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Colm Browne
President, Irish Tax Institute

Introduction

The final quarter is always busy for the Institute and its members, and this year was no different. It kicked off with the publication of the Report of the Commission on Taxation and Welfare on 14 September. A comprehensive and thought-provoking report that contained no fewer than 116 recommendations, it has been the subject of much comment in the media throughout the quarter.

Speculation about Budget 2023 had started in the Summer, and by the time it was announced on 27 September – a week earlier than usual – much of its contents had already been well trailed. Nonetheless, at a cost of €11 billion, the sheer magnitude of the overall package certainly made a splash.

Three weeks later, Revenue announced that the Tax Debt Warehousing scheme would be extended until May 2024. The extension came as a great relief to small business owners who have been hit by exponential increases in energy prices throughout the year. It was also very welcome news for tax practitioners who had been facing the daunting prospect of getting Phased Payment Agreements over the line for their clients on top of their heavy Pay & File workload.

Meanwhile, the Finance Bill has been winding its way through the Oireachtas, and Revenue guidance on the operation of the Temporary Business Energy Support Scheme has been issued.

All these fast-moving developments have been punctuated by the return of some very welcome events that made all the difference to the run-up to the end of 2022. After two Christmases of restrictions, the freedom to gather and celebrate has been given back to us. And despite the uncertainty that continues to shroud the world, there is palpable relief that science and human endeavour has bested the pandemic.

Conferring Day

The big event of my term so far has been the Conferring Ceremony, on 24 November 2022, which returned to the O'Reilly Hall in UCD for the first time since 2019. This year, we had 301 newly qualified CTAs and 26 Tax Technicians being conferred. It has always been the happiest occasion in the Institute's calendar year, and it was my great fortune as President to be there in person to share in the joy and pride of our newest members and their families.

Our students from Revenue were also conferred on the day, 68 of whom were awarded certificates, and 56 graduated as Tax Technicians. It's eight years since we first embarked with Revenue on this collaborative educational project, and the Institute is very proud that the courses it provides complement Revenue's own training and development programme. Long may it continue.

It was also a great privilege to award a Fellowship to our highly respected member colleague Paul Nestor. I worked with Paul in BDO at an earlier stage in my career, and I know he richly deserves this accolade from the Institute for his expertise on the Finance Bill which he has shared with members over recent years. He also co-authored *Practical Income Tax – The Professional's Guide* for the Institute.

The Conferring Day was a great success, and well done to our Director of Education, Martina O'Brien, and all the team at the Institute for organising such a professional event. From my interaction with the graduates on the day, I am happy to report that the future of the tax profession is safe and in the hands of a very talented and enthusiastic group.

Budget 2023

The Budget was framed in the context of a growing cost-of-living crisis and looming recession among our main trading partners. As I write, the latest inflation numbers are marginally down due to falling energy prices, but they could rise again if a hard winter eats into gas supplies built up across Europe. Fears of a sharp recession in the EU have also receded somewhat, though much depends on what happens in the war in Ukraine.

Here, at home, the latest economic data suggests the cost-of-living pressures will lead to some reduction in economic activity. Although the latest employment data shows that the numbers at work continue to rise, we know that global retrenchment in the tech sector will lead to jobs losses in Ireland. This sector has been the fastest-growing source of employment over the last five years and is among the largest contributors to the exchequer. Any sustained downturn could have serious consequences for our economy.

As always in Ireland, our ability to attract investment is critical. In that respect, the personal tax changes introduced in Budget 2023 were a significant step in the right direction. Broadening the tax bands and increasing the income tax credits will strengthen Ireland's competitiveness at a time when a move to an agreed global minimum corporate rate is in prospect.

Supporting SMEs

The Temporary Business Energy Support Scheme (TBESS) was another important budgetary measure aimed at SMEs struggling with spiralling energy bills and other input costs. The Institute and its members will work with Revenue, as we did during the Covid-19 crisis, to ensure this scheme operates effectively to enable eligible businesses to continue their post-pandemic recovery. TBESS has now opened, and Revenue will start paying out for valid claims when the Finance Bill is signed into law.

As I already mentioned, the decision to extend the Debt Warehousing scheme, announced after the Budget, is critical to the small businesses most impacted by the pandemic. Many of these businesses were just beginning to see light at the end of the tunnel when inflation started to spiral. No doubt, some will fail, but many will survive and will be in a position to start repaying their debt to the exchequer by the new deadline of May 2024.

The Government's use of one-off measures to support households during the current crisis is prudent and fiscally sustainable. Record-breaking exchequer receipts which amounted to €77.5 billion for the year to end November has given to Government the fire power to fund that support. Receipts from Income tax and Corporation tax combined, accounted for €49.4 billion of the overall take.

Report of the Commission on Taxation and Welfare

The need to rebalance our tax system was a key theme in the Report of the Commission on Taxation and Welfare, whose guiding objective was the broadening of the tax base.

We agree with many of the tax base-broadening measures proposed by the Commission. In many respects, its recommendations echo suggestions included in the submission the Institute made to the Commission last January.

However, we have reservations about some of the Commission's recommendations. For example, the proposal to treat the transfer of assets on a death as a disposal for CGT purposes. This would involve two different taxes being levied on the same event. This would be a major change to the tax code which, in many cases would result in the CGT payment being offset against the CAT liability.

At a meeting of the Oireachtas Budget Oversight Committee to discuss the Commission's Report in mid-November, our Director of Tax Policy and Representations, Anne Gunnell and Council member, Brian Brennan said that if enacted, this proposal would make the process of administering an estate difficult and costly for ordinary taxpayers, with minimal yield for the Exchequer. Indeed, the Commission itself recognises that the net revenue gain for the Exchequer would be limited.

The Commission also recommends restrictions to some CGT and CAT reliefs relating to retirement and agricultural and business assets. The Institute agrees that these reliefs should be subject to review. But, as Anne and Brian pointed out to the Committee, there are clear policy objectives underpinning these measures, and chief among them is facilitating the smooth transfer and continued operation of income-generating farms and businesses all over the country.

It should be acknowledged that the Commission's Report is not blind to these issues and accepts that detailed consideration at both a policy and an operational level would be required before enacting its recommendations. The Institute will host a seminar on the Report early in the new year.

Southwest Region Members' Lunch

I referred earlier to the welcome return of some regular events that had to be postponed during the pandemic. One of them was the Southwest Members' Lunch, which kicked off the Festive Season in earnest at the Metropole Hotel in Cork City on 1 December. We had a record turnout of 91 members from across the region. Our guest speaker was the renowned RTÉ sports broadcaster Michael Lyster, who regaled us with stories from behind the scenes on *The Sunday Game*. It was truly heart-warming to see colleagues coming together for this lunch after a three-year absence. Nothing beats face-to-face gatherings for members, and facilitating such gatherings in the regions is a priority for the Institute. It was a memorable lunch and a privilege to be there.

Happy Christmas

It's been another eventful and busy year for the profession, and for all the uncertainty and challenges we face, there is much to be grateful for in this first post-pandemic Christmas. On behalf of the Institute, I wish you a happy and restful Christmas in the company of your loved ones and a peaceful year ahead for all of us.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

From the lifting of Covid-19 restrictions and a war on European soil to an energy and cost-of-living crisis, 2022 has thrown up unexpected challenges for you and the businesses you support and the Institute works tirelessly to continue to provide you with the technical insights and representations you need. Thankfully, we have also been able to come together in person multiple times this year, and we look forward to building on these new and old connections in the coming year.

Conferring Day

For the first-time since 2019, we welcomed our recently qualified CTAs and Tax Technicians to membership at an in-person Conferring Ceremony on 24 November 2022. It was wonderful to be back in UCD's O'Reilly Hall, where the families and friends of conferees were able to express their pride in the great achievement of our newest members. Congratulations to our 301 new CTAs and 26 Tax Technicians – I hope that you enjoyed your moment. In addition to welcoming our new members, our President, Colm Browne, presented a Fellowship to Paul Nestor, for his dedication and contribution to tax throughout his career. He also awarded scholarships to our Third-Level Scholars from 2020, 2021 and 2022. Photos of the special evening can be found here.

Just before the 2022 Conferring Ceremony, 19 sponsored awards were presented. It is quite an achievement to become a qualified CTA, but to excel is exceptional. Well done to all our prize winners and I would like to thank each of the 12 sponsoring firms for their continued support of our CTA programme.

Earlier in the day, the Institute jointly hosted a conferring ceremony with Revenue, where the Revenue Chairman, Niall Cody and our President presented over 120 conferees with a range of Certificates and Tax Technician qualifications. The Institute is proud to work in partnership with Revenue in the training of its officers. We believe this collaboration benefits all of us who work in tax in Ireland.

Promoting a Career in Tax

The end of autumn is a busy time of year for our career in tax promotion. The team travelled throughout the country, attending 13 career fairs to meet students face-to-face. Our own virtual Career in Tax Fair garnered great engagement between the 18 member firms and students. Hopefully the genuine interest expressed by many of the students will result in them pursuing a career in tax.

Currently, we are conducting research into the complex landscape of graduate recruitment and the positioning of tax as a first choice for graduate careers. The findings should enable us to b to support our member firms in attracting a wider pool of graduates into the tax career path.

Policy and Representations

As usual, the last three months of the year were busy for the Tax Policy & Representations Team. Budget 2023 and Finance Bill 2022 were announced, the lengthy Commission on Taxation and Welfare (CoTW) report was published, and the Institute met with members of the European Parliament Subcommittee on Tax Matters (FISC) and appeared before the Oireachtas Committee on Budgetary Oversight, all in tandem with TALC and the Branch Network. TaxFax included these updates as they happened.

Branch Network

The Branch Network is an important forum, facilitating constructive discussions between your Institute and Revenue on administrative issues. On 4 October a complimentary Branch Network webinar was streamed, where members could hear directly from Revenue officials on a wide range of matters, including the debt warehousing scheme, pay and file, and the resumption of debt collection and enforcement. There was a high level of participation, with more than 600 members tuning in live for Revenue's presentation and the following Q&A session.

The annual cycle of Branch Meetings with Revenue's operational divisions began in autumn, with meetings with Large Cases – High Wealth Individuals Division (LC-HWID) and Business Division taking place. Members will be updated on developments from these meetings in due course.

Meeting with MEPs from FISC Subcommittee

A delegation from the Institute met with visiting Members of the European Parliament in September, who were in Dublin was to discuss topical international tax issues and challenges. The Institute was asked about two specific issues: the proposed "Unshell Directive" and Ireland's position on the unilateral implementation of the EU Minimum Tax Directive in the absence of unanimity among Member States.

On the first question, although supportive of the objective of preventing the misuse of shell entities, the Institute noted its misgivings about the timing and certain technical aspects of the draft Unshell Directive.

On the second matter, we highlighted how unanimity on tax issues has worked well in delivering many areas of reform within the EU and that we would encourage Irish policy-makers to continue to work with their European counterparts to reach a unanimous agreement on the EU Minimum Tax Directive.

Appearance Before Oireachtas Committee on Budgetary Oversight

The Institute was invited to appear before the Oireachtas Committee on Budgetary Oversight as part of the latter's ongoing scrutiny of the CoTW report. The focus was on four chapters (6, 7, 8 and 14). Our representatives, Anne Gunnell, Director of Tax Policy & Representations, and Brian Brennan, Council Member and Chair of the Institute's Policy & Technical Committee, broadly welcomed the report while highlighting the concerns on certain aspects, in particular, some of the recommendations surrounding CGT and CAT.

Budget 2023 and Finance Bill 2022

The Institute broadly welcomed the Budget measures announced against a backdrop of high inflation and an energy and cost-of-living crisis. The change to the entry point for the highest income tax rate will help to address the unfair burden on middle-income earners and incentivise people to work. Another welcomed measure was the introduction of the Temporary Business Energy Support Scheme (TBESS) to support businesses with their spiralling energy costs. We actively engaged with Revenue after the announcement around the administration of and qualification criteria for the scheme. The TBESS is open for claims, and we have created a dedicated webpage with updated guidance from Revenue so you can find the relevant information in one place.

On the night of Budget 2023 the Institute's President, Colm Browne, joined a panel of sector representatives to give their initial reaction to the Budget. From our offices, the lively panel discussion was streamed to more than 400 registrants. The next morning, the Technical Briefing went through the measures in detail and what they mean for CTAs and their clients. Thank you to our speakers for their insights – Elaine Berkery of Eastway Reliability, Fergal O'Brien of Ibec, Kate Newman of KPMG and Mark Barrett of RDJ. Colm Browne was also joined by economist Austin Hughes on Tax Talk the week after the Budget to give their opinions on the longer-term impact on business, our competitiveness, and the direction of economic and social policy that the sizeable Budget 2023 will have.

After a quick "breather" post-Budget, the Finance Bill 2022 provided us with the real details on how the measures will be implemented and applied. Thank you to all who raised your concerns with us – the Tax Policy and Representations team has had multiple engagements with the Department of Finance and Revenue on different elements of the Bill as it has progressed through the Houses of the Oireachtas. The Bill is expected to be enacted later this month. Emma Arlow of *Deloitte* and Brendan Murphy of *Roberts Nathan* analysed Finance Bill 2022 for you in the first part of our Finance Bill & Act 2022 seminar series. The second part will take place in February 2023, once the Bill has been enacted.

CPD Winter Programme

After slowing down during Pay and File season, the winter CPD programme has fully resumed until the week before Christmas. The broad programme caters for CTAs working in all areas of tax and was created to help you to meet your CPD requirements for 2022. All available seminars are on taxinstitute.ie, including the Finance Bill & Act 2022 series, the Certificate in VAT, and our new Tax, Technology and Data series.

Connecting with Old Friends

I am delighted that the Institute was able to hold two lunches that we've missed over the last couple of years. In November, we welcomed our Past Presidents to our offices in Grand Canal. This is always an enjoyable occasion but was somewhat muted this year with Past President Paul Moore noting the absence of Terry Cooney who sadly passed away during the year.

Our President hosted the South-West Region Members Lunch welcoming a record turnout of members from surrounding counties to Cork City for delicious food, good conversation and a wide ranging talk from our guest, Michael Lyster, former Irish radio and television broadcaster. Thank you to everyone who joined us, you can view photos from the event here.

Looking to 2023

As this year comes to an end, we are already looking forward to 2023. A number of important events are planned for the first half of the year including the Annual Dinner which takes place on 24 February and the return of an in person Annual Conference. The conference will be held in its usual home in Galway and will take place from 30 March to 1 April.

Rest in Peace

In sad news, on behalf of all in the Institute, I would like to send my condolences to the families and friends of Caitriona Gaynor, who passed away on 15 October 2022, and of Richard Grogan, who passed away on 22 November 2022. Caitriona was a co-author of the Institute's third-level textbook *Irish Taxation: Law and Practice*, and Richard, known to many in the legal and tax community in Ireland, authored "Legislation Events" in *Irish Tax Review* from 1988 to 2010. May they rest in peace.

Thank You

May I take this moment to wish you and your loved ones a healthy and safe festive period and a Happy New Year. Thank you for continuing to support the Institute throughout 2022.

Terry Cooney: An Appreciation

Written by **Paul Moore**

Terry Cooney has died. It is with a heavy heart that I write those words. Even though Terry had been ill for many years, his death came as a major shock. Right up to the end, he was receiving visitors and, although struggling, would keep up his smiling presence and engage in reminiscences with great humour and clarity. The wonderful smiling photograph of him that accompanies this article was taken by his son John only this summer and illustrates his indomitable spirit. Many people from the tax, business and sporting worlds visited Terry during those last few months and were a great help to him and his family.

Terry was a founder member of the then Institute of Taxation in Ireland and attended the legendary first meeting in the Presbyterian Association Hall on St Stephen's Green that approved the foundation of the Institute. One of the first tasks that the Institute set itself was to produce a summary book of the Irish tax system. Right from the beginning, Terry and colleagues the late Jim McLaughlin and Paschal Taggart stepped up to the plate and were the initial co-authors of *Taxation Summary*, which went on, under changing authors, from being a booklet to a much-consulted tome on all aspects of Ireland's taxes. In later years Terry acted as editor of the publication.

Pictured at the presentation of Fellowships for distinguished services were: Back Row L. to R.: Robert Johnston, Derry O'Hegarty, Edmond Cummins, Patrick Maguire, Jim McLoughlin, Terry Cooney. Front Row: L. to R.: Norman Bale, Jim O'Sullivan (President), Donald McLean and Oliver Fry.

Terry contributed hugely to the Institute in other ways, chairing the Education Committee for many years. The apotheosis of his contribution was as President of the Institute in the years 1988–1989. The big event during his term was the introduction of self-assessment, which transformed the administration of our ancient tax system inherited from Westminster. Terry embraced these changes and went as far as visiting the USA and Canada with me before his election as President to see how such a system worked there. His positive and radical attitude as a leader of the profession contributed immensely to the successful introduction of self-assessment.

In the early 1990s Terry served on the main TALC board and was a key member of the TALC VAT sub-committee at a time when VAT was undergoing major transformation with the introduction of the Single Market in the EU.

Apart from his family, Terry's private passion was hockey. This in itself was astonishing because he was a native Dubliner engrossed in Gaelic games and the county teams. He had attended every All-Ireland hurling and football final since the early 1950s. He had a prodigious memory for names of teams and scorers in every final over the years. Yet with Teresa, his wife, he devoted his leisure time to hockey and the development and promotion of Glenanne Hockey Club.

He managed both the youth and the men's senior sides in Glenanne, achieving great success at Leinster and All-Ireland levels. He was as widely liked and appreciated in Irish hockey circles as he was in the profession and in GAA circles.

On the social scene, Terry could light up a room. People edged towards him – they knew that this was where the fun and humour would be. Terry's big smile, sparkling eyes and sense of humour kept everyone at a roar. In the good old days his party piece was *Are You Lonesome Tonight?*, where he did a take-off of Elvis that would reduce his audience to helpless laughter.

Then there was the caring and helping Terry. He had a very wide range of friends. People might say contacts, but Terry nearly always made friends. If anyone needed a helping hand, Terry was unsparing in helping and making the right introduction: he got many people over the stile. He was a caring and loyal friend.

Candidaıes who passed the Final Examination held in June 1988 with (centre) Mr Terry Cooney, President of the Institute and on his left, Mr Tadhg O'Donoghue, Craig Gardner & Co.

Don Thornhill said of Terry:

> "He truly was a remarkable man. He brightened up any company with his humour and anecdotes and insights. His bonhomie went hand in hand with a keen intellectual and emotional intelligence. I always appreciated his analysis and advice."

A lovely summary, reminding us that Terry was not just a great presence in our lives but a top tax consultant, and his services were in high demand. After taking a BComm and MEconSc in UCD, Terry joined the Revenue Commissioners as an Inspector of Taxes. He left Revenue and joined Griffin Lynch, and then moved to Cork for a while with McCarthy Daly Stapleton. Returning to Dublin, he became a partner in McGrath & Co. for some time, before joining Bastow Charleton & Co. as a partner. And along the way he qualified as a Chartered Accountant and a Chartered Certified Accountant. Terry enjoyed many happy days in those firms and made many lifelong friends there, but eventually he and his old friend Paschal set up Cooney Taggart, which is where he spent the rest of his working life. He acted in many leading cases throughout the course of his career, and we worked together on cases on occasion, where I had the opportunity to observe his keen intellect at first hand.

Terry will be sorely missed as long as any of us who were privileged to know him well are alive. Although the saying is often used, it is never more true than about our friend Terry: Ní bheidh a leithéid arís ann.

We offer our deepest sympathy to Teresa, his children, John, Emer and Brendan, grandchildren and other family members.

From left: Mr Finian Breheny, President 1987/88, Mrs Breheny, Mrs Anne Brennan, Mr Seamus Brennan TD Minister for Trade and Marketing, Mrs Teresa Cooney and Mr Terry Cooney, President, 1988/89 at the annual dinner of the Institute in the Burlington Hotel on Friday, 4 March 1988.

Policy and Representations Monitor

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

News Alert

Key tax measures in Budget 2023 and Finance Bill 2022

On 27 September the Minister for Finance, Paschal Donohoe TD, and the Minister for Public Expenditure and Reform, Michael McGrath TD, delivered Budget 2023. This was followed by the publication on 20 October of Finance Bill 2022, which introduced several additional measures not announced on Budget Day.

In a press release following the publication of Finance Bill 2022 (as initiated), Minister Donohoe confirmed that draft legislation relating to several measures that were announced on Budget Day would be introduced at Committee Stage, rather than in Finance Bill 2022 (as initiated). The Finance Bill 2022 Committee Stage amendments were published on 9 November.

The key features of Budget 2023 and Finance Bill 2022 (as initiated), including Committee Stage amendments, are outlined below.

Personal tax

- Increase in the ceiling of the 2% USC rate from €21,295 to €22,920 to ensure that it remains the highest rate of USC paid by full-time minimum wage workers when the national minimum wage increases to €11.30 on 1 January 2023.
- The reduced USC rate of 2% that currently applies to full medical card holders aged under 70 whose aggregate annual income is less than €60,000 is extended until the end of 2023.
- Increase of €3,200 in the standard rate income tax band to €40,000 for single individuals and €49,000 for married couples/civil partners (with one earner) for 2023 onwards.
- The personal tax credit, employee tax credit and earned income tax credit will each increase by €75 to €1,775 for 2023. The home carer credit will be increased by €100 to €1,700 from 2023 onwards.
- The weekly income threshold for the 11.05% rate of employers' PRSI will be increased from €410 to €441 from 1 January 2023. This will ensure that the 8.8% rate of employers' PRSI will apply to workers on the minimum wage once it is increased on 1 January 2023.
- The Help to Buy scheme will be extended for a further two years, to 31 December 2024.
- Introduction of an exemption from income tax, USC and PRSI for ex gratia payments made by or on behalf of the Minister for Children, Equality, Disability, Integration and Youth in respect of an incorrect birth registration.
- Increase to the annual limit for the small benefits exemption from €500 to €1,000. Employers are permitted to provide an employee with two vouchers in a single year, provided the cumulative value of the two vouchers does not exceed €1,000. The increased limit applies from the 2022 tax year onwards.
- Amendment to s118 TCA 1997 to extend the benefit-in-kind (BIK) exemption to cargo bicycles and increase the threshold that

applies to cargo bicycles to €3,000. The amendments apply from 1 January 2023.

