coins used as legal tender).

The CJEU concluded that Bitcoin should be viewed as equivalent to fiat currencies. Therefore the exchange of Bitcoin for fiat currency was a supply of services for VAT purposes, and it was a transaction that was exempt from VAT, in accordance with the VAT exemption contained in Article 135(1)(e) of the VAT Directive.

The *Hedqvist* decision is referred to in the Revenue guidance discussed above. This outlines that Revenue agrees with the decision of *Hedqvist* and that it views the exchange of Bitcoin for traditional currencies as exempt from VAT pursuant to paragraph

6(1)(d) of Schedule 1 of the Value-Added Tax Consolidation Act 2010.

The decision of *Hedqvist* was welcomed as it brought some clarity to the VAT treatment of the area. However, the crypto-currency sector encompasses a wide range of different types of transactions and activities that are broader than this one, specific case.

Treatment of mining activities

The VAT treatment of crypto mining raises interesting questions, and it has not been considered by the CJEU or the Irish courts. Mining is the process by which coins are minted and blockchain transactions are validated. It is a central feature of crypto-currency networks that are using a "proof of work" protocol (e.g. Bitcoin).

The activity of mining involves miners expending computing power to solve equations for which they are rewarded with crypto-coins from the network. The equations are solved based on probability, and therefore there is an element of luck with regard to when a reward is issued to a miner.

From a VAT perspective, for a supply to be within the scope of VAT, it must be a supply made "for" consideration. This means that there must be a direct link between the supply and the consideration (i.e. reciprocal performance – "I am providing you this service in return for your paying me this amount"). In this respect, it has been questioned whether miners are supplying a service in return for receiving consideration from the network in the form of crypto-coins. This is on the basis that the crypto-coins issued by the network are to a degree based on luck and probability. Therefore there is a view that mining should be considered a non-business activity for VAT purposes as it is not a supply of services for consideration.

The VAT Committee, established under EU law to promote the harmonised interpretation of VAT law, considered the VAT treatment of mining in its working papers no. 1037 and no. 892.[7] The Committee questioned whether mining was a supply for consideration given that miners work anonymously, on a voluntary basis and the remuneration received from the network is based on an element of probability or luck. Revenue in its manual also indicates that the activity of mining does not constitute an economic activity for VAT purposes.

However, it is becoming more common for crypto-currency networks to provide for an additional transaction fee to be paid to miners. This is paid by users of the network to speed up the processing of transactions. It will also be the way that crypto-currency networks reward miners for validating transactions when all coins have been minted (for Bitcoin, the last coin is expected to be mined by 2140). Therefore it is likely to become more common for miners to earn income from transaction fees, and it may become more difficult to sustain that miners are engaged in non-business activities. This point was acknowledged by the VAT Committee in its latest working paper.

The categorisation of mining as a non-business activity versus an exempt supply of services may have important implications from a VAT recovery perspective. In general, VAT may be deducted on costs relating to exempt financial transactions where they are contracted with a non-EU counterparty, whereas VAT is not deductible on costs relating to a non-business activity. However, even in respect of the latter, it could be difficult to demonstrate that the transaction is with a non-EU counterparty, given that most crypto-currency networks are based on a decentralised principle with no central point of control. This example particularly highlights the ever-evolving nature of the crypto-asset industry and how the legislation

7 Document taxud.c.1(2022)1585400 – Working Paper No. 1037 and Document taxud.c.1(2016)689595 – Working Paper No. 892.

and guidance may need to evolve in tandem to ensure alignment.

Conclusion

The wider crypto-asset sector is a rapidly growing and evolving market. Tax authorities are struggling to keep pace with the level of innovation and technological developments in the crypto-currency and digital asset space and an ever-changing landscape. Traditional taxing concepts and rules may no longer be fit for purpose for these new types of assets and transactions. The OECD and EU proposals will be of particular relevance to those operating in the intermediary space, whereas for individual taxpayers, understanding the local tax treatment of transactions and crypto-currency-related activities will be key. As tax legislation, guidance and case law develop and evolve to address new transactions, assets and activities, careful consideration of the implications of any dealing in crypto-assets will be needed for individuals and businesses alike.