- Introduction of a new s897C to Part 38, Chapter 3, of TCA 1997, which provides for an electronic return to be submitted by an employer where, in any income tax month, an employer provides "reportable benefits" to an employee. A "reportable benefit" means a small benefit (i.e. a benefit to which s112B TCA 1997 applies), a remote working daily allowance (i.e. payment of up to €3.20 per day for the employee performing duties from home), and a travel and subsistence payment (i.e. payment in respect of travel or subsistence incurred by the employee where tax has not been deducted). It is intended that there will be a stakeholder engagement process, and this section is subject to a Ministerial Commencement Order.
- Amendments to s480B TCA 1997, which provides for relief in a "Week 53" scenario, to extend this relief to the sea-going naval personnel credit from 1 January 2023. The sea-going naval personnel credit is extended 31 December 2023.
- Where the home carer tax credit applies, the income threshold to determine the level of the credit will be increased proportionately depending on how the individual is paid, putting this administrative practice on a statutory basis.
- Introduction of a new s473B to TCA 1997 to provide a new tax credit for renters in the private sector who are not in receipt of other State housing supports. The value of the credit is the lesser of 20% of the qualifying payment and €500, or €1,000 for a jointly assessed couple. The rent tax credit is available for the tax years 2022 to 2025 inclusive on submission of a claim to Revenue.
- Extension to the end of 2025 of the foreign earnings deduction (FED), which provides relief from income tax on up to €35,000 of income for employees who are tax resident in Ireland and who travel out of the State to temporarily carry out employment duties in certain qualifying countries.
- Extension until 31 December 2025 of the Special Assignee Relief Programme (SARP) and an increase in the income threshold to avail of SARP from €75,000 to €100,000 for relevant employees who arrive in Ireland in the tax years 2023, 2024 and 2025. In addition, in respect of individuals arriving in Ireland from 2023 to 2025, the individual must have been issued with a PPSN to be considered a "relevant employee" for SARP. Furthermore, the certification that an employer must provide to Revenue within 90 days of an employee's arrival in the State will include confirmation that the employee has complied with the requirement to have a PPSN and that the relevant employer or associated company has complied with the PAYE Regulations relating to the commencement of employments (i.e. Regulation 17(2) of the Income Tax (Employments) Regulations 2018 (SI 345 of 2018)).

Pensions

- Introduction of a new s200A to TCA 1997, which provides that, from 1 January 2023, an individual who is paid a lump sum from a foreign pension that is not subject to the provisions of s790AA (which deals with the tax treatment of Irish pension lump sums) may claim a tax-free exemption of €200,000 on the lump sum. Amounts in excess of this tax-free limit are subject to tax; the portion between €200,000 and €500,000 is taxed at the standard rate of 20%, and any amount above that is taxed at the individual's marginal rate of tax and USC. The standard rate charge is effectively ring-fenced so that no reliefs, allowances or deductions may be set against the portion of a lump sum subject to that charge. The limits are lifetime limits, meaning that all lump sums from a foreign pension arrangement that are paid to a resident individual after 1 January 2023 will use up these limits. In addition, all prior lump sums received that were subject to the provisions of s790AA and paid before or after 1 January 2023 will count towards the limits. The portion of a lump sum that is charged at the standard or marginal rate of income tax is regarded as Case III income of the individual for the tax year in which the lump sum is paid and, accordingly, is subject to income tax self-assessment provisions.

- Introduction of a new Chapter 2D to Part 30 TCA 1997, which provides for the taxation and relief rules for the Pan-European Personal Pension Product (PEPP), as required under Regulation (EU) 2019/1238. The PEPP is an EU-wide voluntary personal pension scheme that aims to complement existing public and occupational pension systems, as well as national private pension schemes.
- Amendment to s118 TCA 1997 to exempt employer contributions to an employee's PRSA or PEPP from BIK. In addition, sub-section (2) of s787E TCA 1997, which treated both employer and employee contributions to a PRSA for the purposes of the tax relief as if they had been made by the employee, has been deleted as this is no longer required following the abolition of the BIK charge.

SMEs and supports for enterprise

- The Bill included three amendments to Part 16 TCA 1997 in respect of the Employment Investment Incentive (EII), Start-Up Relief for Entrepreneurs (SURE) and Start-up Capital Incentive (SCI) schemes. Section 500 TCA 1997 has been amended to provide an exception to the connected-persons provisions in respect of persons who are partners solely as a result of being partners in a partnership constituting a qualifying investment fund within the meaning of Part 16 TCA 1997. This exception does not extend to partnerships arising in any other circumstances, and it is confined in its application to Part 16 relief only. In addition, modifications to s508A TCA 1997 have been made to amend the information to be included in a statement of qualification (SOQ) to reflect the amendment made by Finance Act 2019 to allow relief in respect of the full investment made under the EII and the SCI schemes to be claimed in the year of investment. Finally, s508U TCA 1997 has been amended to provide that, where the legislation requires, the full amount of the EII relief claimed by an individual investor may be recovered from the company in which the investment has been made for investments made on or after 1 January 2023.
- Introduction of the legislation relating to the Temporary Business Energy Support Scheme (TBESS), as follows:
  - Case I trades and Case II professions, together with charities and approved sporting bodies that carry on certain activities that would be chargeable to tax under Case I or Case II but for an available exemption, are eligible businesses for the scheme. The definition of eligible business was amended at Committee Stage to exclude credit institutions and financial institutions.
  - To be a "qualifying business" the eligible business must satisfy certain conditions – in particular, it must pass an "energy cost threshold" to submit a claim for a claim period. There must be at least a 50% increase in the business's natural gas/ electricity average unit price between the relevant bill period in 2022 and the corresponding reference period in 2021.
  - Once the eligible business has passed the energy cost threshold in relation to a particular electricity and/or gas bill, and it satisfies certain other conditions, it is regarded as a qualifying business and is entitled to claim a Temporary Business Energy Payment (TBEP). This amounts to 40% of its "eligible cost", which is subject to a cap of €10,000 or €30,000 (where the business operates in multiple locations that are not adjacent to each other) for each monthly claim period.
  - The scheme falls under the European Commission Temporary Crisis Framework (TCF) and is subject to State Aid approval before payments can be made. A number of amendments were made to the scheme at Committee Stage, including extending the end date of the "specified period" from 31 December 2022 to 28 February 2023, in line with the European Commission's decision to prolong and amend the TCF. Finance

Bill 2022 (as initiated) provided that the Minister for Finance can extend the TBESS, by Ministerial Order, to no later than 30 April 2023.

- The Committee Stage amendments also include provisions to allow the Minister to vary the €10,000 per trade per claim cap, by Ministerial Order.
- The Committee Stage amendments reflect increases announced by the European Commission to the ceiling for aid for a single undertaking under the TCF to €2m per undertaking (the lower caps applicable to businesses engaging in agriculture and those in the fishery and aquaculture sectors have also increased, to €250,000 and €300,000, respectively).
- The definitions of gas and electricity bills were amended at Committee Stage to include statements for prepaid metered supplies of electricity and natural gas.
- Committee Stage amendments provide that where a person makes a claim that is not permitted and it has not been repaid, the overclaim will be treated as income tax due and payable from the date that the TBEP was paid to the claimant, and interest will accrue accordingly. The provisions of the Income Tax Acts will apply as regards collection and recovery of this relevant tax.
- Committee Stage amendments also provide that Revenue may consult with the electricity/gas suppliers to verify a claim and may serve notice in writing to the supplier to furnish information that the Revenue officer may reasonably require in relation to a claim, within no less than 30 days of the date of the notice; otherwise, the supplier will be liable to a penalty of €1,000.
- In addition, Committee Stage amendments provide that claimants are required to maintain records to support their claim for a period of 10 years from the end of the period to which the claim relates.
- Revenue published version 1 of its "Guidelines on the Operation of the Temporary Business Energy Support Scheme" on its website on 27 October. Once the Finance Bill has been enacted, further details of this scheme and other supports for SMEs will be outlined in the next issue of *Irish Tax Review*.

- Significant amendments to the Key Employee Engagement Programme (KEEP) provisions in s128F TCA 1997 were introduced at Committee Stage. The Finance Bill (as initiated) is amended by the insertion of new ss13 and 14, which repeal and reinsert the definitions that were enacted in Finance Act 2019 (but were subject to a Ministerial Commencement Order) in relation to a "qualifying group", "qualifying subsidiary", "qualifying share option", "qualifying individual" and "relevant subsidiary". The definition of a "qualifying share option" includes a requirement that the shares that are acquired on the exercise of the share option are "new ordinary fully paid up shares". A number of other amendments are subject to a Ministerial Commencement Order, including: the KEEP has been extended for two years from 1 January 2024 to 1 January 2026; the lifetime company limit for KEEP shares has been increased from €3m to €6m; and a new sub-section (6A) has been inserted in s128F to enable CGT treatment to apply to the buy-back of KEEP shares by a company from a relevant employee.
- Committee Stage amendments were made to the interest rate that applies to late payments of relevant tax on share options, reducing it from 0.0322% to 0.0219% (per day or part of a day). In addition, Schedule 29 TCA 1997 is amended to include s128C(15) TCA 1997 in Column 3, which will enable Revenue to apply a penalty in cases of non-compliance with the requirement to file the return (Form RTSO1), as required under s128C.

R&D tax credit

- A number of changes to the R&D tax credit were introduced in the Bill to align the credit with new international definitions of refundable tax credits.[1] The changes are timing changes and do not affect the quantum of credit that a company is entitled to claim. The amendments introduced are:

- The current system of offsetting the R&D tax credit against corporation tax liabilities and providing for payment in three instalments is being changed to a new three-year fixed payment schedule.
- A company will have an option to call for payment of its eligible R&D tax credit or to request for it to be offset against other tax liabilities.
- Existing caps on the payable element of the credit are being removed.
- The first €25,000 of a claim on R&D expenditure will now be payable in full, to provide a cash-flow benefit for smaller R&D projects and encourage more companies to engage with the regime.
- Pre-trading expenditure incurred on qualifying R&D activities can be claimed as a payable R&D tax credit over a three-year period from the year that the company commences to trade.

- Section 766B is amended to remove the caps that were imposed on the amount of the payable R&D tax credit, for accounting periods beginning on or after 1 January 2022.
- Two new sections are being introduced – s766C (relating to R&D expenditure other than on a building or structure) and s766D (relating to qualifying R&D expenditure on a building or structure) – to apply for accounting periods beginning on or after 1 January 2022. These sections introduce the new system for payment or offset of the R&D tax credit. A company will have the option to specify whether the R&D tax credit should be offset against the company's tax liabilities or paid to the company.
- Section 766C provides that the R&D tax credit in respect of qualifying expenditure (other than expenditure on buildings or structures) will be payable over three years, as follows:
  - The first payable instalment, in year 1, shall equal the greater of:

    €25,000 or, if lower, the amount of the R&D tax credit and

    50% of the amount of the R&D tax credit.
  - The second payable instalment, in year 2, shall be three-fifths of the remaining balance of the R&D tax credit.
  - The last payment in year 3 shall be the remaining balance of the R&D tax credit in respect of the accounting period, less the sum of the first and second instalment amounts.
- Section 766D provides for payment of the R&D tax credit over a three-year period in respect of expenditure on buildings or structures used for qualifying R&D activities, as set out below:
  - The first payable instalment, in year 1, shall be 50% of the R&D tax credit.
  - The second payable instalment, in year 2, shall be three-fifths of the remaining balance of the R&D tax credit.
  - The last payment, in year 3, shall be the remaining balance of the R&D tax credit in respect of the accounting period, less the sum of the first and second instalment amounts.
- Committee Stage amendments to ss766C and 766D provide that where a company decides that the R&D tax credit is to be treated as an overpayment of tax and where that amount is, under s960H TCA 1997, offset in whole or in part against the company's corporation tax liability, for the purposes of calculating the preliminary tax amount for that period and subsequent period, the amount of corporation tax payable by the company will be reduced by the offset.

1 The R&D tax credit must be paid as cash or available as cash equivalents within four years from when the claimant satisfies the conditions for receiving the credit to be considered a "qualified refundable tax credit" for the purpose of the Pillar Two Global Anti-Base Erosion (GloBE) Rules, relating to the global minimum tax rate. In addition, US Foreign Tax Credit Regulations recognise a qualifying refundable credit as a means of paying a tax liability where the taxpayer has the option to receive in cash the full amount of the tax credit.

- The new provisions provide for the payment of the R&D tax credit in full within 48 months from when a valid claim is made where all conditions to qualify for the R&D tax credit are met, which includes satisfying Revenue in respect of the company's entitlement to the R&D tax credit by furnishing any information that may reasonably be required. The section also sets out the relevant interest and penalty provisions and other administrative matters.
- Committee Stage amendments have been made to introduce additional reporting requirements for claims under the newly introduced ss766C and 766D. Under the new reporting requirements a company must provide:
  - the amount of the expenditure attributable to R&D development activities incurred by the company during the accounting period concerned in respect of plant or machinery (as referred to in s766(1A)(a)) **and** emoluments of the employees carrying on qualifying R&D activities; and
  - the sum of the remaining qualifying expenditure incurred by the company during the accounting period concerned.
- The timing of the application of ss766C and 766D was amended at Committee Stage so as to apply in respect of accounting periods the specified return date of which is on or after 23 September 2023.
- Section 23 of the Bill repeals the provisions of Finance Act 2019 relating to micro and small companies, which cannot be commenced for State Aid reasons.
- Section 24 of the Bill contains technical amendments to s472D TCA 1997, which contains the key employee relief provisions for the R&D tax credit. It updates cross-references to the main R&D tax credit provisions in s472D arising from the new payment mechanisms for the R&D tax credit introduced in s23.
- Once the Finance Bill has been enacted, further details on the changes to the R&D tax credit will be outlined in the next issue of *Irish Tax Review.*

Corporation tax

- The Knowledge Development Box (KDB) was extended for four years so that the relief will be available for accounting periods commencing before 1 January 2027. In addition, to prepare for the implementation of the OECD/G20 Inclusive Framework Two-Pillar Solution, specifically the subject-to-tax rule (STTR), the Bill increases the effective rate of the KDB from 6.25% to 10%. The amendments are subject to Ministerial Commencement Order, the date of which will be determined by reference to international progress on the implementation of the Pillar Two STTR.
- There was an amendment to s835D TCA 1997 to update the definition of "transfer pricing guidelines" to require transfer pricing rules to be construed, as far as practicable, in accordance with the 2022 version of the OECD Transfer Pricing Guidelines.
- The Bill includes a new, expanded definition of a "relevant monetary item" in s79 TCA 1997, which is intended to allow for foreign exchange gains or losses in respect of trade debtors and non-Euro currency deposits held in a trading bank account to be treated in the manner that currently applies to foreign exchange gains or losses on trade creditors and Euro currency deposits held in a trading bank account.
- The Bill introduces a number of technical amendments to Part 35D TCA 1997, which contains the Anti-Tax Avoidance Directive interest limitation rules (ILR) introduced in Finance Act 2021. The amendments are required to ensure that the ILR and associated preliminary tax rules operate as intended.
- The end date for film relief (s481A TCA 1997) is extended from 31 December 2024 to 31 December 2028. This amendment is subject to a Ministerial Commencement Order as it is subject to EU State Aid approval.
- The Bill makes a number of amendments to the digital gaming tax credit in s481A TCA 1997, which was introduced by Finance Act 2021, to ensure compliance with State Aid

requirements and make minor technical corrections. As EU State Aid approval is required, the credit and the amendments included in the Bill are subject to a Ministerial Commencement Order.

Capital taxes

- The Bill amends the treatment of capital sums received from the sale of patent rights by providing relief for intra-group transfers of patent rights in a similar manner to the relief that is available for intra-group transfers of patents.
- Alterations have been made to the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) to take account of amendments made to the Succession Act 1965 by the Birth Information and Tracing Act 2022. These amendments provide that a person affected by an incorrect birth registration (an "affected person") will have, in addition to his or her existing right of succession in relation to his or her birth parents, succession rights in relation to his or her "social" parents.
- There was an amendment to s48A CATCA 2003 introducing a statutory obligation for banks to provide information relating to a deceased person's accounts to the person applying for probate in relation to the deceased's estate or to an agent acting on their behalf.
- The Bill amends s82 CATCA 2003, which outlines receipts that are deemed not to be gifts or inheritances. The amendment incorporates any payments made under the COVID-19 Death in Service Ex-Gratia Scheme for Healthcare Workers in the list of exempt receipts.

VAT

- The Bill provides for the temporary extension of the 9% VAT rate to gas and electricity supplies to 28 February 2023, as confirmed by the Minister for Finance in his Budget speech.
- The flat-rate addition for farmers will be reduced from 5.5% to 5% from 1 January 2023.
- From 1 January 2023 the zero rate of VAT will apply to newspapers, including digital editions, automated external defibrillators, menstrual products, non-oral hormone replacement therapy and non-oral nicotine replacement therapy. The Bill also removes the wording "preparations and extracts derived from milk" from the food and drink table in Schedule 2 of the Value-Added Tax Consolidation Act 2010 (VATCA 2010), which deals with zero-rated supplies.
- The Bill makes a number of amendments to Schedule 1 VATCA 2010, which provides for a VAT exemption for certain activities in the public interest:
  - Paragraph 2(3) has been amended to clarify that the persons who may supply exempt medical care services under this provision are registered medical professionals and registered members of designated health and social care professions, as provided for by the Department of Health.
  - Paragraph 3(1) has been amended to provide for the extension of the exemption from VAT currently in place for independent groups of persons (also known as cost-sharing groups) to members who also carry out taxable activities, in line with recent judgments of the Court of Justice of the European Union.
  - Paragraph 6(2) has been amended to clarify that financial funds that are subject to Directive 2009/65/EC (the Undertakings for Collective Investment in Transferable Securities Directive) and Directive 2011/61/EU (the Alternative Investment Funds Managers Directive) and that are registered in other EU Member States are exempt from VAT, similar to equivalent financial funds registered in the State.
  - Paragraph 6(2) has also been amended to remove s110 TCA 1997 companies holding "qualifying assets" in the form of plant and machinery from the VAT exemption for fund management with effect from 1 March 2023.

  - Paragraph 7 has been amended to provide that the provision of agency services related to the management of an undertaking specified in paragraph 6(2) is not exempt from VAT.

- The Bill amends ss108 and 115 VATCA 2010 to allow Revenue to request information from financial institutions where such information has been requested by another Member State under the provisions of Council Regulation (EU) 904/2010 and to provide for the application of a penalty where a request served on a financial institution by Revenue is not complied with.
- Amendments are made to s59 and Schedule 1 VATCA 2010 regarding input VAT deductions incurred in respect of dealing in new stocks, new shares, new debentures or new securities for raising capital, which are now subject to deduction under general provisions.
- The Bill amends s65 VATCA 2010 to provide that a person who registers for VAT in respect of domestic-only transactions but subsequently engages in intra-Community trade is required to notify Revenue within 30 days of that engagement.

Stamp duty

- The Bill amends s31E of the Stamp Duties Consolidation Act 1999 (SDCA 1999), which charges a higher, 10%, rate of duty on the acquisition of certain residential property where a person acquires at least 10 residential units during any 12-month period. Section 31E(7) SDCA 1999 is replaced to exclude a residential unit acquired by a home reversion firm by way of a home reversion agreement from the higher rate. The exclusion for a residential unit in an apartment block continues to apply. A new sub-section (4A) specifies that the acquisition of a partial estate or interest in a unit is within the scope of the charge. A newly inserted sub-section (7A) provides that when calculating the total number of residential units acquired, any partial estate or interest shall be taken into account for the purposes of determining whether the 10-unit threshold has been met.
- Sections 83E and 83F SDCA 1999, which provide for a refund of the difference between the 10% rate of stamp duty paid and the normal, lower, residential rate of 1%/2% where a residential unit is subsequently leased to a local authority or an approved body for the provision of social housing within 24 months of purchase or where the residential unit is designated a cost rental dwelling within 6 months of its acquisition, have been repealed and replaced with a new partial repayment scheme comprised in a new s83DB SDCA 1999. The new section consolidates the legislative machinery for the administration of refunds of the difference between the 10% rate and the lower residential rates. Commencement of the new s83DB SDCA 1999 is subject to a Ministerial Order.
- The date by which projects must commence construction for the purposes of the Residential Development Stamp Duty Refund Scheme is extended from 31 December 2022 to 31 December 2025.
- The Bill inserts a new s83DA in SDCA 1999, which provides for a full repayment of the 1%, 2% or 10% rate of stamp duty where a residential property is acquired and then sold, within 12 months of acquisition, for the purpose of affordable home arrangements under the Affordable Housing Act 2021.
- The Bill makes a number of amendments to the provisions of SDCA 1999 dealing with the transfer of shares by electronic means.
- The Bill amends a number of measures introduced in Finance Act 2021 to legislate for the modernisation and streamlining of the collection of stamp duty on financial cards, cheques and insurance policies, which are subject to a Ministerial Commencement Order. The Bill also provides for specific commencement dates of 1 January 2023 or 1 January 2024 in respect of the Finance Act 2021 amendments.
- A new system to collect the stamp duty arising on authorised health insurers is

introduced. It puts the requirement to use electronic means to deliver statements to Revenue on a statutory footing.

- The Bill confirms the extension of the bank levy for a further year to the end of 2023.

Property

- The Bill introduces a new Part 22B to TCA 1997 to provide for a new vacant homes tax (VHT), which was announced on Budget Day. The VHT will apply to residential properties for the purposes of local property tax (LPT) that are occupied for fewer than 30 days in a 12-month period. The tax will be charged at a rate equal to three times the property's existing base LPT liability (i.e. the liability before the application of the Local Adjustment Factor). The first chargeable period commences on 1 November 2022 and ends on 31 October 2023. The filing date for VHT returns will be 7 November after the end of the chargeable period, and the payment date for VHT will be the following 1 January. The VHT applies to buildings that are residential properties for the purposes of LPT, which means that it will not apply to derelict properties or properties unsuitable for use as a dwelling, which are not captured under the LPT system. The Bill provides for a number of other exemptions from VHT.
- The Bill amends the legislation underpinning the tax treatment of non-Irish resident landlords. Tenants withholding tax on rent paid to a non-resident landlord and remitting it to Revenue will be required to provide additional information to Revenue. In addition, "collection agents" who are currently chargeable and assessable to tax on the rental income of the non-resident landlord on the landlord's behalf will be relieved of this obligation if the collection agent deducts withholding tax from rental payments, remits the tax to Revenue and provides Revenue with certain information on the payments.
- A number of amendments were made to the residential zoned land tax (RZLT), which was introduced in Finance Act 2021. The purpose of the amendments is to support the efficient administration of the RZLT.
- The amount of pre-letting expenditure on vacant premises that can be claimed under s97A TCA 1997 was increased from €5,000 to €10,000. In addition, the period for which a premises must be vacant has been reduced from 12 months to 6 months for 2023 and 2024. This relief is available for qualifying expenses up to the end of 2024.
- The Bill introduces a new Part 18E and a new Schedule 36 to TCA 1997 to provide for a new defective concrete products levy. This levy will contribute towards meeting the cost of helping homeowners who have been affected by defective concrete products used in the building of their homes. The levy will be set at a rate of 5% of the open market value of the concrete product on the supply date and will come into force from 1 September 2023.
- Committee Stage amendments introduced a new tax deduction for small-scale landlords who undertake retrofitting works while the tenant remains in situ. A new s97B TCA 1997 provides for a tax deduction of up to €10,000 per property, against Case V rental income, for certain retrofitting expenses incurred by a landlord on rented residential properties, for a maximum of two rental properties. The expenses that qualify for deduction are those in respect of which the landlord has received an approved retrofitting grant from the Sustainable Energy Authority of Ireland. The scheme will run for three years (from 1 January 2023 to 31 December 2025). The property must remain as a rental property for a period of two years after the work has been carried out, and the landlord must be LPT compliant, have tax clearance and be registered with the Residential Tenancies Board.

Agri-tax measures

- The Committee Stage amendments extend a number of agri-tax measures that were due to expire on 31 December 2022. The extension of the measures requires European Commission approval under the Agricultural Block Exemption Regulation (ABER), and ABER needs to be in effect for the full duration of any such extension. The existing ABER is due to expire at the end of 2022, with a new ABER expected to be in place from 1 January 2023 and to run for at least five years, but this has not yet been formally confirmed. The following measures have been extended until 30 June 2023 but are subject to a Ministerial Commencement Order:

- s604B TCA 1997, relating to relief for farm restructuring;
- s667B TCA 1997, relating to new arrangements for qualifying farmers, and s667C TCA 1997, relating to special provisions for registered farm partnerships;
- s81AA SDCA 1999, relating to transfers to young trained farmers, and s81C SDCA 1999, relating to farm consolidation relief.

- Committee Stage amendments introduced a new s654A to TCA 1997, providing a list of trained farmer qualifications. Technical amendments have also been made to TCA 1997, CATCA 2003 and SDCA 1999 to include references to this new section and the list of qualifications. This section will come into effect from 1 January 2023.
- Committee Stage amendments also introduced a new s658A to TCA 1997 to provide for accelerated capital allowances for the construction of slurry storage, which was announced on Budget Day. The accelerated capital allowances can be claimed over two years, rather than seven. The capital expenditure incurred on qualifying capital items must be incurred in the "relevant period", which is the six-month period commencing on 1 January 2023 and ending on 30 June 2023. The maximum aggregate amount of relief available under the new section is €500,000.

Funds

- The Bill amends s743 TCA 1997 to clarify that an authorised unit trust the general administration of which is carried on in the State will not be treated as an offshore fund solely on the basis that its trustee is an Irish branch of a company resident in another EU or EEA Member State.
- Additional reporting requirements for common contractual funds, exempt unit trusts and investment limited partnerships have been introduced. The Bill also provides for the introduction of a €3,000 penalty where the management company of a common contractual fund or the partners of an investment limited partnership fail to submit an annual statement or submit an incomplete or incorrect annual statement.

Other measures

- The Bill amend ss949AP and 949AQ TCA 1997 to improve the administration of the case stated procedure by the Tax Appeals Commission (TAC), to allow a dissatisfied party an additional 21 days in requesting a case stated for the opinion of the High Court, extending the current period for a party to request a case stated from 21 to 42 days, and to allow parties an additional 21 days to submit written representations on a draft case stated issued by the Appeal Commissioners, extending the current period for parties to submit written representations from 21 to 42 days.
- The Bill fully replaces s891I TCA 1997, which was inserted by Finance Act 2021, with a new s891I. Section 891I transposes DAC7 into Irish legislation, introducing a reporting obligation for digital platform operators from 1 January 2023. DAC7 extends automatic exchange of information (AEOI) to digital platform operators that provide a platform for the sale of goods, the rental of immovable property (e.g. accommodation), the provision of personal services and the rental of any mode of transport. The new s891I has been amended to enable Revenue to access data that has been collected for the purposes of meeting anti-money laundering and terrorist financing obligations, when enquiring into transactions that involve the obscuring of the beneficial ownership of assets to avoid a reporting obligation under DAC7.
- A new s891K TCA 1997 was introduced at Committee Stage to provide for the

transposition of Article 1(12) of Council Directive (EU) 2021/514 (known as DAC7), which amends Directive 2011/16/EU on administrative cooperation between EU Member States in the field of taxation relating to joint audits.

- A new s891J has been inserted in Part 38 of TCA 1997. This new section provides for the transposition of the OECD Model Rules for Reporting by Platform Operators with Respect to Sellers in the Sharing and Gig Economy and the OECD Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods, known as the "Model Rules". The Model Rules introduce reporting obligations for digital platform operators relating to sales made via digital platforms.
- The Bill amends s959AA TCA 1997 to provide that a Revenue officer may make or amend an assessment to give effect to a mutual agreement procedure (MAP) notwithstanding any time limits in TCA 1997 on taxpayers' making claims for loss relief, group relief or similar reliefs, thereby allowing such reliefs in MAP cases outside of those time limits.
- The Bill makes two technical amendments to s959Z TCA 1997, which deals with the right of a Revenue officer to make enquiries. The first corrects a typographic error in s959Z(2) so that it refers to paragraph (a) of sub-section (2) of s959Y TCA 1997. The second clarifies that Revenue can make enquiries outside the four-year period if any of the circumstances listed in (a) or (b) of sub-section (4) apply.

Institute Post-Finance Bill 2022 Submission

The Institute wrote to the Minister for Finance, Paschal Donohoe TD, on 9 November to raise our concerns about two technical amendments contained in Finance Bill 2022 (as initiated). The letter highlights members' concerns about amendments to s79 TCA 1997. We recommended that the reference to "sole purpose" in the definition of "relevant monetary item" be amended to read "sole or main purpose" to reflect more accurately the reality for most companies with foreign bank accounts. We also highlighted that the definition of "trade receivable" may need to be amended to describe a broader range of trading transactions that would give rise to trade receivables.

The letter also outlines our concerns over the introduction of a new section dealing with the taxation of foreign pension lump sums. We highlighted that, as currently drafted, the section could result in a reduction of the tax-free amount available under s790AA TCA 1997 by the amount of foreign lump sums paid after 1 January 2023 even where the individual was not resident or ordinarily resident in Ireland at the time that those foreign lump sums were received.

The Institute's Post-Finance Bill 2022 Submission is available at www.taxinstitute.ie.

Report of the Commission on Taxation and Welfare

On 14 September the Minister for Finance published the *Report of the Commission on Taxation and Welfare: Foundations for the Future* ("the Report"). The Commission on Taxation and Welfare ("the Commission"), chaired by Professor Niamh Moloney, was established in April 2021 as an independent body tasked by the Government with considering how the taxation and welfare systems could best be refined to ensure their sustainability over the medium and longer term and support the State in meeting the costs of public services and supports into the future.

The Commission launched a public consultation, "Your Vision, Our Future", in October 2021 to gather broad perspectives about the way in which Ireland's tax and welfare systems should be structured. The Institute responded to the consultation in January 2022. We made 40 recommendations based on feedback we received from members of the Institute's Commission on Taxation and Welfare Working Group, identifying areas of the tax code that are not working as intended or are in need of reform. The Institute's submission is available at www.taxinstitute.ie.

The Report contains 116 recommendations for the Government to consider on potential future strategic changes to Ireland's tax and welfare systems to meet the challenges of an ageing demographic profile and carbon transition. A full list of the 116 recommendations is included in our dedicated Commission on Taxation and Welfare webpage on the Institute's website.

CFE responds to consultation on role of enablers in tax evasion and aggressive tax planning in the EU

As highlighted in the last edition of this article in *Irish Tax Review*, the European Commission launched a public consultation in July 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 Institute, which is a member organisation of CFE Tax Advisers Europe (CFE), was part of the working group that helped to formulate the CFE's response to the consultation, which was submitted to the Commission on 12 October. In its response, CFE highlighted that there is a mismatch between the Commission's stated objective of tackling aggressive tax planning and tax evasion and the outlined policy options, which focus solely on tackling the role of enablers.

Noting the Commission's view that tax evasion and aggressive tax planning continue to be a substantial problem in the EU, CFE raised concerns that this view is based on pre-BEPS project data and noted that it would be wholly inappropriate to introduce further measures without first fully evaluating the impact of recently introduced measures.

In the view of CFE and its member organisations, any EU proposals should not have a disproportionate impact on reputable tax advisers (i.e. members of professional organisations who are giving advice on market-based, commercial transactions). Any additional compliance burden for reputable tax advisers must not, in any event, go beyond reasonable "due diligence" to ensure that they do not promote aggressive avoidance regimes.

CFE also highlighted to the Commission its paper "Professional Judgment in Tax Planning", which sets out a framework to help steer tax advisers in the direction of an appropriate balance between the rights and obligations of taxpayers, thereby raising standards in tax advice and reducing incentives for aggressive tax avoidance.

The response to the consultation is available on the CFE website, www.taxadviserseurope.org.

Policy News

Developments on the building blocks for Amount A of Pillar One

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 this article in *Irish Tax Review*, 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 eight consultations on the building blocks for Amount A of Pillar One.

On 12 September the OECD held a public consultation meeting, as part of the ongoing work on the Draft Model Rules to implement Amount A of Pillar One and to discuss the responses to the 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.

The OECD launched another public consultation, on the Progress Report on the

Administration and Tax Certainty Aspects of Amount A of Pillar One. Responses to the consultation were to be submitted by 11 November 2022.The Institute responded to public consultation on 11 November and the Institute's submission is available at www.taxinstitute.ie.

On 16 November, the OECD published the comments it received from all stakeholders in response to the public consultation.

At the meeting of G20 Finance Ministers and Central Bank Governors in Washington D.C. on 12 and 13 October, the OECD Secretary-General, Mathias Cormann, presented his *OECD Secretary-General Tax Report to the G20 Finance Ministers and Central Bank Governors*, noting that the Inclusive Framework will develop the terms of the Multilateral Convention for Amount A so that a signing ceremony can be held by mid-2023.

In respect of Amount B of Pillar One, the OECD Secretary-General noted that work is progressing on proposals to simplify the application of the arm's-length principle with respect to certain activities. A discussion draft is expected to be released for public consultation by the end of the year, with a view to completing ongoing work in the first half of 2023.

New Ukraine Enterprise Crisis Scheme

The Tánaiste and Minister for Enterprise, Trade and Employment, Leo Varadkar TD, and the Minister for Public Expenditure and Reform, Michael McGrath TD, announced details of the new €200m Ukraine Enterprise Crisis Scheme at the end of October. There will be two streams of funding under the scheme to assist viable but vulnerable firms of all sizes in the manufacturing and internationally traded services sectors.

Stream 1 of the scheme will address direct liquidity issues, with aid of up to €500,000 in grants, repayable advances, equity and/or loans. Applicants will have to demonstrate the impact of the Ukraine war on their business, including supply chain and input cost increases including energy. Aid will be granted to implement a business sustainment plan.

Stream 2 of the scheme is for "energy-intensive businesses" (where energy cost was at least 3% of turnover before the crisis). It will consist of a grant of up to €2m for costs incurred between February and December 2022. The quantity of units of gas and electricity used to calculate the eligible costs must not exceed 70% of consumption for the same period in 2021. This ensures that companies do not receive compensation for increased energy costs that have resulted from the company's increasing production output compared to 2021.

Applicants must submit an energy-efficiency plan for both streams, and companies without such plans will be directed to the Sustainable Energy Authority of Ireland and Enterprise Ireland climate action measures, particularly consultancy initiatives aimed at preparing an energy-efficiency plan.

The Ukraine Enterprise Crisis Scheme will be implemented through Enterprise Ireland, IDA Ireland and Údarás na Gaeltachta on behalf of the Department of Enterprise, Trade and Employment.

EU list of non-cooperative jurisdictions for tax purposes updated

Three countries – Anguilla, Bahamas, and Turks and Caicos – have been added to the EU list of non-cooperative jurisdictions for tax purposes due to concerns that the jurisdictions, which all have a zero or nominal-only rate of corporate income tax, are attracting profits without real economic activity (criterion 2.2 of the EU list). These countries failed to address adequately a number of recommendations of the OECD Forum on Harmful Tax Practices in connection to the enforcement of economic substance requirements, which they had committed to earlier this year. The next revision of the list is scheduled for February 2023.

Commission publishes summary report on consultation on new EU system for withholding taxes

In August the European Commission published a summary report on the public consultation on a new EU system for the avoidance of double taxation and the prevention of tax abuse in the field of withholding taxes (WHT) that was launched in April.

The report noted the majority of respondents (89%) strongly agreed that the current functioning of WHT refund procedures in Member States hinders cross-border investment in the EU securities market, and respondents favoured a harmonised relief-at-source system. The three most preferred measures to streamline WHT refund procedures are the creation of a single web portal for refund claims, standardised and same-language forms, and the ability to e-request tax residence certificates, along with a digitalised verification system.

Respondents also believe that dividends, interest, royalties and other passive income payments should be covered by a potential EU relief-at-source system and that it would be appropriate to broaden the Directive on Administrative Cooperation (DAC) framework in the EU.

The Institute responded to this public consultation in June and prepared a position paper to accompany the completed consultation questionnaire, and we highlighted our response to the consultation in the last edition of this article in *Irish Tax Review*.

The summary report notes that further contact with stakeholders, including custodians, collective investment vehicles and financial authorities, will be needed to gain a better understanding of how to regulate crucial aspects of the initiative, such as liability, entitlement under double taxation treaties, and potential exchange of information between financial and tax authorities. This will help to guide the preparation of an impact assessment and the drafting of the legislative proposal for the WHT initiative.

Commission launches consultation on business taxation in the EU

On 13 October the European Commission launched a call for evidence for an impact assessment and a public consultation questionnaire on a proposed Directive for a comprehensive solution for business taxation in the EU, known as Business in Europe: Framework for Income Taxation (BEFIT). The BEFIT initiative aims to introduce a common set of rules for EU companies to calculate their taxable base while ensuring a more effective allocation of profits between EU countries, based on a formula. It also aims to reduce compliance costs and create a coherent approach to corporate taxation in the EU.

A non-exhaustive list of policy options that will be analysed in detail is set out in the call for evidence for an impact assessment and includes policy options on scope, tax base calculation, formula for allocating taxable profits, allocation of profit to related entities outside the group and administration.

The feedback period for the call for evidence for an impact assessment and the public consultation will run until **Thursday, 26 January 2023**.

EU proposals to address high energy prices and secure supply

On 30 September EU Ministers reached political agreement at an extraordinary meeting of the Transport, Telecommunications and Energy Council on a Proposal for a Council Regulation on an Emergency Intervention to Address High Energy Prices. The Regulation introduces common measures to reduce electricity demand and to collect and redistribute the energy sector's surplus revenues to final customers. These measures include:

- **Electricity demand reduction target:** The Council agreed to a voluntary overall reduction target of 10% of gross electricity consumption and a mandatory reduction target of 5% of the electricity consumption in peak hours. Member States will identify 10% of their peak hours between 1 December 2022 and 31 March 2023 during which they will reduce the demand.
- **Cap on market revenues for inframarginals:** The Council agreed to cap the market revenues at €180/MWh for electricity

generators, including intermediaries, that use so-called inframarginal technologies to produce electricity, such as renewables, nuclear and lignite. As such operators are providing electricity to the grid at a cost below the price level set by the more expensive "marginal" producers, they have made unexpectedly large financial gains in recent months without their operational costs increasing. The level of the cap is designed to preserve the profitability of the operators and avoid hindering investments in renewable energies.

- **Solidarity levy for fossil fuel sector:** Member States have agreed to set a mandatory temporary solidarity contribution on the profits of businesses active in the crude petroleum, natural gas, coal and refinery sectors. The solidarity contribution will be calculated on taxable profits, as determined under national tax rules in the fiscal year starting in 2022 and/or in 2023, that are above a 20% increase of the average yearly taxable profits since 2018. The solidarity contribution will apply in addition to regular taxes and levies applicable in Member States. Member States can keep national measures that are equivalent to the solidarity levy provided they are compatible with the objectives of the Regulation and generate comparable proceeds. Member States will use proceeds from the solidarity contribution to provide financial support to households and companies and to mitigate the effects of high retail electricity prices.
- **Measures for SMEs:** The Council agreed that Member States may temporarily set a price for the supply of electricity to small and medium-sized enterprises (SMEs) to further support SMEs struggling with high energy prices. Member States also agreed that they may exceptionally and temporarily set a price for the supply of electricity that is below cost.

The measures will apply from 1 December 2022 to 31 December 2023. The reduction targets for energy consumption will apply until 31 March 2023, and the mandatory cap on market revenues will apply until 30 June 2023.

The Regulation was formally adopted by written procedure on 6 October. It was published in the EU's Official Journal on 7 October and entered into force on that day.

On 18 October the European Commission published a Proposal for a Council Regulation: Enhancing Solidarity Through Better Coordination of Gas Purchases, Exchanges of Gas Across Borders and Reliable Price Benchmarks. This emergency Regulation aims to address high gas prices in the EU and to ensure security of supply this winter through joint gas purchasing, price limiting mechanisms on the Title Transfer Facility (TTF) gas exchange, new measures on transparent infrastructure use and solidarity between Member States, and continuous efforts to reduce gas demand.

The main elements of the proposed Council Regulation, which requires a qualified majority vote in the Council to be approved, are:

- Aggregation of EU demand and joint gas purchasing to negotiate better prices and reduce the risk of Member States outbidding each other on the global market, while ensuring security of supply across the entire EU.
- Advancing work to create a new liquefied natural gas (LNG) pricing benchmark by March 2023 and in the short term proposing a price correction mechanism to establish a dynamic price limit for transactions on the TTF gas exchange. To deal with excessive volatility in the markets, it includes mechanisms to smoothen out the volatility on futures markets by way of an intra-day price volatility management mechanism that limits extreme changes in a short time period.
- Default solidarity rules between Member States in case of supply shortages, extending the solidarity obligation to Member States without direct pipeline connection to involve also those with LNG facilities and a proposal to create a mechanism for gas allocation for Member States affected by a regional or Union gas supply emergency.

The Commission is also proposing targeted flexible use of Cohesion Policy funding to tackle the impact of the energy crisis on citizens and businesses, using up to 10% of the total national allocation for 2014–20, worth close to €40bn.

At a meeting of the European Council on 20 October, EU leaders discussed the energy crisis and agreed on the need to accelerate and intensify efforts to reduce energy demand, avoid rationing, secure supply and lower prices. The European Council adopted conclusions that call on the Council and the Commission to urgently submit concrete decisions on additional measures and on the Commission's proposals. It also insisted on the need to assess their impact on existing contracts and to take into account different energy mixes and national circumstances.

The additional measures include:

- Voluntary joint purchases of gas, except for binding demand aggregation for 15% of storage filling needs, according to national needs, exploiting the Union's collective market weight and making full use of the EU Energy Platform.
- A new complementary price benchmark by early 2023 that more accurately reflects conditions on the gas market.
- A temporary dynamic price corridor on natural gas transactions to immediately limit episodes of excessive gas prices, taking into account the safeguards set out in Article 23(2) of the draft Council Regulation proposed on 18 October 2022.
- A temporary EU framework to cap the price of gas in electricity generation, including a cost-and-benefit analysis.
- Improvements to the functioning of energy markets to increase market transparency, alleviate liquidity stress, eliminate factors that amplify the volatility of gas prices and preserve financial stability.
- Fast-tracking of the simplification of permitting procedures to accelerate the roll-out of renewables and related grids.
- Energy solidarity measures in case of gas supply disruptions at national, regional or EU level, in the absence of bilateral solidarity agreements.
- Increased efforts to save energy.
- Mobilise relevant tools at national and EU level to enhance the resilience European economies and preserve Europe's global competitiveness.

UK Autumn Statement 2022

On 23 September the then UK Chancellor of the Exchequer, Kwasi Kwarteng MP, presented his Growth Plan to tackle high energy costs and inflation. The Growth Plan reversed a number of planned tax changes that were signalled by the previous Chancellor, Rishi Sunak MP, in the Autumn Budget 2021 and in the Spring Statement this year.

On 3 October Mr Kwarteng announced that the UK Government would not proceed with the abolition of the additional rate of income tax of 45% on annual income above £150,000, as had been announced in the Growth Plan.

On 14 October the then UK Prime Minister, Liz Truss MP, announced that the UK Government had decided not to proceed with the proposal under the UK Growth Plan to cancel the previous government's plans to increase the rate of corporation tax from 19% to 25% from April 2023 for firms making more than £250,000 profit. On the same day, Ms Truss also announced the appointment of Jeremy Hunt MP as Chancellor of the Exchequer, replacing Mr Kwarteng.

On 17 October the newly appointed Chancellor, Mr Hunt, announced that he would bring forward a number of measures from the Medium-Term Fiscal Plan. He also announced a reversal of almost all tax measures set out in the Growth Plan of 23 September. The UK Government has decided to no longer proceed with the following tax policies:

- the cut in the basic rate of income tax to 19% from April 2023,
- the cut to dividend tax rates from April 2023,

- the reversal of the off-payroll working reforms introduced in 2017 and 2021,
- the new VAT-free shopping scheme for non-UK visitors to Great Britain and
- the freeze on alcohol duty rates from 1 February 2023 for a year.