News and Moves

EY strengthens Island of Ireland partnership with a record 27 new Equity Partners including 5 new Tax Partners

Aoife Murray leads EY's Transfer Pricing Team. Aoife has been working in international tax and transfer pricing for 15 years, in Ireland and the US. Her experience includes planning projects, transfer pricing audits, advance pricing agreements, mutual agreement procedures and compliance documentation.

Brian Kelly joins the partnership as part of the International Tax and Transaction Services team where he is a TMT sector Tax and Law leader. Brian provides international tax consultancy services to a broad range of EY clients across a number of areas.

Alison McHugh has joined EY as a Partner in Tax and leads the Private Client Services Team. Alison has 20 years' experience working with high-net-worth individuals and their families advising them on all aspects of their tax affairs. She also works with private companies advising them on a wide range of issues including corporate restructuring and M&A.

Michael Johnson leads EY's Accounting Compliance and Reporting Team. Michael joined EY in 2001 and has 19 years of financial accounting and compliance experience across a vast array of industries. He focuses on helping clients meet their financial accounting and compliance requirements.

John Farrelly has been admitted as Partner, leading Digital Transformation & Technology. John employs his skills in innovation and digital transformation to support people and organisations, aiming to help create more value. He advises in the areas of business analytics, big data, process automation, decision science, data management and business value.

BDO in Ireland is delighted to announce the appointment of Derek Henry as Head of Tax

Derek's role will see him build on the success of the tax services team to date and lead BDO's client offering across Financial Services, Transfer Pricing, Customs and International Trade, R&D tax credits, Employment Taxes and Private Clients. Derek has been with the firm since 2006 and has over 20 years' experience as a tax advisor.

ByrneWallace LLP Promotes Colin Bolger to Partner

Colin Bolger advises clients on all aspects of their national and multi-jurisdictional tax matters. He has extensive experience delivering tax advisory services to many of Ireland's leading private and public sector organisations, international corporations, financial institutions, as well as private clients. He regularly advises on the tax implications of mergers and acquisitions, group reorganisations and restructurings, debt financing, structured property deals and specific investment proposals.

ByrneWallace LLP Promotes Fergal McConnon to Associate

Fergal is a practising solicitor and Chartered Tax Adviser with extensive experience in the delivery of tax and legal advisory services to many of Ireland's leading private and public sector organisations and international companies. He also works with individuals and their families, advising them on estate and succession planning and optimal holding structures for investments.

Doyle Keaney to Circulo

Following a recent rebrand we will now be advising you under the new name of Circulo. Circulo is a boutique tax advisory firm that offers full circle corporate advice underpinned by tax expertise. Circulo works with leaders in family businesses, professional services firms, Irish SMEs and investors. With extensive top tier advisory experience, our people are highly qualified professionals.

Our services include corporate transactions and planning; shareholder exit planning; business succession planning; private client and succession planning; inbound and outbound investment; revenue engagements, audits and appeals; and compliance services.

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EisnerAmper Ireland appoints Brian Frawley as Partner in the Firm's Tax Department

EisnerAmper Ireland is delighted to announce the expansion of their leadership team with the appointment of Brian Frawley as partner in the firm's Tax Department. Brian leads the provision of the firm's International Tax Services to financial services entities and internationally based corporate and private equity clients doing business in and through Ireland.

Smith & Williamson Ireland rebrands to Evelyn Partners Ireland

Smith & Williamson has recently rebranded to Evelyn Partners across Ireland and the UK. Evelyn Partners continues to operate as a leading tax and accountancy firm, with a substantial wealth management offering. Evelyn Partners Ireland Head of Tax, Michael McGivern commented "*Our rebranding is an exciting chapter in our development. We also have exciting growth plans and look forward to continuing to attract talent to help us achieve these goals.*"

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