The Chancellor also confirmed that the UK Government would continue with the abolition of the health and social care levy, changes to stamp duty, the increase in the annual investment allowance to £1m and the wider reforms to investment taxes. He also launched a Treasury-led review of how the UK Government can provide support for energy bills beyond April next year.

Rishi Sunak MP became the UK Prime Minister on 25 October and the following day confirmed, with the Chancellor, that the Autumn Statement would be delivered on 17 November with a forecast from the Office for Budget Responsibility.

The UK Chancellor of the Exchequer, the Rt Hon Jeremy Hunt MP, delivered his Autumn Statement 2022 on 17 November and a summary of the key tax measures announced in the Autumn Statement 2022 are outlined below.

Corporation Tax

- The planned increase in the corporation tax rate to 25% for companies with over £250,000 in profits will proceed from 1 April 2023.
- From April 2023, the rate of Diverted Profits Tax will increase from 25% to 31% in order to retain a 6-percentage points differential above the main rate of Corporation Tax.
- The Annual Investment Allowance (AIA), which provides 100% relief on qualifying capital expenditure in the year of acquisition, will be permanently set at £1 million from 1 April 2023.
- The banking surcharge rate will be reduced to 3% from 1 April 2023.
- From April 2023, large multinational businesses operating in the UK will be required to keep and retain transfer pricing documentation in the prescribed and standardised format set out in the OECD's Transfer Pricing Guidelines (Master File and Local File). This will be legislated for in the Spring Finance Bill 2023.

R&D Tax Reliefs

- For expenditure on or after 1 April 2023, the Research and Development Expenditure Credit (RDEC) rate will increase from 13% to 20%, the small and medium-sized enterprises (SME) additional deduction will decrease from 130% to 86%, and the SME credit rate will decrease from 14.5% to 10%. These rate changes will be legislated for in the Autumn Finance Bill 2022.
- The UK government will consult on the design of a single R&D scheme to understand whether further support is necessary for R&D intensive SMEs, without significant change to the overall cost for supporting R&D.
- As previously announced in Autumn Budget 2021, the R&D tax reliefs will be reformed by expanding qualifying expenditure to include data and cloud costs, refocusing support towards innovation in the UK, and targeting abuse and improving compliance. These changes will be legislated for in the Spring Finance Bill 2023.

International Tax Reform Measures

The UK government will legislate to implement the OECD/G20 Inclusive Framework Two Pillar Agreement in the UK. For accounting periods beginning on or after 31 December 2023 the UK government will:

- Introduce an Income Inclusion Rule (IIR) which will require large UK headquartered multinational groups to pay a top-up tax where their foreign operations have an effective tax rate of less than 15%.
- Introduce a supplementary Qualified Domestic Minimum Top-up (QDMTT) tax rule which will require large groups, including those operating exclusively in the UK, to pay

a top-up tax where their UK operations have an effective tax rate of less than 15%.

- Both the IIR and QDMTT will incorporate the substance-based income exclusion that forms part of the Two Pillar Agreement. This will be legislated for in the Spring Finance Bill 2023.

The UK government intends to implement the Undertaxed Profits Rule in the UK, but with effect no earlier than accounting periods beginning on or after 31 December 2024.

VAT and Indirect Taxes

- The VAT registration threshold will be maintained at £85,000 for two further years from April 2024 until 2026.
- From April 2025, electric cars, vans and motorcycles will begin to pay Vehicle Excise Duty in the same way as petrol and diesel vehicles.

Windfall Taxes

- The Energy Profits Levy will be extended to the end of March 2028, and its rate will be increased by 10 percentage points to 35% from 1 January 2023.
- A new temporary Electricity Generator Levy of 45% will be imposed on extraordinary returns from low-carbon UK electricity generation from 1 January 2023 until 31 March 2028 and will be legislated for in Spring Finance Bill 2023.

Income Tax and NIC

- The additional rate of income tax of 45% will not be removed, and the basic rate of income tax will be maintained at 20%. The additional rate threshold will be lowered from £150,000 to £125,140 from 6 April 2023.
- The Dividend Allowance will be reduced from £2,000 to £1,000 from April 2023, and to £500 from April 2024. This measure will be legislated for in the Autumn Finance Bill 2022.
- The National Insurance Contributions (NIC) Secondary Threshold for employers will be maintained at £9,100 until 31 March 2028.

Capital Gains Tax

- The Capital Gains Tax Annual Exempt Amount will be reduced from £12,300 to £6,000 from April 2023 and to £3,000 from April 2024. The UK government will legislate for this measure in the Autumn Finance Bill 2022.

Stamp Duty

- On 23 September 2022, the UK government increased the nil-rate threshold of Stamp Duty Land Tax (SDLT) from £125,000 to £250,000 for all purchasers of residential property in England and Northern Ireland and increased the nil-rate threshold paid by first-time buyers from £300,000 to £425,000. The maximum purchase price for which First Time Buyers' Relief can be claimed was increased from £500,000 to £625,000. This will now be a temporary SDLT reduction that will remain in place until 31 March 2025.

Other Measures

- Following consultation, the UK government has decided not to introduce an Online Sales Tax (OST). A response to the OST consultation will be published shortly.
- From 1 April 2023, business rate bills in England will be updated to reflect changes in property values since the last revaluation in 2017. A package of targeted support worth £13.6 billion over the next 5 years is intended to protect businesses from the full impact of inflation. Measures include freezing the multipliers, increasing relief for retail, hospitality and leisure to 75%, and reforming transitional relief on the revaluation by exchequer funding the scheme and abolishing downward caps.
- To address tax avoidance, the UK government will legislate in the Spring Finance Bill 2023 to provide that shares and securities in a non-UK company acquired in exchange for securities in a UK close company will be deemed to be located in the UK. This will have effect where an individual has a material interest in both the

UK and the non-UK company and where the share exchange is carried out on or after 17 November 2022. Draft legislation and a policy paper regarding this measure have been published by HMRC.

- The UK government is investing a further £79 million over the next 5 years to enable HMRC to allocate additional staff to tackle more cases of serious tax fraud and address tax compliance risks among wealthy taxpayers.

US Inflation Reduction Act signed into law

The US President, Joe Biden, signed the Inflation Reduction Act of 2022 into law on 16 August, following approval by the US House of Representatives. The Act includes a corporate alternative minimum tax of 15% on the average annual adjusted financial statement income of domestic corporations (excluding Sub-chapter S corporations, regulated investment companies and real estate investment trusts) that exceeds $1bn over a specified three-year period. The tax is effective for taxable years beginning after 31 December 2022.

The Act does not include a substantial number of international tax changes, such as modifications to the global intangible low-taxed income (GILTI) and base erosion and anti-abuse tax (BEAT) regimes, that had been proposed in the Build Back Better Act. Thus, the interaction of the Act with the OECD Pillar Two Model Rules is unclear.

The Act also includes an excise tax of 1% on corporate stock buy-backs, energy-related tax credits and additional funding for the Internal Revenue Service for taxpayer services and enforcement.

Revenue eBriefs Issued from 1 August to 31 October 2022

No. 152 Movement of Excisable Products Manual Updated

Three Revenue manuals relating to alcohol and excise duty have been updated. These updates follow on from amendments to Finance Act 2003 made under s43 Finance Act 2021, including the introduction of the Certification System for Small Alcohol Producers by s78B of the 2003 Act and changes to s77(c) and (d) of that Act regarding denatured alcohol. The manuals are:

- the “Movement of Excisable Products Manual”,
- the “Administration & Control of Tax Warehouses Manual Part 2 – Breweries, Micro-Breweries and Cider Manufactures” and
- the “Alcohol Products Tax and Reliefs Manual”.

Guidance is also provided regarding the judgment given in the case *Y GmbH* C-668/20 concerning alcoholic products used in the flavouring of foodstuffs.

No. 153 Mineral Oil Traders Excise Licences Manual

Revenue has updated the manual “Mineral Oil Traders’ Excise Licences (Auto Fuel & Marked Fuel Traders’ Licences)” to modify the specific licence condition in relation to the Dangerous Substances Regulations 2019 on mineral oil licences.

This modification does not remove the obligation of mineral oil traders to be compliant with all relevant regulations, including those related to planning, measurement equipment, safety, health and welfare at work, dangerous substances and fire safety, before submitting an application for a mineral oil licence.

The relevant appendices to the manual have also been updated.

No. 154 Accelerated Capital Allowances for Energy-Efficient Equipment

Revenue’s manual “Accelerated Capital Allowances for Energy-Efficient Equipment [Section 285A TCA 1997]” has been updated to reflect amendments introduced by Finance Act 2021. Capital expenditure incurred on or after 1 January 2022 on equipment operated on fossil fuel (other than equipment operated on electricity generated using such fuel) does not qualify for accelerated allowances.

No. 155 Period of Account

Revenue's "Period of Account" manual has been updated to include information on changing accounting periods on the ROS Form CT1 (in paragraph 2). The manual also notes the importance of ensuring that linked returns (the 46G Company) have the exact same accounting period as the Form CT1 for the same tax year (see paragraph 3).

No. 156 Guidance on the Interest Limitation Rule

Revenue has published a new "Guidance on the Interest Limitation Rule" manual. This manual provides guidance on the interest limitation rule (ILR) after the transposition of Article 4 of the EU Anti-Tax Avoidance Directive (ATAD) into Irish law in Finance Act 2021.

The ILR applies to accounting periods commencing on or after 1 January 2022 for corporate taxpayers. A group of Irish companies may, where certain conditions are met, be treated as a single taxpayer when calculating the impact of the restriction.

Where the restriction applies, it operates by deferring the deductibility of interest from the accounting period in which the restriction applies to future accounting periods in which there are sufficient earnings to allow an interest deduction.

No. 157 Tax and Duty Manual 05-01-01i The Provision of Work Related Equipment and Supplies

Revenue has updated Chapter 9 of the "Employer-Provided Benefits" manual, which relates to the provision of work-related equipment and supplies, to include further clarification with regard to the provision of personal protective equipment (PPE). Paragraph 6 notes that, given an employer's obligations under the Safety, Health and Welfare at Work (General Application) Regulations 2007, where an employer provides an employee with PPE, including, for example, an FFP 2 mask, no charge to tax will arise where such PPE is used by the employee solely in the performance of his or her duties.

No. 158 Deduction for Digital Services Taxes

Revenue has published a new manual, "Section 81: Deduction for Digital Services Taxes", providing guidance on the tax deductibility of digital services taxes (DSTs).

No. 159 Section 701, Transfer of Shares Held by Certain Societies to Society Members

Revenue has updated the manual "Transfer of Shares Held by Certain Societies to Society Members" to remove previous guidance regarding "patronage shares". The eBrief notes that this removal reflects Revenue's acceptance that shares issued by a cooperative at a value less than market value to members arising from the trading relationship between the member and the cooperative (or a nominated purchaser), otherwise known as patronage shares, do not give rise to a trading receipt within the charge to income tax.

No. 160 Health and Well-being Related Benefits

Revenue has created a new manual to set out the tax treatment of a number of health- and well-being-related benefits, including the provision of:

- a qualifying medical check-up,
- access to healthcare,
- Covid-19 testing and
- a flu vaccination.

Previously, Revenue did not seek to apply a charge to tax when the above benefits were provided by an employer. These administrative measures were placed on a statutory footing by Finance Act 2021. The "Health and Well-being Benefits" manual includes detailed guidance of all conditions attaching to the exemptions.

The manual also provides further guidance on how to determine the amount liable to PAYE, PRSI and USC where an employer provides a contribution to an in-house medical plan.

The manuals "Index – Employer-Provided Benefits" and "Chapter 12 – The Provision of

Miscellaneous Benefits” have been updated to include links to the new manual.

No. 161 MyEnquiries

Revenue has updated the suite of manuals relating to MyEnquiries.

- The manual “Part 37-00-36 – MyEnquiries” includes a new paragraph 4, titled “MyEnquiries Data Retention Policy”, that reflects Revenue’s policy.
- The manual “Part 37-00-36A – Access to and Registering for MyEnquiries” includes updates to the myAccount and ROS screens. Two new paragraphs have been added: paragraph 3.3, titled “MyEnquiries Auto-registration for new ROS Registrations”, and paragraph 3.6, titled “Removing Email Addresses”.
- The manual covering guidance on submitting and managing queries (Part 37-00-36B) has been split into separate manuals for myAccount users and ROS users.
    - The manual “Part 37-00-36B – MyEnquiries: Submitting and Managing Enquiries in myAccount” is for myAccount users and includes some new introductory text and guidance on procedures, automatically generated confirmations and notifications. The manual also includes screenshots of new screens for PAYE-only customers.
    - The manual “Part 37-00-36C – MyEnquiries: Submitting and Managing Enquiries in ROS” includes information for ROS users that was previously contained in Part 37-00-36B. It also includes a new paragraph 3.3, titled “Restoring Email Addresses to Access Enquiries under Deactivated Email”.
    - The manual “Part 37-00-36E – Notifications about Enquiries Including Tax Clearance Applications in myAccount” includes the new screens for automatic confirmation notifications for submitted enquiries. The manual also includes information on notifications on requests for clearance in death cases.

No. 162 Income Tax Return Form 11 2021 – ROS Form 11

Revenue has updated the “Income Tax Return Form 2021 (ROS Form 11)” manual to highlight further updates and changes to the 2021 form. The 2021 Form 11 has been available in both online and offline ROS facilities since January 2022 and was subsequently updated in July.

The recent changes reflected in this manual include:

- Additional claim fields for health and safety equipment in the Self-Employed panel in paragraph 3.2.
- In paragraph 3.1, an update on pre-filled data in the 2021 Form 11 on claims under s667C TCA 1997 and s81D SDCA 1999 from the Form 11 2020.
- Pre-filled information on rental income from Form 8-3 (return of third-party information by letting agents/property managers) in paragraph 4.2 and an update on non-resident landlords with a revision to the “temporary workaround” in paragraph 4.1.
- Additional information in paragraph 6.2 to advise that the Department of Social Protection (DSP) data in the table of pre-filled information may include cents; however, the DSP fields in the Form 11 require whole number amounts to be entered.
- Information on the local property tax (LPT) surcharge advisory message (in paragraph 12.1), which will prompt the filer if an LPT surcharge is likely to be raised on the return.
- Information in paragraph 13.1 on the letter provided by Revenue to paper Form 11 filers with information on employment/pension income.
- Information in paragraph 13.2 on ensuring that filers use the latest version of the ROS Offline Form 11 2021.

No. 163 Capital Acquisitions Tax Manual Parts 7 and 25 – Limited Interests and Rights of Residence

Revenue has updated the capital acquisitions tax manual “Limited Interests – CAT Manual

Part 7", which provides guidance on the CAT treatment that applies where a limited interest, such as a life interest, is terminated early. The manual has been updated to include general guidance on limited interests.

Revenue has also published a new CAT manual titled "Rights of Residence – CAT Manual Part 25", which provides guidance on the CAT treatment of rights of residence.

No. 164 Stamp Duty Manual Part 7: Section 83F "Repayment of Stamp Duty on Cost Rental Dwellings"

Revenue has published a new stamp duty manual titled "Section 83F – Repayment of Stamp Duty on Cost Rental Dwellings", which contains guidance on the operation of s83F Stamp Duties Consolidation Act 1999 (SDCA 1999).

Section 83F SDCA 1999 was introduced by s14 of the Finance (Covid-19 and Miscellaneous Provisions) Act 2022. It provides for a repayment scheme relating to stamp duty paid at the rate of 10%, in accordance with s31E SDCA 1999, on the acquisition of residential property, where the property is designated as a cost rental dwelling by the Minister for Housing, Local Government and Heritage under Part 3 of the Affordable Housing Act 2021, within six months of acquisition.

No. 165 Manual on the Enforcement of Intellectual Property Rights

Revenue has revised the "Customs Enforcement of Intellectual Property Rights Manual", which provides guidance on Revenue's role in the protection of intellectual property rights on behalf of rights holders for goods being imported from outside the EU, as provided for under Regulation (EU) 608/2013.

The updated sections provide:

- advice on the electronic submission of Applications for Action (AFA);
- details of the requirement to include the Economic Operator's Registration and Identification (EORI) number when submitting, amending or extending an AFA; and
- information on the introduction of the EU Customs Trader Portal for the electronic submission of an AFA.

No. 166 Attribution of Profits to a Branch

Revenue has published a new manual titled "Attribution of Profits to a Branch", which provides an overview of, and guidance in relation to, the legislation contained in s25A TCA 1997.

Section 25A TCA 1997 was introduced by s28 Finance Act 2021 to provide for the application of an OECD-developed mechanism for the attribution of income to a branch or agency of a non-resident company operating in the State, i.e. the authorised OECD approach, or AOA. The new s25A TCA 1997 applies for accounting periods commencing on or after 1 January 2022.

No. 167 Revenue Arrangements for Implementing EU and OECD Exchange of Information Requirements in Respect of Tax Rulings

Revenue has updated the manual "Revenue Arrangements for Implementing EU and OECD Exchange of Information Requirements in Respect of Tax Rulings". The Annex 3 list of jurisdictions covered by the OECD Framework, with which Ireland has a legal basis to spontaneously exchange information, has been updated to include Mauritania, Samoa and Togo.

No. 168 Deduction for Digital Services Taxes

Revenue has updated the "Deduction for Digital Services Taxes" manual to include the Austrian, Kenyan and Spanish digital services taxes (DSTs) in the list of DSTs that are accepted as being deductible where incurred wholly and exclusively for the purposes of a trade.

No. 169 Betting Duty Return and Payments Compliance Procedures Manual

Revenue updated the "Betting Duty Returns and Payments Compliance Procedures Manual" to clarify the information required in betting duty returns.

No. 170 Procedures for Small Companies Administrative Rescue Process (SCARP)

Revenue has published a new manual titled "Procedures for Small Companies Administrative Rescue Process". The SCARP was introduced by the Companies (Rescue Process for Small and Micro Companies) Act 2021, which was commenced on 8 December 2021, to help certain companies that are viable, yet insolvent, by providing a simplified corporate rescue mechanism specifically geared towards small and micro companies.

The scheme allows small and micro companies to restructure their debts, helps companies to avoid liquidation and ensures that creditors get a better outcome than they would under a liquidation.

No. 171 Guidance Manual on Comprehensive Guarantee

Revenue's "Guidance Manual on Comprehensive Guarantee" has been updated to include additional information on the evaluation of authorised economic operator (AEO) traders in section 2.2. The manual has also been updated to include new information on associated traders in section 2.2.1. Additional information has also been provided on the cancellation of the guarantee in section 5.

No. 172 Vehicle Registration Tax Manual Section 1A

Revenue has updated the manual "Vehicle Registration Tax Manual Section 1 – Part Vehicle Classification and Tax Categories", which provides guidance on how vehicles are categorised for VRT purposes. Section 6 of the manual on "Declaration and Payment of VAT for New and Used Vehicles" has been updated.

No. 173 Form CT1 2021 – Completion and Submission of Returns

Revenue released an updated "Completion of Corporation Tax Returns Form CT1 2021" manual, which includes important information for taxpayers uploading 2021 Form CT1s that were in draft on ROS Offline on 16 August 2022. An update to the 2021 Form CT1 was released on 16 August, and CT1 files that were started in ROS Offline before 16 August and in draft at that date cannot be submitted on ROS without a technical amendment. Otherwise, the 2021 Form CT1 will need to be redone.

Appendix 2 of the manual includes step-by-step instructions for ROS Offline users on applying this technical amendment. Revenue emphasises the importance of following all steps and saving a copy of the draft Form CT1 before applying the technical amendment. Queries about this technical amendment can be raised with the ROS Helpdesk.

No action by the filer is required if a Form CT1 was started and in draft in ROS Online on 16 August.

No. 174 Instalment Arrangements

Revenue has updated sections 2.3 and 10 of the "Guidelines for Phased Payment Arrangements (PPA)" manual to reflect enhancements to the PPA system.

Revenue has also added Appendix 9 to the manual, outlining details of temporary changes introduced during Covid-19 that currently remain in place.

No. 175 Guide to Exchange of Information

Revenue has updated the manual "Guide to Exchange of Information under Council Directive 2011/16/EU, Ireland's Double Taxation Agreements and Tax Information Exchange Agreements and the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters" in section 2, "Exchange of Information on Request" to update references to reflect the Compliance Intervention Framework.

In addition, a new section 3.7 has been added, titled "Council Directive (EU) 2018/822 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (DAC6 – EU Mandatory Disclosure Regime)".

No. 176 Revenue Compliance Interventions – Operation of Payroll Taxes (Income Tax, PRSI, USC) by Employers

Revenue published a new manual titled "Revenue Compliance Interventions – Operation of Payroll Taxes (Income Tax, PRSI, USC) by Employers". The purpose of this manual is to provide guidance for caseworkers conducting compliance interventions in respect of employers who have incorrectly operated payroll taxes.

This guidance deals only with cases where it is determined that the updating of an employee's payroll record is required due to the incorrect operation of the PAYE system by an employer as a result of error or carelessness.

The guidance set out in this manual will apply to any self-correction or qualifying disclosure received and/or Revenue compliance intervention initiated following the publication of this manual.

No. 177 Guidance on the Level 1 Compliance Programme – Debt Warehouse Scheme

Revenue has published a new "Level 1 Compliance Programme – Debt Warehousing Scheme" manual.

In September 2022 Revenue issued a Level 1 Compliance Intervention notification offering taxpayers an opportunity to self-review returns eligible for debt warehousing and, if additional undisclosed relevant liabilities arise, these can benefit from the provisions of the debt warehousing scheme (DWS). By making an unprompted qualifying disclosure in relation to previously undisclosed Period 1 liabilities on or before 31 January 2023, the taxpayer has an opportunity to have those additional liabilities warehoused under the terms of the DWS.

A taxpayer who makes an unprompted qualifying disclosure also receives the normal benefits of mitigation of the tax-geared penalty (in cases where such a penalty applies), non-publication of the tax settlement and non-prosecution.

The manual includes information on a range of topics, including taxpayer eligibility, the scope of the disclosure and the conditions applying, and how the tax due can be brought to account in order to be included in a phased payment arrangement (PPA).

The manual includes samples of the letters issued to taxpayers.

No. 178 ROS Pay & File 2021 – Tips and Tricks

Revenue has updated the manuals "Revenue Online Service (ROS)" and "ROS Pay and File – Useful Tips" to include additional information on filing 2021 Form 11 returns.

The pay and file deadline is Wednesday, 16 November 2022, provided that the 2021 Form 11 return is filed and the appropriate payment is made through ROS for both preliminary tax for 2022 and the income tax balance due for 2021. The extension does not apply where only one of these actions is completed through ROS.

The updates to the ROS manual include information on:

- new services available, including Trust Register Functions and the facility for taxpayers to display and print their current registration status, in paragraphs 1 and 7;
- the redesign of the ROS Login and Manage My Certificate screens, including additional guidance, in paragraph 5;
- MyEnquiries auto-registration for new ROS registrations, in paragraph 5.1; and
- updating a bank account in a ROS debit instruction (RDI), in paragraph 8.

The "ROS Pay and File – Useful Tips" manual contains tips to assist taxpayers and agents with their ROS pay and file obligations, including information on new features on the return, such as the LPT surcharge advisory message and newly pre-populated information for 2021.

No. 179 Excise Duty Rates and Tobacco Products Tax

Revenue has updated the "Budget Excise Duty Rates" manual to reflect the changes made to excise duty rates announced in Budget 2023.

The "Tobacco Products Tax Manual" has also been updated to reflect changes announced in the Budget. The worked examples in section 4.2, "Calculation of Tobacco Products Tax", have been updated to reflect changes in the rates of tobacco products tax. In addition, Appendix 1 "Definitions" has been updated to clarify that "Member State" is to be read as including Northern Ireland.

No. 180 Amendments to Membership of the EU GSP Scheme

Revenue has amended the "Customs Manual on Preferential Origin – Appendix 2" to reflect changes to the Generalised System of Preferences (GSP) scheme with effect from 1 January 2022. The following changes were made to the manual:

- Nauru, Samoa, Tonga and Uzbekistan were removed from the standard GSP;
- Mozambique was removed from the list of Least Developed Developing Countries GSP; and
- Armenia and Ecuador were removed, and Kyrgyzstan, Sri Lanka and Uzbekistan were added, to the GSP+ list of countries.

No. 181 myAccount User Manual

Revenue has updated the "myAccount User Manual" to include additional guidance on two-factor authentication (2FA), as outlined in paragraph 5.1. This feature is mandatory for the myAccount login process since 3 September 2022.

No. 182 Ships Stores Manual

Revenue's "Customs Staff Manual on Ship's Stores" has been updated to include clarification on the application process for dutiable products delivered to vessels as ship's stores. The manual specifies the application required when requesting dutiable products as well as requesting a copy of the IMO Fal Form 3 to accompany all applications. It also includes some minor amendments to the text where necessary.

No. 183 Manual on Cash Controls Entering or Leaving the EU

Revenue has revised the "Cash Controls on Entering or Leaving the EU" manual, which provides guidance on the requirements to declare cash on entering or leaving the EU. The revisions include an expanded definition of cash, new requirements for unaccompanied cash, new obligations on customs authorities to record cash related to criminal activity and a link to a new cash declaration form.

No. 184 ROS Support for the 2022 Pay and File Period, Extended Opening Hours and Updating Your Bank Details

Revenue has confirmed the extended opening hours for the ROS Technical Helpdesk and Collector-General's Division (including ROS Payment Support) for the days leading up to the ROS pay and file deadline of 16 November 2022.

Revenue's eBrief includes details of the MyEnquiries pathways and the phone numbers for contacting the ROS Technical Helpdesk and the Collector-General's Division.

Revenue also draws attention to the need for taxpayers to update bank account details for a tax payment or a tax refund if they have recently changed to a new banking provider because of the exit of Ulster Bank and KBC Bank from the Irish market. When updating bank account details, Revenue advises that the details will need to be updated separately for tax payments and tax refunds, and where a taxpayer uses different bank accounts for their tax registrations.

Revenue advises taxpayers to update their bank details at least seven days before the next payment is due, to allow sufficient time for Revenue's system to update.

No. 185 iXBRL – "Tagging Errors in iXBRL Submissions"

Revenue has updated its manual "Submission of iXBRL Financial Statements as Part of Corporation Tax Returns" to include a new paragraph 4.1.2, "Tagging Errors in iXBRL Submissions". The updated manual highlights to taxpayers, their agents and iXBRL software vendors some common tagging errors that have been seen on iXBRL financial statements submitted to Revenue.

The manual also notes that poor tagging causes distortions in the accounting information apparent to Revenue and may lead to unnecessary Revenue Compliance Interventions and associated costs for businesses.

No. 186 Repayment of Tax Where Earnings not Remitted

Revenue has archived the manual "Part 34-00-08: Repayment of Tax Where Earnings not Remitted – Section 825B Taxes Consolidation Act 1997" as the relief is no longer relevant.

The relief was an expatriate-based tax relief available to individuals who were not Irish domiciled and who, before they came to the State, were living and working in a country with which Ireland had a double taxation agreement. It pre-dated the introduction of the Special Assignee Relief Programme (SARP). The relief applied where the individual was sent by his or her foreign employer to work in Ireland for that employer or for an associated company of that employer and continued to be paid from abroad. If available, it placed a cap on the level of employment income that was subject to Irish tax.

The latest tax year in which the relief could be claimed was 2015. As a claim for tax relief for the 2015 tax year is now statute barred under s865(4) TCA 1997, the manual has been removed.

No. 187 Tax and Duty Manual Stamp Duty on Certain Acquisitions of Residential Property

Revenue has updated the manual "Stamp Duty on Certain Acquisitions of Residential Property (10% Rate of Duty) – Part 5: Section 31E". The manual contains guidance on the application of s31E SDCA 1999, which provides for stamp duty to be charged on certain acquisitions of residential property at a higher rate of 10%.

The updates to the manual include:

- New material has been added to the introduction, which refers to the stamp duty treatment of acquisitions of residential property by local authorities and approved housing bodies and two s31E-related repayment schemes.
- Section 3.3 contains additional information on the general stamp duty exemptions provided for in ss93A and 106B SDCA 1999, which was previously contained in section 3.4.
- Section 4.1 contains information on s83E SDCA 1999 (repayment scheme in respect of social housing leases), which was previously contained in sections 3.3. and 8.5.
- Section 4.2 contains new information on s83F SDCA 1999 (repayment scheme in respect of cost rental dwellings).
- Section 6 has been updated to confirm that the provisions of s31E SDCA 1999 that deal with indirect acquisitions of residential units do not apply to apartments.
- Section 9.2 has been updated to clarify that where relief under s79 SDCA 1999 applies in respect of the acquisition of a residential unit, the acquisition is disregarded for the purpose of determining whether the 10-unit threshold has been met.

No. 188 Excise Duty Rates on Energy Products and Electricity Taxes

Revenue has updated the manual "Excise Duty Rates Energy Products and Electricity Taxes" to reflect changes in the rates of mineral oil tax announced in Budget 2023 and introduced with effect from 12 October 2022.

No. 189 Form 1 (IREF) 2021 Filing Deadline Extension

Revenue has confirmed that the return filing and payment date for Irish real estate funds

(IREFs), with an obligation to submit the Form 1 (IREF) 2021 via MyEnquiries, is Wednesday, 16 November 2022.

When remitting an electronic payment, as instructed on the Form 1 (IREF) 2021, details should be forwarded to moneytrans@revenue.ie to ensure correct and prompt allocation of funds to a taxpayer's record.

The form has also been updated as follows:

- to refer to the 2021 year of assessment;
- a panel (h) has been inserted at Part C – Self Assessment made under Chapter 4 of Part 41 to capture the amount of preliminary tax payable for the 2022 year of assessment; and
- Note 4 has been inserted to provide information on the minimum preliminary tax to be paid for 2022.

No. 190 Tax and Duty Manual on the Control and Examination of Baggage

Revenue's "Manual on the Control and Examination of Baggage" now reflects the Budget 2023 changes in excise duty to be charged on imported tobacco products in a travellers' baggage.

No. 191 Guidelines for Charities and Sports Bodies Applying On-line for Tax Exemption

Revenue has updated the manual "Charities and Sports Bodies On-line Applications for Tax Exemption" to include a new section 8, setting out the circumstances in which Revenue withdraws tax exemption from charities and sports bodies and the processes that are in place to do this. The eBrief notes that enquiries can be submitted to the Charities and Sports Exemptions Unit via MyEnquiries or by phone (01 7383688).

No. 192 Requests for Clearance to Distribute Sales Proceeds to Non-resident Vendors

Revenue has published a new manual titled "Requests for Clearance – Capital Gains Tax and Non-Resident Vendors". This manual outlines the process whereby a representative acting on behalf of a non-resident vendor in respect of the disposal of a specified asset can request clearance from Revenue to distribute the sales proceeds.

The manual sets out how the new online clearance request should be submitted (e.g. for a solicitor) and the documentation that must accompany a valid clearance request. The new process will apply from Monday, 24 October 2022, and will be subject to ongoing review by Revenue.

No. 193 Revision of Payment Information Associated with the Electronic Excise Declaration System

Revenue has updated "The Electronic Excise Declaration System (EEDS) Manual" to remove out-of-date information, including references to EFT (electronic funds transfer), and to include the payment arrangements currently available via myAccount and ROS.

No. 194 New Guidelines for the Temporary Business Energy Support Scheme (TBESS)

Revenue published new "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)".

Sections 87 to 89 of Finance Bill 2022 make provision for the TBESS, which will assist businesses with their electricity and natural gas costs over the winter months. The scheme, which will be administered by Revenue, provides for a cash payment to qualifying businesses.

The scheme will be open to businesses that:

- are tax compliant,
- carry on a Case I trade or Case II profession (including certain charities and approved sporting bodies in relation to certain income) and
- have experienced an increase of 50% or more in their natural gas and electricity average unit price between the relevant bill period in 2022 and the corresponding reference period in 2021.

The scheme is designed to be compliant with the EU State Aid Temporary Crisis Framework. This means that European Commission approval will be required for the scheme before any payments can be made to businesses.

Information on the scheme is contained in the TBESS guidelines. The eBrief notes that further information will be published in the coming weeks, including on how businesses can submit claims via ROS.

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

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	Topic	Court
01	**Income Tax and CGT – "Bona Fide Commercial Reasons" and "Tax Avoidance as Main Purpose"**	Tax Appeals Commission
02	**Director's Expenses and Modern Work Practices**	Tax Appeals Commission
03	**CGT – Who Is Liable on Disposals Through Forced Sales by Banks/Liquidators?**	High Court
04	**Benefit-in-Kind – "Commercial Vehicles"**	Tax Appeals Commission
05	**Employment Investment Incentive Scheme – Whether "Follow-on" Investments Were Foreseen**	Tax Appeals Commission

01 "Bona Fide Commercial Reasons" and "Tax Avoidance as Main Purpose" Tests Deny Retirement Relief and Reorganisation Relief

The background to tax appeal **127TACD2022** was that the Appellant held eleven shares in a trading company ("TradeCo"), with his wife holding the remaining one issued share. On 1 November 2011 the Appellant's son incorporated a new company ("HoldCo"). On 29 November 2011 HoldCo acquired six of the appellant's eleven shares for €700,000 (although the payment of that €700,000 was not made until 2013 (it would seem that the funds were retained in TradeCo until that time and then distributed to HoldCo to fund the payment). Also on 29 November 2011 the Appellant transferred his remaining five shares (valued at €583,335) and his wife transferred her one share to HoldCo as part of a share-for-share exchange with HoldCo, with the Appellant being issued five new HoldCo shares and his wife one new HoldCo share.

After the transactions, HoldCo held 100% of TradeCo, and HoldCo's shareholders were the Appellant's son (six shares, 50%), the Appellant (five shares, 41.67%) and the Appellant's wife (one share, 8.33%).

The Appellant and his wife remained the only directors of TradeCo until 2018, when (after meetings with Revenue) the Appellant resigned. In this regard it should be noted that the taxpayer was over 70 years of age[1] in 2011, when the transaction was carried out, and gave evidence

1 The age of the taxpayer is redacted in the determination. However, the parties are identifiable from the information given and have been named in newspaper stories.

that he rarely left the house due to his health. At the hearing under cross-examination, when asked why the Appellant did not step down as director and pass the mantle to his son completely, the Appellant's evidence was that "it wasn't a cut and dried, like it just continued", while the Appellant's son gave evidence that the Appellant was "a paper Director maybe ... [the Appellant] had retired and wasn't doing any of the day-to-day".

The Appellant did not disclose details of the 2011 transactions in his income tax return for 2011. In his income tax return for 2013 the Appellant claimed retirement relief (s598 TCA 1997) in respect of the disposal of the six shares for €700,000 and claimed reorganisation relief under s586 TCA 1997 in respect of the share-for-share transaction with HoldCo.

On 4 December 2018 Revenue raised an assessment to CGT in the sum of €348,112 for 2011 (i.e. disallowing both the retirement relief and reorganisation relief claims). Then on 5 December 2018 Revenue issued a second, "alternative", assessment in respect of income tax in the amount of €673,866 (i.e. income tax raised under s817 TCA 1997).

Time-limit arguments were not pursued by the Appellant at the hearing of the appeal.

The questions that the Commissioner had to decide on were:

- How are "alternative assessments" to be addressed by the TAC?
- Were the transactions entered into for bona fide commercial reasons?
- Were the transactions entered into for a tax-avoidance purpose?

The TAC decided the matter in favour of Revenue and opted to uphold the CGT assessment in priority to the income tax assessment. It approached the three questions as follows.

How are "alternative assessments" to be addressed by the TAC?

Revenue's entitlement in law to raise "alternative assessments" (i.e. assessments in respect of the same issue under both income tax and CGT) was not disputed by the Appellant. Revenue accepted that it was for the TAC to decide which of the two assessments should be upheld, and Revenue conceded that it could not recover under both assessments.

The Commissioner set out his approach to the issue as follows:

> "77. The Commissioner considers that the appropriate way to proceed is to consider one of the assessments first. If he determines that this assessment should be upheld, then he does not need to proceed to consider the other assessment. However, if he finds that the first assessment should not be upheld, then he should consider the alternative assessment.
> 78. Therefore, the first question to determine is which assessment should be considered first. The Commissioner notes that the assessment under sections 584 and 586 to CGT was raised first (4 December 2018 compared to 5 December 2018 under section 817). Additionally, he considers that the transaction in question was, at the very least, prima facie a capital transaction. Therefore, the Commissioner is satisfied that it is appropriate to consider the CGT assessment first, before if necessary proceeding to consider the income tax assessment."

Were the transactions entered into for bona fide commercial reasons?

The determination cites the House of Lords' decision *Commissioners of Inland Revenue v Brebner* [1967] 2 AC 18, where it was held that the question of whether a transaction was made for bona fide commercial reasons "was one of pure fact".

The Commissioner noted that the reason given by the Appellant for entering into the transaction was to allow him to retire while preserving the company as a going concern (in preference to liquidating it). The Commissioner held that this stated reason was inconsistent with the facts, which showed that the Appellant remained a director with effective financial and strategic control of TradeCo in terms both of he and his wife being TradeCo's only directors and their holding 50% of its shares (through HoldCo).

"84. The Commissioner accepts the submission of the Appellant that it is not a requirement under the TCA 1997 that he cease to be a director in order to avail of relief. However, **the Commissioner would expect that if the Appellant had genuinely wished to step back from the business, he would have relinquished control to a much greater degree than the evidence suggested had occurred**; indeed, it appeared to the Commissioner that there had been no effective relinquishing of control by the Appellant at a strategic and financial level. It was not clear to the Commissioner why the Appellant's son had not been made a director of [redacted: TradeCo] if the intention of the Appellant was to hand the business over to him. The Appellant's son was a director of [redacted: HoldCo] but this was simply a holding company; the trading company was [redacted] [emphasis added]."

The Commissioner considered that the delay in making the payment of the €700,000 until 2013 also factored into the analysis of whether the transaction was bona fide commercial.

"90. Furthermore, **the Commissioner accepts the submission of the Respondent that the evidence demonstrated that the transaction was not in the bona fide best interests of [redacted: presumably, TradeCo] in 2011, because the money was not paid to the Appellant until 2013**. Counsel for the Appellant stressed that the company had sufficient funds in 2011 to make the payment. However, both the Appellant and the Appellant's son accepted that [redacted: TradeCo's] financial position was tight in 2011, and that it was necessary to have sufficient monies in the company bank accounts in order to be able to arrange bonds for tenders, and that this was the reason the monies were not paid until 2013 [emphasis added]."

Were the transactions entered into for a tax-avoidance purpose?

"92. As a result, the Commissioner is satisfied that the Appellant falls foul of the anti-avoidance provisions of sections 586(3)(b) and 598(8) of the TCA 1997, and that the assessment for CGT should be upheld. As it has been found that the transaction was not carried out for bona fide commercial reasons, it is not strictly necessary to consider the second limb of the relevant test, i.e. that the transaction did not form part of any scheme or arrangement of which the main purpose or one of the main purposes is avoidance of liability to tax. However, for the avoidance of doubt, **the Commissioner finds that, given the transaction was not in the interests of [redacted: presumably, TradeCo] in 2011 and that the Appellant continued to effectively control the company afterwards, the transaction did form part of a scheme or arrangement of which the main purpose or one of the main purposes was avoidance of liability to tax** [emphasis added]."

Commentary

Both retirement relief and reorganisation relief were denied to the taxpayer on the grounds that the transactions were held to have been carried out (1) not for bona fide commercial reasons and (2) for a tax-avoidance purpose, because (i) the reasons stated by the taxpayer for entering the transaction (that he wanted to step back from the business) were held to be inconsistent with the subsequent facts (he remained as a director and continued to maintain strategic and financial control of the business until 2018), (ii) it was not in the trading company's interests to pay a dividend to the holding company in 2011 to fund the exit and (iii) the taxpayer retained control of the company.

This raises several questions that will be of concern to tax advisers:

- What is the point in time when the motivation of the taxpayer should be considered?

  In reaching its decision, the TAC appeared to put considerable weight on the actions of the taxpayer over the seven years (2011–2018) following the transactions, when he continued as a director of the company. It would seem that those subsequent actions strongly influenced how the TAC viewed the taxpayer's motivations at the time of the transactions.

- Did the TAC effectively introduce concepts similar to the "trade benefit test" in s176 TCA 1997 (buy-back relief) to a retirement relief claim?

  The transaction was said to have been carried out not for bona fide commercial reasons and for a tax-avoidance main purpose because in 2011 it would not have been in TradeCo's[2] interests to pay a €700,000 dividend to HoldCo to fund the purchase.[3] In considering the interests of TradeCo (the asset being disposed of) as part of the bona fide commercial reasons test, the TAC would appear to have applied a concept similar to a "trade benefit test".

- Did the TAC effectively introduce a "control" and/or s817-style "significant reduction" and/or s176-style "substantial reduction" test to the interpretation of retirement relief?

  The transactions were held to have been carried out not for bona fide commercial reasons and for a tax avoidance main purpose because the taxpayer remained in "effective control" of TradeCo afterwards (as he and his wife were its only directors and held 50% of the shares of HoldCo).[4]

The TAC's determination does not set out a detailed review of the case law on the "bona fide commercial reasons" or "tax-avoidance purpose/main purpose" tests.

It is unclear to what extent the Appellant, through his submissions to the TAC or at the hearing, directed the Commissioner's attention to such decisions as *Laird Group plc v IRC*, *IRC v Goodwin, Trevor G Lloyd v HMRC* or *Clark v IRC*, which, arguably, could have supported the position that the taxpayer ought to be regarded as having satisfied the bona fide commercial reasons test.

In the same vein, it is unclear whether judgments such as those of Lord Nolan in *IRC v Willoughby* were cited by the Appellant to support the position that, in disposing of his shares, and thus reducing his shareholding from 100% to 50% (amalgamating his spouse's interest), he had incurred genuine economic consequences in line with what the Oireachtas had intended when it enacted retirement relief, and therefore the transactions ought to be framed as legitimate tax mitigation rather than tax avoidance.

> "The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any such taxpayers qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option offered to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option [Lord Nolan in *IRC v Willoughby*]."

Ultimately, although the determination will concern tax advisers, the taxpayer himself

2 At paragraph 84 of the determination the name of the entity is redacted. It is assumed that the redaction refers to TradeCo given the context.
3 The transaction was entered into before the introduction of s135(3A) TCA 1997.
4 At paragraph 90 of the determination the name of the entity is redacted. It is assumed that the redaction refers to TradeCo given the context.

may have been relieved that the TAC opted to dispose of the matter in the way that it did, by upholding the CGT assessment rather than the "alternative", income tax, assessment. Arguably, the Commissioner could have chosen to start with an appraisal of the s817 assessment as that had been raised under an anti-avoidance provision. Had he done so, then *prima facie* the taxpayer would have fallen within the charge to s817 as his interest in TradeCo was not "significantly reduced" given the requirement to consider the interests of connected persons (i.e. those of his son through HoldCo) per s817(1)(ca) TCA 1997.

02 Director's Expenses and Modern Work Practices

In tax appeal **106TACD2022** the Appellant was a company that was assessed to PAYE on travel expense payments it made to its director (its only employee). The company provided specialist IT consultancy services to financial service providers in the UK. The payments were made in respect of travel from the director's home office to multiple client sites in the UK. The director travelled frequently to the UK (on average 45 trips a year, each trip being for a period of approximately two days).

The question before the TAC was whether a home office can be a normal place of work, such that expenses of travel therefrom could be reimbursed tax-free. The Appellant argued that the director's normal place of work was his home office, and that was where the services relating to the contracts were to be carried out. Any travel to the UK was solely for the purposes of the director's engaging with stakeholders at meetings and advancing future business.

Revenue contended that the costs of travel from the director's home to the airport, parking at the airport and flights to the UK were not expenses that could be reimbursed by the company tax-free. Revenue argued that the normal place of work of an intermediary is the premises of the intermediary's client and not the registered office of the company (being the home of the director).

The Commissioner decided the matter in favour of the Appellant and held that Revenue was incorrect in not applying s114 TCA 1997 to allow a deduction for the travel expenses. In reaching that decision, the TAC summarised the legislative provisions and case law. The seminal case on the issue of travel expenses is *Ricketts v Colquhoun* [1925] 10 TC 118, which is authority for the position that travel expenses incurred by an employee to get from his home to his place of work are not deductible, and the following extracts from that judgment were cited in the Commissioner's decision:

> "They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them [Viscount Cave LC, at page 4]".
> "A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance [Viscount Cave LC, at page 134]."
> "The deductible expenses do not extend to those which the holder has to incur mainly, and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition [Lord Blanesburgh, at page 7]."

Thus the "general rule" on how s114 should be applied, per *Rickets v Colquhoun*, is that expenses of a personal nature (i.e. as a result of a personal decision to live at a distance from your place of work) are not deductible.

The Commissioner distinguished the facts in the present case from those in *Ricketts v Colquhoun* on the grounds of changes to work practices arising from the adoption of modern technology.

> "The case of *Ricketts v Colquhoun* appears to be the cornerstone of case law invoked by the Respondent. This case does not rest easily with modern day employee work practices such as the use of technology, remote hubs and working from home. Neither does it rest easily with the circumstances in this particular case. In *Ricketts v Colquhoun* the situation was that of a directly employed employee travelling from home to his employer's workplace to carry out the tasks of employment. In the current appeal, we have a situation where there is no contractual relationship per se between the Appellant and the client. The evidence was that when the Director arrives at the client site he is not an employee, he has no entitlement to a fixed place within the physical infrastructure or management organisation. He uses a transient 'hot desk' and is acting on behalf of the Appellant to fulfil a contract with [redacted]. In the Commissioner's view, it would be incorrect to say that his place of work is the client site in the sense understood in the case of *Ricketts v Colquhoun*. The Commissioner accepts as credible the evidence of the Director that the programme of work or services cannot be disclosed for reasons of confidentiality [at paragraph 48]."

The Commissioner also held that a home office could be the normal place of work:

> "there are situations where a person's home is the main place of work and that is not negated by the fact that the building also functions as the person's home. In the modern working environment, there are many cases in which a person's home may be the main place of work. The position adopted by the Respondent in this regard, does not recognise the changes in working patterns which modern technology has facilitated in recent years. Accordingly, the Commissioner is satisfied that the Appellant does not fail in this appeal simply because the office of the Appellant happens to be located at the Director's home [at paragraph 50]."

Having distinguished *Ricketts* on the basis of changes to the working environment, the Commissioner determined the matter on the basis of the following findings of fact:

- The Commissioner accepted the director's evidence that, at the time the contract was made, it had been agreed that he would perform his duties from Ireland, and subsequent to that the director felt that he had to travel to the UK to attend meetings.
- The director worked approximately three days per week from his home office in Ireland. Although he spent on average two days a week on-site in the UK, he was required to travel to multiple locations in the UK and only had access to a "hot desk" at those locations.

It followed that the TAC held in favour of the Appellant by concluding that the normal place of work of the director was his office in Ireland not the client sites in the UK and that the travel expenses were necessarily incurred in the performance of the duties of the employment.

03 Who Is Liable for CGT on Assets Disposed of Through Forced Sales by Banks/Liquidators?

The High Court case of *The Revenue Commissioners v Robert Stewart* [2022] IEHC 558 concerned a taxpayer (an Irish resident and domiciled individual) who, in 2007 and 2008, borrowed money from a French bank ("the bank") (which had an Irish Branch) to buy shares in a publicly traded French company. The bank held those shares as security for the loan.

The taxpayer fell into arrears on the loan payments, and the bank enforced its security by carrying out a forced sale of the shares in various tranches in 2008, 2010 and 2011. The bank did not apply any of the proceeds from those sales towards satisfying the taxpayer's CGT. Nor did Revenue take any steps to recover CGT from the bank. The taxpayer filed tax returns and paid an amount in respect of CGT to Revenue on the 2008 and 2010 disposals.

In 2015 the taxpayer became aware of the provisions of s571 TCA 1997 and sought a refund of the CGT that he had paid to Revenue on the basis that, per s571, it was the bank, rather than he, who was obliged to account for the CGT on the disposal of the shares. Revenue refused to issue the refund and instead raised an assessment in respect of the 2011 disposal.

The taxpayer appealed the assessments to the TAC, which found in his favour (92TACD2021). Revenue appealed the TAC's determination to the High Court on a point of law.

The question before the High Court was whether the Appeal Commissioner was correct in holding that:

- s571(5) TCA 1997 mandates that the CGT shall be recoverable solely from the bank; and
- s571(9) TCA 1997 does not permit Revenue to seek secondary recovery from the taxpayer.

Section 571(5) provides (among other things) that where a liquidator or other person entitled to an asset by way of security (in the section defined as an "accountable person") disposes of an asset:

> "notwithstanding any provision of the Capital Gains Tax Acts...(a) any referable capital gains tax in respect of any chargeable gains which accrue on the disposal shall be assessable on and recoverable from the accountable person...and (c) referable capital gains tax paid by the accountable person shall discharge a corresponding amount of the liability to capital gains tax, for the year of assessment in which the disposal is made, of the person (in this section referred to as 'the debtor') who apart from this subsection is the chargeable person in relation to the disposal".

Section 571(7) provides (among other things) that:

> "Notwithstanding any provision of the Capital Gains Tax Acts or of the Corporation Tax Acts...the amount of referable capital gains tax or referable corporation tax, as the case may be, which under this section is assessable on an accountable person in relation to a disposal, shall be recoverable by an assessment on the accountable person...".

Section 571(9) provides that "[s]ubject to subsections (5)(c) ... nothing in this section shall affect the amount of chargeable gains on which...the debtor is chargeable to capital gains tax...".

The High Court approached the issue by first noting that the imposition of a tax occurs in three stages, being (1) the declaration of liability under statute (the charge to tax), (2) the quantification of that liability in a particular case and (3) the recovery of that tax. The court noted that the case before it concerned the third stage, being the question of recovery and, specifically, from whom the tax should be recovered.

Revenue had sought to frame the issue in terms of whether s571 exempted the taxpayer from tax. Revenue then argued that the references to "notwithstanding any other provision of the Capital Gains Tax Acts" in s571 were not sufficiently precise to disapply the provisions of Part 41 as exemptions from tax must be expressed in clear and unambiguous terms. The High Court rejected that argument on the basis that it held that s571 did not act as an exemption from tax but, rather, set out from whom the tax is recoverable (paragraph 27).

The High Court further rejected Revenue's argument that the application of s571 by Revenue was discretionary, on the grounds that the use of the word "shall" denoted something that was mandatory (paragraph 29) and because of the absence in the legislation of any clear mechanism as to how such purported discretion would be exercised (paragraph 46).

The High Court also clarified that the references in s571 to "referable capital gains tax" rather than just "capital gains tax" was a "distinction without a difference".

As regards the use of the word "notwithstanding" in s571, the court cited the judgment of Kearns J in *Sheady v Information Commissioner* [2005] 2 ILRM 374:

> "The use of a 'notwithstanding' clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation...Such a clause can clearly operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation...The word 'notwithstanding' is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, 'despite' or 'in spite of' any other enactment. It underlines in the clearest possible manner the free-standing nature of the provision."

The difficulty faced by the court was that there were competing uses of "notwithstanding" in play, as s950(2) TCA 1997 (self-assessment) contained similar language (i.e. "Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts").

The court resolved this difficulty by noting that the provisions of s571 were clearly expressed in mandatory terms and afforded Revenue no discretion not to pursue the accountable person (i.e. the bank). The court further cited Clarke CJ's judgment in *Droog v Revenue* [2016] IESC 55 for the proposition that there is "no absolute requirement that there be a specific mention of the fact that Part 41 or any part of it has been disapplied once the language of the relevant other aspect of the TCA is sufficiently clear to make it obvious that a particular part of Part 41 is being disapplied".

Accordingly, the court held that the effect of s571 was that recovery was to be made against the accountable person (i.e. the bank) rather than the taxpayer and, further, upheld the Appeal Commissioner's finding that s571 did not contain a provision permitting the taxpayer to be pursued for secondary liability (paragraph 58).

04 Benefit-in-Kind and "Commercial Vehicles"

The background to tax appeal **112TACD2022** was that the Appellant (a company) provided company vehicles (model: Land Rover Discovery 4) to each of its two directors. The Appellant had originally applied the benefit-in-kind (BIK) rate applicable to vans (5%) to the provision of these vehicles. After a compliance check by Revenue, the Appellant argued that no BIK should arise at all as the vehicles fell outside the statutory framework. In contrast, Revenue formed the view that the vehicles should be treated as cars for the purposes of BIK (at a rate of 30%) and raised assessments to PAYE.

The vehicles in question were equipped with five doors and had side windows and rear seats. The vehicles were stated as being treated as "commercial vehicles" for the purposes of VRT, VAT and insurance.

The central issue before the TAC was whether each of the vehicles in question was a "car" for the purposes of s121 TCA 1997. The Appellant argued that each vehicle was not a "car" within the meaning of s121 as:

- The vehicle should not be considered to be a "road vehicle" because its off-road capabilities did not restrict it to the road.
- The vehicle was not solely designed for the carriage of passengers but had extensive load-carrying capacity beyond that of a normal car.
- The vehicle was of a type "not commonly used as a private vehicle and unsuitable to be so used". In this regard, it put forward two arguments:
  - "commonly" should be given its dictionary definition, and on the basis that all Land Rover passenger models have only a 1% market share in Ireland (and Land Rover Discovery 4 models a smaller share than that), it could not be said to be a "commonly used" vehicle; and
  - in the alternative, the vehicle was "not suitable to be so used" as a private vehicle as it was large and comparatively cumbersome and had a large turning circle, and so was difficult to park.
- Finally, the Appellant argued that the vehicle was treated as a "commercial vehicle" for VRT, VAT and insurance purposes.

Revenue argued the vehicles were "cars" within s121 as:

- They were road vehicles designed and constructed for the carriage of passengers.
- It could not be said that they were uncommon on the roads, and that was how they were being used by the directors personally.
- The status of the vehicles as "commercial vehicles" for the purposes of VRT, VAT and insurance was irrelevant to the BIK treatment.

The TAC held that vehicles were cars for the purposes of s121 TCA 1997 (BIK on cars) and upheld the Revenue assessments. It rejected all of the Appellant's arguments, holding:

> "The relevant legislation in this appeal is section 121 of the TCA 1997. Provisions concerning the 'commercial' classification of the vehicles for the purposes of VRT, VAT and insurance are not relevant. In the Commissioner's view section 121 of the TCA 1997 is clear in its meaning. In order to be a 'car', the vehicle must be 'a mechanically propelled road vehicle designed, constructed or adapted for the carriage of the driver or the driver and one or more other persons'. The legislation does not impose a requirement, as the Appellant contends, that to be road car a vehicle must be designed only for use on the roads. Likewise, there is nothing in the wording of the provision to suggest that a car must be designed with just a single purpose in mind, namely the carriage of passengers [paragraph 25]."

The decision continues by noting that the increased load-carrying and off-road performance capabilities of the vehicle did not bring it outside the definition of a car. The TAC also rejected the Appellant's statistical approach to the interpretation of "commonly":

> "The statistics cited by the Appellant regarding the prevalence of the Land Rover Discovery 4 on Irish roads as a private vehicle are not relevant to the question of whether it is of a type that is commonly used as a private vehicle. Plainly, the Land Rover Discovery 4 is a vehicle of a type, sometimes referred to as an SUV with four wheel drive, which one sees frequently in such use [paragraph 26]."

The nature of the activity of the company is redacted. It is not clear from the decision to what extent the vehicles' load-carrying capacity or off-road capabilities were used for business purposes. The determination makes no reference to any arguments raised in this regard, and the fact that the capabilities of the vehicles mentioned in the determination appear to have been largely drawn from marketing materials (e.g. that it can "ascend a slope steeper than an Olympic ski jump") suggests that the vehicles in question were exclusively used for normal, on-road passenger transport. Although, arguably, the particular use of a vehicle is not relevant to its classification as a "car" for s121 purposes, it may have contributed to the view of the vehicles taken by the TAC if they were effectively only used as such.

The decision will have implications for businesses and industries that require their employees to have access to vehicles that have significant load-carrying capacity or off-road capability. Many such vehicles, sold as "commercial vehicles", would, per this determination, be treated as falling within the definition of "cars" for BIK purposes, if they, like the Land Rover Discovery 4, are "a vehicle of a type, sometimes referred to as an SUV with four wheel drive, which one sees frequently in such use".

Although such vehicles may have the ability "to ascend a slope steeper than an Olympic ski jump", it seems that they can't climb their way of out of BIK treatment as "cars". The 5% BIK rate for "vans" would only be appropriate if there were no rear seats and no rear side windows.

05 EIIS – Whether "Follow-on" Investments Foreseen in Business Plan

In tax appeal **102TACD2022** the Appellant company sought to avail of the Employment Investment Incentive (whereby individual investors obtain income tax relief for investments in shares in a qualifying company) in respect of shares that it issued in 2016. The company had claimed BES/EII relief in prior periods and claimed that it was a qualifying company under the "follow-on risk finance" criteria in respect of the shares that it issued in 2016 to its EII investors.

Revenue denied EII relief on the 2016 investment on the grounds that the company did not satisfy the condition, imposed by paragraph 6(b) of Article 21 of the General Block Exemption Regulation (651/2014) (GBER), that the "the possibility of follow-on investments was foreseen in the original business plan". The requirement to comply with paragraph 6(b) of Article 21 was contained in s494(4A) TCA 1997 of the legislation as it was in 2016 (the requirement is now contained in s496(7) TCA 1997).

The company was incorporated in 1998, and its original business plan dated from 19 June 2001, when it had sought BES funding. That business plan contained projections for the three-year period May 2001 to April 2004 and foresaw a funding requirement of IR£500,000, which the business plan also described as a "1st round of funding from outside the company".

The question before the TAC was whether the 2001 business plan foresaw the possibility of follow-on investments, so as to satisfy the condition set out in Article 21, paragraph 6(b), of the GBER and thus allow EII relief in respect of the 2016 investment. At the hearing the Appellant was represented by its tax agent, and Revenue by counsel.

The Appellant argued that the business plan should be read as foreseeing follow-on financing requirements because:

(1) the reference to a "1st round of funding" in the business plan implied that subsequent, follow-on rounds were anticipated and
(2) a hypothetical accountant advising a potential first-round investor would have warned such an investor of the possibility of dilution of his/her investment through subsequent investment rounds.

As regards the first point, the determination records that the Appellant's tax agent effectively conceded the point at the hearing:

> "The Commissioner put it to the Tax Agent that what is at issue in the within appeal is whether the Business Plan complies with paragraph 6(b) of Article 21 of the GBER by foreseeing the possibility of follow-on investments and not what an investor might infer

> from its contents. The Tax Agent agreed with the Commissioner in this regard [at paragraph 38]."

As regards the second point, the determination notes that no independent expert evidence was adduced by the Appellant to support this contention (paragraph 24).

The TAC dismissed the appeal, the Commissioner holding that:

- The business plan did not expressly make reference to any additional investment rounds (paragraph 41).
- The "mention of a '1st round of funding from outside the company' on two occasions in the Business Plan is not sufficient to establish that the Business Plan foresaw the possibility of follow-on finance. The Commissioner finds that it would be incorrect to infer from the wording '1st round of funding' that the possibility of follow-on finance was foreseen in the Business Plan" (paragraph 49).
- The business plan only addressed a three-year period, and the document does not establish that follow-on investments were foreseen beyond that three-year period.

As the appeal had been determined on that issue (the TAC's having decided as a material fact that the business plan did not foresee the possibility of follow-on investments), the TAC made no findings in respect of the subsidiary question of whether the business plan also needed to foresee the particular quantum of such follow-on investments.


Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Corporation Tax – Interest Withholding Tax and Treaty Relief**	UK First-tier Tribunal
02	**Corporation Tax – Distribution and Directors' Loan Account**	UK Upper Tribunal
03	**Income Tax – Settlement of Employment Claim**	England and Wales Court of Appeal
04	**Corporation Tax – Availability of Unilateral Relief**	UK Upper Tribunal
05	**UK CGT Group Relief – Freedom of Establishment**	Court of Justice of the European Union

01 Corporation Tax – Interest Withholding Tax and Treaty Relief

In ***Burlington Loan Management v HMRC*** [2022] UKFTT 290 (TC) the First-tier Tribunal (FTT) decided that an Irish taxpayer was entitled to the exemption from UK withholding tax under the UK–Ireland double taxation treaty (DTT) because no party involved in the sale of a debt had the main purpose of taking advantage of the treaty exemption.

The facts in the *Burlington* case were relatively straightforward. SAAD Investments Company (SICL), a Cayman company, had a debt claim of a principal amount of *circa* £140m against Lehman Brothers International (Europe) (LBIE). LBIE was part of the Lehman Brothers group and went into administration in 2008. SICL itself had been in liquidation since 2009. In 2016 the principal amount of the claim was paid in full by LBIE's administrators, leaving *circa* £90m of interest still to be paid. There was a secondary market in claims against LBIE, and the liquidators of SICL engaged Jefferies, a broker, to sell SICL's claim. In March 2018 the claim was sold by SICL to Jefferies for £82.4m and then by Jefferies to Burlington Loan Management (BLM) for £83.55m. BLM was an Irish-resident company and the principal European fund investment corporate vehicle for Davidson Kempner Capital Management.

LBIE paid the claim to BLM net of withholding on account of UK income tax. BLM applied to HMRC for a refund of that tax under Article 12(1) of the UK–Ireland DTT. However, HMRC contested the refund claim and invoked Article 12(5) of the DTT, which would deny the benefit where "it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment".

However, the FTT held that neither BLM nor SICL had a main purpose of taking advantage of the UK withholding tax exemption in Article 12(1) of the DTT for itself. Therefore, BLM should be granted a full refund of the withheld UK tax.

In arriving at this conclusion, the FTT considered that BLM's sole purpose for acquiring the debt was "to realise a profit by reference to the difference between its purchase price and the cash flows". The mere fact that BLM was aware that it was entitled to benefit from Article 12(1) and took that entitlement into account when calculating the price that it was prepared to offer for the claim, did not mean that obtaining that benefit was a main purpose of acquiring the claim. Furthermore, SICL did not have a main purpose of taking advantage of the UK withholding tax exemption in the DTT.

02 Corporation Tax – Distribution and Directors' Loan Account

In *Pickles & another v HMRC* [2020] UKFTT 195 (TC) the First-tier Tribunal had determined that, when calculating the excess paid for goodwill on the incorporation of a business, the part of the consideration that was credited to a directors' loan account did not constitute a distribution under the UK equivalent of s130(3) TCA 1997. Only the amount of cash paid over and above the market value of the goodwill was to be taken into account in determining the amount of any distribution. At the time, there was significant doubt regarding the correctness of the decision, which was reviewed in "Direct Tax Cases", *Irish Tax Review*, 33/3 (2020).

In ***HMRC v Mr Neil Pickles and Mrs Sharon Pickles*** [2022] UKUT 253 (TCC) the Upper Tribunal has now held that on the incorporation of the partnership business in return for a promise to pay, the distribution was required to be calculated by reference to that sale consideration, and not by reference to the amount of cash "actually received".

By way of background, the appellant taxpayers were in partnership. The business graded and processed potatoes. They incorporated the partnership. Goodwill was transferred to the new company on incorporation. The goodwill was entered into the accounts at approximately £1.2m. £770K cash was paid to acquire the goodwill, and the balance was left outstanding on the directors' account. The company went into administration, and the amount was never paid out to the shareholders.

It was already decided at the FTT that the value of the goodwill was £270,200. All parties agreed that the amount of cash paid (£770K) that exceeded £270K constituted a distribution. However, there was disagreement on whether the amount credited to the directors' loan account also constituted a distribution.

The Upper Tribunal granted HMRC's appeal and dismissed the taxpayers' cross-appeals. The Upper Tribunal held that the FTT had materially erred in law and that the value of the benefit received by the taxpayers (the promise to pay) should be determined by reference to the value to a member sharing the taxpayers' attributes and knowledge. A purely subjective valuation was not considered appropriate. On that basis, the market value of the benefit received by the taxpayers was considered to be the full monetary amount of the promise to pay, and not the amount actually received. The full amount of £1.2m had been recorded in the agreement for sale as being payable in cash or on demand as debt, and there was no evidence to suggest that the promise was not genuine or that the parties did not intend for the amount to be paid.

03 Income Tax – Settlement of Employment Claim

In ***HMRC v Keith Murphy*** [2022] EWCA Civ 1112 the Court of Appeal held that a success fee and indemnity premium paid under an employment-related settlement were taxable as employment income.

Members of the Metropolitan Police Service ("the Met") brought legal proceedings against the Met for unpaid overtime and other employment allowances. The police officers entered into an agreement with their legal representatives that provided for a "success fee" based on a percentage of any settlement amount. Indemnity insurance was also taken out to cover the risk of having to pay the Met's legal costs.

Ultimately, the Met settled out of court, agreeing to pay the claimants a settlement sum and "agreed costs". Under the settlement, the success fee and insurance premium were not part of the "agreed costs". They would instead be deducted from the gross compensation amount and paid directly by the Met. HMRC argued that the gross payment under the settlement agreement was paid "in full and final settlement" of the claim, which was for unpaid overtime and allowances. Therefore it could not, HMRC contested, be said that the gross payment was made for anything other than the unpaid overtime and allowances. Accordingly, HMRC considered that the individuals were liable to pay income tax in respect of the full amount received.

The First-tier Tribunal (FTT) held that the success fee and indemnity insurance premium were not deductible. However, the Upper Tribunal overturned that decision in favour of the taxpayer. The Court of Appeal has now effectively reinstated the decision of the FTT and held that the full payment was taxable as employment income. The amounts deducted from the gross payment did not cease to be taxable in full because the recipients had to use some of the money to pay the balance of what they owed their own lawyers and the premium due to the insurers. The court held that the full amount clearly arose "from" the employment, with no deduction available for success fee or insurance premium amounts.

04 Corporation Tax – Availability of Unilateral Relief

In ***Aozora GMAC Investment Ltd v HMRC*** [2022] UKUT 258 (TCC) the Upper Tribunal dismissed HMRC's appeal, upholding the First-tier Tribunal (FTT) judgment that relevant UK legislation at the time did not deny unilateral relief by way of credit for US withholding tax on interest, notwithstanding the fact that the taxpayer was not entitled to relief under the UK–US double taxation treaty (DTT) as a result of the limitation-on-benefits provision. The FTT decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 34/2 (2021).

Aozora was in receipt of interest payments, net of withholding tax, from its US subsidiary. The US tax authority rejected Aozora's claim to access the benefit of the UK–US DTT on the grounds that Aozora was not a qualified person within the meaning of Article 23 on the limitation on benefits. Aozora applied to the US competent authority for discretionary treatment under Article 23(6). This was refused.

Therefore Aozora claimed unilateral relief by way of credit under the relevant UK provision against the UK tax due on the interest. HMRC refused the claim, arguing that a domestic UK provision denied unilateral relief in these circumstances. The UK domestic provision in question could be invoked in situations where the applicable DTT contained an "express provision" denying relief.

The Upper Tribunal found that for the UK domestic provision to have effect in relation to the exclusion of credit relief, the terms of the relevant DTT must be explicit regarding the cases and circumstances in which the credit relief is not available. According to the tribunal, Article 23 of the DTT (limitation on benefits) did not satisfy the requirements of the UK domestic provision. Credit relief for non-qualified persons who do not obtain benefits as a result of the Article 23 process is simply outside the scope of the DTT, rather than "expressly precluded".

05 UK CGT Group Relief – Freedom of Establishment

In ***Gallaher v HMRC*** C-707/20 the Advocate-General of the Court of Justice of the European Union (CJEU) opined that the imposition of an immediate tax charge on asset transfers outside the UK tax net is compatible with EU law.

The request for a preliminary ruling from the UK Upper Tribunal concerned the transfer of shares and intangible assets from UK-tax-resident companies to related companies resident in the Netherlands and Switzerland. In 2011 the UK-resident company Gallaher Limited disposed of intellectual property to a Swiss fellow group company, and in 2014 it transferred shares in a subsidiary to its parent entity, a Dutch-tax-resident company. Chargeable gains accrued on both disposals. As UK group relief provisions apply only where the transferor and transferee are within the charge to UK tax (a similar requirement exists in s617 TCA 1997), an immediate liability to UK tax arose. The taxpayer did not argue that group relief should apply in respect of each disposal, as if the transferee had been within the scope of UK corporation tax; rather, it was contending that the inability to defer the immediate tax liability was contrary to EU law.

In relation to the 2014 disposal, the First-tier Tribunal (FTT) agreed that the restriction was disproportionate, as an immediate charge to tax arose, with no option to pay in instalments. HMRC appealed the decision, and the Upper Tribunal referred several questions regarding the interpretation of EU law to the CJEU for a preliminary ruling. The FTT decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 32/3 (2020).

The Advocate-General stated that a distinction should be drawn between situations where capital gains are realised by the transferor of the assets within a group of companies and situations where there are unrealised capital gains. The opinion comments that in the case of a capital gain realised by a transfer of assets, the taxpayer is not faced with a liquidity problem when paying the tax. The 2014 disposal concerned a realised gain. In respect of the 2014 disposal, Gallaher Limited received full market-value consideration. The Advocate-General decided that where consideration has been received that facilitates the payment of tax, no deferment is required in order for the group transfer rules to be justified and proportionate.

International Tax Update

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01 BEPS: Recent Developments

OECD: Progress reports on Pillar One and Pillar Two, new public consultation launched

On 6 October 2022 the OECD issued an announcement on progress toward the implementation of Pillar One and Pillar Two. According to the announcement, "strong progress continues" toward the implementation of the two-pillar solution.

A consultation on a progress report on the administration and tax certainty aspects of "Amount A" of Pillar One was launched. Comments on the progress report were requested by 11 November 2022. The report includes draft rules on the administration of the new taxing right, as well as provisions on tax certainty that have been developed by the Task Force on the Digital Economy. The Inclusive Framework aims to finalise a new multilateral convention for the implementation of Pillar One by mid-2023, for entry into force in 2024.

Two other public consultation documents are to be released by the end of 2022. One is on the withdrawal of digital services taxes (including other measures similar to digital services taxes) as part of the Amount A implementation. The other will cover Amount B, the transfer pricing fixed return for marketing and distribution activities, with a view to this work being finalised in the first half of 2023.

European Parliament committee proposes to adopt digital levy if Pillar One fails

On 26 August 2022 the Economic and Monetary Affairs Committee of the European Parliament (ECON Committee) published a Draft Opinion proposing the introduction of a digital levy in the EU in the absence of progress on the implementation of Pillar One or in the absence of ratification of a multilateral convention implementing Pillar One by a critical mass of countries by 31 December 2025. The Draft Opinion states that the proposed amendments aim to make the decision "future proof and up to date with the latest developments at European and international level". The digital levy had been one measure under consideration to boost the sources of income of the EU but was put on hold to prioritise the implementation of Pillar Two in the EU.

The proposed amendment is now awaiting the ECON Committee's decision before being voted on by the plenary of the European Parliament.

Joint statement by France, Germany, Italy, Netherlands and Spain on implementation of global minimum effective corporate taxation

On 9 September 2022 the relevant Ministers from France, Germany, Italy, the Netherlands and Spain issued a joint statement in which they reaffirmed their strengthened commitment to swiftly implement the global minimum effective corporate taxation. Effectively this reaffirms the commitment to adopt rules to implement Pillar Two.

The statement sets out that the goal is to achieve consensus for implementation from EU Member States, but if unanimity should not be reached in the following weeks that the governments of the five signatories are ready to implement the global minimum effective taxation in 2023 by any possible legal means. The statement further notes that the five countries are fully committed to complete the work on the better reallocation of taxing rights of global multinationals' profits, with the objective of signing a multilateral convention by mid-2023.

The statement was followed in late October by the publication of Dutch draft legislation for the implementation of a global minimum tax under Pillar Two. The draft legislation is in line with the OECD's Pillar Two Model Rules and the EU's Pillar Two Directive proposal.

The Dutch draft legislation contains an income inclusion rule (IIR), an undertaxed profits rule (UTPR) and a qualified domestic minimum top-up tax (QDMTT).

It is expected that the IIR and QDMTT will apply to in-scope groups for financial years starting on or after 31 December 2023. The UTPR is expected to take effect one year later. A consultation on the draft legislation will close in December 2022. After the consultation (and any possible amendments), draft legislation will be sent to the Council of State for advice before being presented to the House of Representatives and the Senate for voting and enactment, this is expected to take place by spring 2023.

Hong Kong: OECD Pillar Two implementation deferred

The Secretary for Financial Services and the Treasury (FSTB) of Hong Kong Special Administrative Region (SAR) announced that the Government would defer the implementation of a global minimum tax regime in Hong Kong SAR.

- The income inclusion rule is now expected to apply from 2024, in line with the timing of the draft EU Directive and draft UK legislation.
- Timing for the implementation of the undertaxed profits rule (UTPR) and domestic minimum top-up tax (DMT) will be reviewed and with reference to the implementation timelines of other jurisdictions. The original timeline for the UTPR to come into effect was 2024. The FSTB were also to consider the introduction of the DMT starting from year of assessment 2024/25.
- When the announcement was made in August 2022 the FSTB stated its plan to launch a consultation towards the end of 2022 on how adopt the OECD rules

into domestic legislation and the relevant requirements for implementing these reforms in Hong Kong SAR.

Global minimum tax announced in Malaysia Budget 2023

On 7 October 2022 the Minister of Finance announced that Malaysia will introduce a global minimum effective tax rate as recommended under Pillar Two and plans to implement a qualified domestic minimum top-up tax in 2024.

Australia: Treasury consultation on global agreement on corporate taxation

On 4 October 2022 the Australian Treasury released a consultation paper titled Global Agreement on Corporate Taxation: Addressing the Tax Challenges Arising from the Digitalisation of the Economy. The purpose of the consultation paper is to seek views from interested parties on how Australia can best engage with the two-pillar solution, including the Pillar Two model rules and commentary. The consultation closed on 1 November 2022.

OECD: MLI now has 100 signatories and parties; deposited ratification instruments cover 79

As announced by the OECD Mongolia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 6 October 2022. This brings the total number of signatories and parties to the MLI to 100. On 30 September 2022 South Africa deposited its instrument of ratification for the MLI with the OECD. This brings the total number of jurisdictions which have deposited instruments of ratification, acceptance or approval with the OECD to 79.

The OECD announcement notes that the MLI now covers around 1,850 bilateral tax treaties, and as of the date of the announcement, 6 October 2022, 910 treaties concluded among the 79 jurisdictions which have ratified, accepted or approved the MLI have been modified, around 930 additional treaties will be modified once the MLI has been ratified by all signatories.

Guidance on implementation of CbC reporting updated

In October 2022 the OECD/G20 Inclusive Framework on BEPS released an updated version of guidance on the implementation of country-by-country (CbC) reporting under Action 13 of the OECD/G20 BEPS project. The guidance, which is periodically updated, is intended to assist in supporting the consistent and swift implementation of CbC reporting and provide increased certainty for taxpayers and improve the ability of tax administrations to use CbC reports in their risk assessment work.

The updated guidance includes new content on the following topics:

- positive and negative figures in completing Table 1 of a CbC report (which provides an overview of the allocation of income, taxes and business activities of the group by jurisdiction);
- reporting permanent establishment information; and
- short and long accounting periods.

02 US Tax Developments

Inflation Reduction Act becomes law

In the last edition of “International Tax Update” we covered the draft Inflation Reduction Act. This was signed into law by President Biden on 16 August. The Act includes a book-minimum tax (corporate AMT) similar to that originally proposed in the Build Back Better Act that would impose a 15% minimum tax on “adjusted financial statement income” of applicable corporations over the “corporate AMT foreign tax credit for the taxable year", which would be effective for taxable years beginning after 31 December 2022. An applicable corporation's minimum tax would be equal to the amount by which the tentative minimum tax exceeds the sum of the corporation's regular tax for the year and the corporation's base erosion and anti-abuse tax (BEAT) liability under s59A of the Internal Revenue Code.

The corporate AMT shares some similarities with an income inclusion rule and qualified domestic minimum top-up tax, such as using financial statement income as the tax base and imposing a 15% minimum rate. A number of discrepancies exist, however, such as the worldwide aggregate tax base under the AMT as opposed to the jurisdictional computation under the OECD Pillar Two Model Rules, and the inclusion of deferred taxes when determining whether the taxpayer is required to pay a top-up tax for purposes of the OECD Pillar Two Model Rules.

03 UK Tax Developments

Update on Chancellor's Statement on Tax Measures

Although there had been a number of proposed tax changes in the UK, many were reversed before becoming effective. Therefore the top income tax rate will remain at 45%, and the corporate tax rate will increase from 19% to 25% from 1 April 2023 as planned. Also, the IR35 rules in relation to contractors will remain untouched. Some other measures announced in the Chancellor's Autumn Statement of 17 November 2022 include:

- The Research and Development Expenditure Credit (RDEC) rate will increase from 13% to 20% on expenditure from April 2023. The R&D tax reliefs will be reformed by expanding qualifying expenditure to include data and cloud costs, refocusing support towards innovation in the UK.
- The Spring Finance Bill will introduce Transfer Pricing documentation requirements e.g. Master File and Local File.
- The reversal of the temporary 1.5% increase to both the main and additional rates of Class 1, Class 1A, Class 1B and Class 4 National Insurance contributions (NIC) for the 2022/23 tax year announced in the previous Growth Plan have been retained. From 6 November 2022 onwards, the NIC rates will decrease back to 2021/22 levels. Also, the 1.25% Health and Social Care Levy that was previously announced will not come into force.
- the annual investment allowance is set at £1m; and
- the stamp duty cuts announced in September (e.g. an increase in the thresholds over which stamp duty land tax (SDLT) arises in some cases) will only be temporary and will expire on 31 March 2025.

HMRC issues draft legislation for UK platform operators

HMRC has released draft regulations, The Platform Operators (Due Diligence and Reporting Requirements) Regulations, for UK platforms that need to report sellers' income. The UK regulations will implement the OECD's model reporting rules for digital platforms, which require platforms to report details of sellers' income to HMRC.

The rules apply where a platform facilitates the sale of tangible goods, the provision of personal services, or the rental of accommodation or transport. There are certain, narrowly targeted exceptions.

The rules are due to apply with effect from 1 January 2024, with first reporting of data in January 2025. A technical consultation on the draft regulations is open until 13 December 2022. Similar rules are being introduced in the EU under DAC7; however, the EU rules should apply from 1 January 2023, with first reporting of data in January 2024 – i.e. one year earlier than the UK rules.

04 EU Tax Developments

EU adds Anguilla, Bahamas, and Turks and Caicos to non-cooperative jurisdictions list

The conclusions of the review of the EU list of non-cooperative jurisdictions for tax purposes by the Council of the European Union was announced on 4 October 2022. . Three new jurisdictions (Anguilla, Bahamas, and Turks and Caicos) are added to Annex I for failure to take all necessary actions to ensure the effective implementation of substance requirements. Annex I is referred to as the "black list". American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu continue to remain on the list.

The Council also approved and updated the "state-of-play" document (Annex II), which reflects the ongoing EU cooperation with its international partners and the commitments of these jurisdictions implement tax good governance principles. A number of countries made commitments – in particular, with regard to the recommendations of the OECD Forum on Harmful Tax Practices on the effective implementation of the economic substance requirements or the implementation of the OECD BEPS country-by-country reporting minimum standards. Several countries also are taking steps to reform their preferential tax regimes or further improve their tax governance. The list of jurisdictions with pending commitments now includes Armenia, Barbados, Belize, Botswana, British Virgin Islands, Costa Rica, Dominica, Eswatini, Hong Kong SAR, Israel, Jamaica, Jordan, Malaysia, Montserrat, North Macedonia, Qatar, Russia, Seychelles, Thailand, Türkiye, Uruguay and Vietnam.

European Commission opens feedback period, reveals options for BEFIT proposal

The European Commission has launched a consultation in respect of a proposal for a Directive on Business in Europe: a Framework for Income Taxation (BEFIT). According to the Commission, the BEFIT initiative aims to introduce a common set of rules for EU companies to calculate their taxable base while ensuring a more effective allocation of profits between EU countries, based on a formula – a revised form of the CCCTB. The policy options specified by the Commission for the BEFIT proposal include:

- On the scope of the proposal:
  - only groups with consolidated global revenues exceeding €750m; or
  - a broader scope, with a lower revenue threshold, which could be of interest to SMEs with cross-border activities or even to SMEs with plans to operate cross-border in the near future, with an opt-in possibility.

  Sectoral carve-outs would, in either case, be limited.
- On the tax base calculation:
  - groups in scope would be required to use standardised financial statements, and the income reported therein would be subject to a limited list of tax adjustments; or
  - setting up of a comprehensive corporate tax system, with detailed rules for all aspects of profit and tax determination.
- On the formula to allocate taxable profits to the Member States in which groups in scope maintain a taxable presence:
  - a formula excluding intangible assets and considering only tangible assets, labour and sales by destination; or
  - a formula incorporating intangible assets as a factor, in addition to the factors in the alternative option.
- On the allocation of profit related to entities outside the group:
  - a simplified approach to the administration of transfer pricing rules,

based on macroeconomic industry benchmarks; or

- keep current approach to the application of transfer pricing rules.

- The administration aspect of BEFIT is still under careful consideration, as one of the objectives of the initiative is to reduce compliance and administrative costs.

The Commission will take account of the input provided during the feedback and consultation period as it further develops this initiative.

05 Hong Kong: Draft Legislation on Amendments to Foreign-Sourced Income Exemption Regime

On 28 October 2022 a Bill proposing amendments to Hong Kong SAR's foreign-sourced income exemption (FSIE) regime was published. This followed a prolonged negotiation with the EU (as it had requested changes to the Hong Kong regime) and a consultation exercise with various stakeholders.

The Bill proposes that specified foreign-sourced income would be deemed taxable in Hong Kong SAR unless certain conditions are met. It is expected that the new FSIE regime would become effective as from 1 January 2023.

The Inland Revenue Department (IRD) has published guidelines on the new FSIE regime and tries to provide clarity on a number of practical matters.

- The regime would be applicable to entities that carry on a business in Hong Kong SAR and are part of a multinational group (MNE).
- Four types of income would be in scope: interest, dividends, disposal gains on equity interests, and income from intellectual property (IP). Only income that is received in Hong Kong SAR would be in scope.
- The primary method of obtaining an exemption would be by satisfying one of the following requirements:
  - the economic substance requirement for interest, dividends and disposal gains; or
  - the nexus requirement for IP income.
- Dividends and disposal gains would benefit from a another method of obtaining a tax exemption through the participation exemption regime.
- Where no exemption applies, double taxation relief would be available. For example for dividends, double taxation should be prevented using tax credits.

Economic substance requirement for interest, dividends and disposal gains

Foreign-sourced interest, dividends and disposal gains would be exempt from profits tax if the economic substance requirement is met.

A pure equity holding company (i.e. a company that holds only equity interests in companies as its primary function and earns only dividends, disposal gains, and income incidental to the acquisition, holding or sale of such equity interests) should be subject to a reduced economic substance requirement.

The economic substance requirements for non-pure equity holding companies are:

- carrying out the specified economic activities (i.e. making necessary strategic decisions, managing and bearing principal risks in regard to any assets that it acquires, holds or disposes of) itself or through another entity in Hong Kong SAR;
- employing an adequate number of qualified employees to carry out the specified economic activities in Hong Kong SAR; and
- incurring an adequate amount of operating expenditure in Hong Kong SAR.

The Bill or the IRD guidelines do not contain specific guidance on the number of employees or amount of expenditure that would be sufficient for economic substance purposes but instead the adequacy test would be satisfied where the specified economic activities are commensurate with the income earned. This ultimately appears to be a subjective judgement of the IRD taking account of the following factors:

- the average number of employees having regard to the nature of the specified economic activities;
- whether the employees are full-time or part-time employees;
- the qualifications of the employees;
- the quantitative and qualitative aspects of the management and administration of the taxpayer; and
- the office premises.

Although substance would not be considered on a group-wide basis, it would be possible for an MNE group entity without substance to outsource the performance of the specified economic activities to another entity that has sufficient substance in Hong Kong SAR. To do this, the MNE group entity that appoints the outsourced service provider would be required to demonstrate adequate monitoring of the outsourced activities (which should be documented by the group).

Nexus requirement for IP income

- The nexus approach adopted by the OECD would apply in determining the extent of exempt foreign-sourced IP income. Only income from the use of patents and copyrighted software would qualify for exemption under the new FSIE regime.

  Income from marketing-related IP assets (e.g. trademarks and copyrights) would not qualify for the exemption.
- The relevant IP income would be exempt based on a fraction that references research and development (R&D) expenditure (i.e. by dividing the qualifying expenditure on R&D by the total expenditure on R&D that has been incurred by the taxpayer or the original owner to develop the IP asset in the specified period.

Ruling mechanism on economic substance

The guidance provides that taxpayers may apply for an opinion from the Commissioner of Inland Revenue (CIR) or an advance ruling on whether the adequacy test of the economic substance requirement is satisfied. The CIR opinion will not be legally binding on the IRD. However, the IRD has indicated that it will abide by the CIR opinion provided the arrangements stated in the CIR opinion are adhered to and the enacted economic substance requirement is substantially the same as that proposed in the Bill.

06 Belgium: Federal Budget 2023

On 11 October 2022 the Belgian Government reached an agreement on the Belgian Federal Budget for 2023 and 2024. We set out below some of the most important international tax measures, although it should be noted that some aspects and details of the relevant measures are still unclear.

Temporary "Belgian minimum tax"

With the introduction Pillar Two on the horizon, there will be amendments to the current "basket limitation" rule so that the relevant set of tax attributes would be deductible from taxable profits only up to 40%, instead of the current 70% limit, (applies where a threshold of €1m is exceeded). This would apply as from tax year 2024. It is expected that the "Belgian minimum tax" will be temporary, as it should be abolished once the Pillar Two rules enter into force in Belgium.

Notional interest deduction

The notional interest deduction regime would be abolished from financial years closing after 30 December 2022.

Non-deductibility of financial sector levies

The annual taxes levied on credit institutions, insurance undertakings and undertakings for collective investment that are due after 1 January 2023 would be subject to an 80% deductibility limitation for corporate income tax purposes (including non-residents).

Foreign tax credit for royalties

The current lump sum regime would be transformed into a credit for actual (withholding) taxes paid abroad.

Employers' social security contributions and indexation

There is a proposed reduction of 7.07% of net employers' social security contributions on the increase of wages due to indexation to apply for Q1 and Q2 of 2023. In addition, for Q3 and Q4 2023 contributions it is proposed that employers would be able to obtain a payment deferral until 2025.

This measure would not be available to companies that hold a participation in, or have made qualifying payments to, a series of "tax havens".

07 France: Interest Paid to Shareholders, Third 2022 Quarterly Interest Rate Limit Published

Under the French Tax Code interest paid or accrued in relation to loans from direct shareholders is subject to a maximum interest rate limitation. The limitation corresponds with the average floating rate on bank loans with maturities exceeding two years. The debtor's maximum deductible tax rate for a given fiscal year is based on the four quarterly average floating rates determined during the debtor's fiscal year.

On 29 September 2022 France's Official Journal published the third 2022 quarterly average floating rate for bank loans/credit facilities with maturities exceeding two years. The average floating rate is set at 2.38% for the third quarter of 2022.

Where the lender is a related party for French tax purposes, reference is made to an arm's-length interest rate (Article 212 of the FTC). If the interest rate on the inter-company financing satisfies the arm's-length test, then the maximum interest rate set out above should not apply. Where the arm's length interest rate is higher than the rate published by the French Tax Administration, then a written quotation issued by a bank for a similar financing arrangement (same terms and conditions) or a transfer pricing study established by a third-party expert is recommended.

VAT Cases and VAT News

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VAT Cases

01	**Transfer of Greenhouse Gas Emission Allowances – Avoidance**: CJEU Judgment
02	**Refusal by Tax Authority to Refund VAT Improperly Paid**: CJEU Judgment
03	**Obligation to Adjust Deductions of VAT if Taxable Person Being Placed in Liquidation and Removed from VAT Register**: CJEU Judgment
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08	**Margin Scheme for Second-Hand Goods – Intra-Community Acquisitions**: TAC Determination

01 Transfer of Greenhouse Gas Emission Allowances – Avoidance: CJEU Judgment

The CJEU delivered its judgment on 27 October 2022 in the case of ***Climate Corporation Emissions Trading GmbH ("Climate Corporation") v Finanzamt Österreich*** C641/21. The tax office in Austria imposed VAT on transactions carried out by Climate Corporation that comprised the transfer of greenhouse gas emission allowances. The case dealt with the place-of-supply rules for services under Article 44 and whether those rules could be changed in circumstances involving VAT avoidance. Article 44 of the EU VAT Directive provides the general rule in relation to supplies of services between businesses and stipulates that the place of supply is the place where the recipient is established/has a fixed establishment/has his/her permanent address or usually resides. In line with the recitals of Directive 2008/08, the place of supply of services should, in principle, be where the actual consumption occurs, and in the case of business-to-business supplies it should be where the recipient is established.

Climate Corporation, an Austrian company, transferred greenhouse gas emission allowances for consideration to a German company, Bauduin. The relevant Austrian tax office categorised the supply as a supply of goods but not as an intra-Community supply and taxable in Austria. The tax office was of the view that Bauduin had participated in the transaction as a missing trader and that Climate Corporation knew or should have known that the allowances would be used for evasion purposes. The referring court though noted that the supply was one of services and not goods and the place of supply was Germany, in accordance with Article 44, with Bauduin being liable for German VAT. The referring court had found that Climate Corporation should have known that the allowances sold to Bauduin were being used for fraudulent purposes of VAT evasion. The referring court noted that, when dealing with intra-Community supplies of goods, various benefits can be refused (right to zero rate, right of deduction and right of refund) where the supplier should have known that it was participating in VAT evasion. The referring court queried whether the case law relating to intra-Community supplies of goods could apply to cross-border supplies of services and thereby shift the place of supply to Austria.

The question posed was essentially whether the place of supply of services could be changed where the supplier knew or should have known that it was participating in VAT evasion. The CJEU noted that the supply of greenhouse gas emission allowances is classified as a supply of services and that the place of supply is to be determined in line with the rules applicable to services. It noted that the purpose of the rules is to ensure that double taxation or non-taxation does not occur and that they "set out a rational delimitation of the respective areas covered by national rules on VAT".

The court outlined the application of Article 44 whereby the place of establishment is the primary point of reference, with the other points of reference being the exceptions. It also noted that there was no specific rule in the Directive regarding the place of supply of greenhouse gas emission allowances, and therefore the place of supply is as per Article 44. This means that the place of supply of the services provided by Climate Corporations is Germany, with Bauduin being liable for German VAT (under Article 196). But as Bauduin allegedly committed VAT evasion, the court considered whether the place of supply could instead be the place where the supplier is established.

The CJEU has on numerous occasions indicated that EU law cannot be relied on for abusive or fraudulent purposes and the benefit of the rights under the Directive can be refused in such circumstances. However, in this case, there was no reliance on a right under the Directive, but what had to be determined was the place where the taxable transaction occurred. The court noted that coming to the conclusion that the place of supply could be deemed to be elsewhere would run counter to the objectives and general scheme of the place-of-supply rules and would mean that the fiscal competence and tax revenue in relation to the supply would move to a different Member State.

The court outlined the distinctions between intra-Community supplies of goods and cross-border supplies of services and noted that, under the latter, only one Member State has fiscal competence. The court stated that "the place of supply of services cannot be altered in disregard of the clear wording of Article 44 of the VAT Directive on the ground that the transaction at issue is vitiated by VAT evasion". It also made reference to Article 273, which allows Member States to take measures to prevent evasion and ensure correct collection of VAT but prohibits going beyond what is necessary to attain that objective. The court held that the place of supply cannot be changed to deal with a situation where the supplier knew or should have known that it was participating in VAT evasion committed by the recipient of the supply, and Member States should use the other provisions of the Directive to penalise the wrongdoer.

02 Refusal by Tax Authority to Refund VAT Improperly Paid: CJEU Judgment

The judgment of the CJEU in ***HUMDA Magyar Autó-Motorsport Fejlesztési Ügynökség Zrt. ("Humda") v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*** C397/21 was published on 13 October 2022. The Hungarian appeals directorate refused a claim by Humda for a refund of VAT that had been charged to it in error. The case related to the provision of services in relation to the construction of Hungary's pavilion at the World Expo in Milan in 2015.

A Hungarian company, BHA, provided services to Humda's predecessor, issued invoices to it and paid the VAT amounts over to the tax authority. During an audit the Hungarian tax authority was of the view that Hungarian VAT was incorrectly charged as Italian VAT should have applied (as the services comprised property-related services). Humda sought to recover the Hungarian VAT from the tax authority instead of from BHA on the basis that BHA was in liquidation and the liquidator indicated that the claim was irrecoverable.

The questions referred sought to establish whether national provisions that did not permit a taxable person to seek a refund of VAT incorrectly invoiced to it directly from the tax authority where it was impossible or excessively difficult to claim using another procedure were contrary to the principles of effectiveness and fiscal neutrality. The court noted that where the Directive does not deal with adjustments of VAT incorrectly charged, that it is up to the Member State to set out the rules for such adjustments. The national legislation should provide for the possibility of making an adjustment where the invoice issuer can show that it acted in good faith. It stated that the principles of fiscal neutrality and effectiveness are observed where the supplier can seek recovery from the tax authority of the VAT paid in error to it and the service recipient can sue for recovery of the sums not due. Member States should have procedures and rules that enable reimbursement of the VAT from the tax authority directly where it is impossible or excessively difficult to obtain the refund from the supplier.

The court noted that in this case supplier and recipient had acted in good faith, there is no risk of loss of tax revenue and it was impossible for the recipient to obtain a refund from the supplier as it had gone into liquidation. The court indicated that Member States can impose a penalty where the error results from own negligence, but complete denial of input recovery would be disproportionate unless it was being relied on for fraudulent reasons. The court found that the Hungarian legislation that refused reimbursement was disproportionate in the circumstances. Where it is impossible or excessively difficult to recover VAT incorrectly invoiced and there is no risk of loss of tax revenue, national provisions that refuse a claim are contrary to the principles of effectiveness and neutrality.

The other question posed was whether the tax authority is required to pay interest in respect of the reimbursement sought. The payment of the VAT amount invoiced was not required by the Hungarian tax authority in breach of EU legislation, but instead the payment of the VAT arose because it was included on an invoice (Article 203 provides that VAT shall be payable by any person who enters the VAT on an invoice, with the result that the VAT invoiced in error is due to be paid). In this case the VAT amount had not been levied in breach of EU law. The court considered the provisions of Article 183, and even though that provision does not provide an obligation to pay interest, the principle of fiscal neutrality requires that the financial loss incurred as a result of a refund's not being made within a reasonable time requires compensation via payment of default interest. It is for the referring court to determine whether interest is payable.

03 Obligation to Adjust Deductions of VAT if Taxable Person Being Placed in Liquidation and Removed from VAT Register: CJEU Judgment

On 6 October 2022 the CJEU delivered its decision in ***UAB 'Vittamed technologijos', in liquidation ("Vittamed") v Valstybinė mokesčių inspekcija, intervener: Kauno apskrities valstybinė mokesčių inspekcija*** C-293/21. The case concerned the interpretation of Articles 184–7 in the context of input VAT reclaimed on the acquisition of goods and services to be used to produce capital goods. However, the capital goods were never used, as Vittamed went into liquidation and cancelled its VAT registration. Under Article 187, an annual adjustment to input VAT is required over a period of five years in respect of capital goods and 20 years in respect of immovable goods.

Vittamed, a Lithuanian company, engaged in technical scientific research and the practical application of that research. The company did not make any taxable supplies 2012, but in 2012 and 2013 it purchased goods and services in relation to an EU-funded project to develop a medical diagnostic prototype with a view to sale. It used the goods and services to produce licences and prototype devices and reclaimed the VAT incurred; the project was completed at the end of 2013. Vittamed subsequently operated at a loss, and in the absence of orders and potential income, it ceased to trade and was placed in liquidation. It sought to de-register and submitted its final VAT return without adjusting its input VAT.

The question referred was whether an adjustment to input VAT was required in accordance with Articles 184–7 where the capital goods produced were never used and would never be used for making taxable supplies in a case where the taxable person went into liquidation and de-registered. The court was also asked whether the reasons for the abandonment of the activity are relevant to the requirement to make the adjustment and, if so, whether those reasons must be established by evidence.

The court noted that the use to which the goods or services are put or intended to be put determines the extent of the initial deduction to which the taxable person is entitled and the extent of any adjustments.

> "The Court has also repeatedly held that the right of deduction, once it has arisen, is retained even if, subsequently, the intended economic activity was not carried out and, therefore, did not give rise to taxable transactions, or if, by reason of circumstances beyond its control, the taxable person was unable to use the goods or services which gave rise to the deduction in the context of taxable transactions."

By reference to earlier case law, the court noted that the adjustment mechanism is an integral part of the VAT deduction scheme and aims to establish a close and direct relationship between the right to deduct the input VAT paid and the use of the goods or services concerned for taxed output transactions. If there is no longer a plan to use the goods or services for the purposes of taxable transactions, the link between the right to deduct and the proposed taxable transactions is broken, resulting in a requirement to apply the adjustment mechanism. It is for the referring court to determine whether the taxable person no longer has – and never will have – any intention of putting the capital goods to a taxable use or the capital goods remain unsold.

The CJEU held that a taxable person is required to carry out an adjustment of its input VAT where the capital goods produced have not been used and will never be used for the purposes of making taxable supplies. However, the court noted that where the investment projects that were initially planned are abandoned due to circumstances outside the taxable person's control, there is no requirement to make an adjustment to the input VAT claimed where the taxable person still plans to use the goods for taxable purposes. This exception did not apply here, as the taxable person had put the company into liquidation voluntarily.

> "The reasons for the decision to place that taxable person in liquidation and, consequently, for the abandonment of the intended taxable economic activity… have no bearing on the taxable person's obligation to adjust the deductions of VAT concerned, in so far as that taxable person no longer has – and will never have – any intention of using the capital goods for the purposes of taxable transactions."

04 Possibility of Treating Written Contractual Agreement as Invoice: CJEU Judgment

On 29 September 2022 the CJEU published its decision in ***Raiffeisen Leasing, trgovina in leasing d.o.o. v Republika Slovenija*** C235/21, which related to whether a contract could constitute a VAT invoice where an invoice was not issued. The owner of land and a residential building in Slovenia, RED d.o.o., concluded a sale and leaseback agreement with Raiffeisen Leasing with a view to constructing new buildings. Raiffeisen Leasing agreed to buy the land and lease it back to RED, and the VAT amount was included in the agreement. An invoice was not issued by Raiffeisen Leasing to RED, and it did not charge or account for VAT. RED argued that the agreement constituted an invoice and reclaimed the VAT amount. The contract for the sale of the land included a VAT-inclusive price, and RED issued an invoice for the sale showing the VAT amount. The VAT amount was reclaimed by Raiffeisen Leasing. The parties subsequently terminated the sale and leaseback agreement as RED failed to fulfil its obligations. The Slovenian tax authority refused RED's repayment claim. As a result, the VAT due by Raiffeisen was reduced, but it was required to pay interest on the unpaid VAT amount. The tax authority also determined that the subsequent sale of the land was exempt from VAT.

The question referred was whether Article 203 can be interpreted as meaning that a sale and leaseback agreement can constitute an invoice for VAT purposes and, if so, what information must be contained therein for it to be regarded as an invoice. In addition, the CJEU was asked if it is relevant to assess whether the agreement exhibits an intention by the supplier to provide an expectation that the purchaser will be able to deduct input VAT.

The court noted that the purpose of the details on an invoice is to enable the tax authority to monitor payment of the VAT due and, if appropriate, the existence of the right to deduct VAT. In a number of recent cases the court has reiterated that the principle of fiscal neutrality requires that input VAT deduction is permitted where the substantive requirements are met notwithstanding the fact that the formal requirements are not met. Where a VAT invoice does not satisfy the formal conditions but the substantive conditions are met, the right to deduct VAT cannot be refused.

However, the court indicated that the right to deduct is not automatic in the sense that the right is linked to the supply's actually taking place, and it is not extended to VAT that is due just because it is mentioned on an invoice. The purpose of Article 203 is to eliminate the risk of loss of VAT revenue, and this risk can be avoided where the tax authority has sufficient information to enable it to conclude that the substantive requirements for the right to deduct have been met. This is irrespective of whether the VAT is mentioned on an invoice or in an agreement concluded by the parties. For a document to be considered to be an invoice, it must indicate the VAT amount and must have the required details. It is for the referring court to determine whether the agreement contains the necessary information to enable the tax authority to establish that the substantive conditions have been met. Although the agreement indicated the VAT amount, the VAT rate was not included, but it will be for the referring court to ascertain whether the rate could be deduced therefrom.

The court held that a sale and leaseback agreement could be considered to be an invoice where the document contains all of the information necessary to enable the tax authority to establish that the substantive conditions for the right to deduct input VAT are satisfied.

05 Holding Company – Expenditure Linked to Shareholder Contribution in Kind to Subsidiaries – No Contribution of Expenditure to General Costs: CJEU Judgment

The CJEU delivered its judgment in the case of ***Finanzamt R v W GmbH*** C98/21 on 8 September 2022. A German tax office refused an input claim by W GmbH in respect of VAT incurred on services that enabled W GmbH to supply, as a shareholder contribution, services to its subsidiaries (which engage in exempt supplies). W GmbH engages in the acquisition, management and use of properties, as well as the design, remediation and realisation of building projects. W GmbH was also a holding company, which held shares in its subsidiaries X GmbH & Co KG and Y GmbH & Co KG.

The subsidiaries were engaged in construction and sale of residential properties, which were mainly exempt from VAT. W GmbH made a shareholder contribution to its subsidiaries in the form of various services supplied free of charge. It used a combination of its own staff and bought-in resources to supply the services. W GmbH also agreed to supply accounting and management services to its subsidiaries for consideration, which were separate to the shareholder contribution. W GmbH deducted all VAT incurred in relation to the supply of services to the subsidiaries. The tax authority, however, was of the view the shareholder contribution (in the form of services provided free of charge) should be classified as non-taxable activities as there was no consideration received and therefore the input VAT was not deductible.

The referring court considered that, despite its status as a holding company, because W GmbH provided accounting and management services to its subsidiaries in exchange for payment and was thus involved in the management of its subsidiaries, it was entitled in principle to obtain a full input VAT deduction in respect of the input services it acquired.

The question referred was whether a holding company that carries out taxable output transactions in favour of its subsidiaries is entitled to deduct the input tax levied on bought-in services that are supplied to its subsidiaries in return for the grant of a share in the general profit. Where the input services have direct and immediate links not with the holding company's own transactions but with the largely tax-exempt activities of the subsidiaries, is there an entitlement to deduct? Where those services are not included in the price of the taxable transactions carried out in favour of the subsidiaries and the services are not part of the general costs of the holding company's own economic activity, is there an entitlement to deduct?

The court indicated that to enjoy a right of deduction, two conditions must be met: the person concerned must be a "taxable person"; and the goods or services relied on to confer entitlement to that right must be used by the taxable person for the purposes of his or her taxed output transactions, and as inputs, those goods or services must be supplied by another taxable person.

The court reiterated the position that the mere acquisition and holding of shares in a company does not amount to an economic activity conferring on the holder the status of taxable person. But where the holding includes direct or indirect involvement in the management of the companies, this does comprise an economic activity where VATable transactions carried out. So a mixed holding company would be entitled to input VAT recovery on a pro rata basis.

In this case the court stated that W GmbH must be regarded as taxable person as it supplied services to the subsidiaries in exchange for payment, so that the first condition for input VAT recovery was met. The second condition requires that the goods and services acquired are used for taxable purposes. The court stated that, in principle, it is necessary that there is a direct and immediate link between inputs and outputs, and where there is not a direct and immediate link, an entitlement still arises where the costs are part of the general costs and are components of the price of the goods and services supplied. All of the circumstances surrounding the transactions are to be considered, together with the objective content of those transactions.

> "The Court has held that account must be taken of the actual use of the goods and services purchased by the taxable person...and of the exclusive reason for the transaction in question, since that reason must be regarded as a criterion for determining the objective content."

W GmbH had acquired the goods and services from third parties in order to fulfil its obligations relating to the shareholder contributions. For W GmbH to have an entitlement to reclaim the associated VAT, the referring court will have to verify if the services have a direct and immediate link with the supplies by W GmbH or they form part of the general costs.

However, the third-party services were not used by W GmbH to supply the taxable services to the subsidiaries but instead were used to fulfil the shareholder contribution obligations. Therefore those costs were not components of the price of its taxable supplies. The costs were not costs required to acquire shares in the subsidiaries but were expenditure that itself constitutes the very object of W GmbH's shareholder contribution to its subsidiaries. The court noted that the exclusive reason for the transaction in question is a shareholder contribution from W GmbH to its subsidiaries.

The fact that those services are intended to be used by W's subsidiaries establishes a direct link with the transactions of those subsidiaries and confirms that there is no direct and immediate link with W GmbH's economic activity, as one needs to consider the actual use of those services. The court found that no right to deduct can arise from expenses linked not to transactions carried out by the taxable person but to transactions carried out by a third party. As the services were linked directly to the transactions of the subsidiaries, there is no right to deduct for W GmbH. In addition, the costs were not part of the components of W GmbH's taxable management and accounting services. The court held that no right of deduction arose for W GmbH:

> "where, first, the input services have direct and immediate links not with the holding company's own transactions but with the largely tax-exempt activities of the subsidiaries, second, those services are not included in the price of the taxable transactions carried out in favour of the subsidiaries and, third, the said services are not part of the general costs of the holding company's own economic activity".

06 Documentary Requirements for Zero-Rating of Intra-Community Supplies: TAC Determination

Tax Appeals Commission (TAC) determination **99TACD2022** was provided on 7 June 2022 and related to the evidentiary requirements for zero-rating to apply to intra-Community supplies. The appellant operates a quarry and also engaged in the purchase and sale of heavy plant and machinery from the quarry location. During the period under review – January 2015 to December 2017 – sales of heavy plant and machinery were made to customers in Northern Ireland and Great Britain. The sales were zero-rated for VAT purposes by the appellant. After an initial review, the respondent requested an exchange of information from HMRC. HMRC advised that two of the appellant's customers had never traded in Northern Ireland and Great Britain.

The respondent sought documentary evidence of dispatch to the customers, but this was not provided by the appellant, and the respondent formed the view that the conditions for zero-rating were not met and raised assessments accordingly.

The analysis in the determination stated that there was no commercial substance presented to the TAC regarding why the transactions were carried out in the manner in which they were and that the sole purpose of the arrangement presents itself as an attempt to sell valuable assets without remitting VAT. It also indicated that the invoices issued contained numerous discrepancies and did not comply with the legislative invoicing requirements.

The Commissioner found that the appellant had failed to satisfy the conditions for zero-rating and therefore the correct rate of VAT to be applied is 23%, requiring a correction of the VAT returns to reflect the true position.

07 Refund Order for Touring Coaches – Definition of Qualifying Person: TAC Determination

TAC determination **103TACD022** was published on 20 June 2022 and concerned the VAT (Refund of Tax) (Touring Coaches) Order 2012, specifically, the meaning of qualifying person in the context of this Order. The appellant had sought a reclaim of VAT in respect of new touring coaches. The respondent refused the claims on the basis that the appellant was not a qualifying person as it was not engaged in the business of carriage for reward of tourists by road under contracts for group transport.

The appellant operates its Dublin airport route service on behalf of the licence holder and provides the coach (luxury spec, as required by the licence holder), driver, fuel and maintenance. Tickets for the service are sold by the licence holder, and the fares are retained by it. There is a sub-contractor agreement between the appellant and the licence holder. The licence held is for public bus passenger service, with each journey being open to use by members of the public, and the passenger's contract is with the licence holder. The appellant did not identify who the passengers were and so did not know how many were tourists.

The appellant argued that the definition of qualifying person contained a test with four elements and contended that it met each element of the test. It argued that the respondent was adding a further element to the definition so that service providers involved in provision of public transport services were not covered by the definition. This was the main dispute between the parties, so that the issue for determination was the correct statutory interpretation of a "qualifying person" under the Refund Order. The main part of the definition to be ascertained was whether the appellant was carrying "tourists" and whether it operated "under contracts for group transport".

The Commissioner agreed with the appellant that it was reasonable to assume that the vast majority of passengers travelling to and from the airport were tourists. However, he did not agree that the contract concluded between the licence holder and the appellant constituted a "contract for group transport", and therefore the appellant did not satisfy this element of the definition. The Commissioner held that the respondent was correct in refusing the refund claims as the appellant did not meet the definition of qualifying person.

08 Margin Scheme for Second-Hand Goods – Intra-Community Acquisitions: TAC Determination

TAC determination **129TACD2022** was delivered on 20 July 2022 and related to the application of the second-hand goods margin scheme and the rules relating to intra-Community supplies. The appellant operates as an antique dealer specialising in antique jewellery. The main source of antique jewellery supplies was UK suppliers. The respondent conducted an audit for the period 2013 and 2014 and became aware that supplies to the appellant were zero-rated on foot of the provision of her Irish VAT number to the UK suppliers.

The appellant was also operating the margin scheme when accounting for VAT on the subsequent sale of the antique jewellery to Irish customers. The respondent was of the view that the appellant had not operated the margin scheme as per the legislation, resulting in an underpayment of VAT. The appellant argued that as the UK supplier travelled to Ireland to show her the antique jewellery that was for sale and that she chose to buy, the place of supply was Ireland as the sale occurred in her home in Ireland.

The appellant argued that the UK supplier had a permanent establishment (PE) in Ireland and should have registered for Irish VAT when the registration threshold for goods was exceeded and that it incorrectly issued zero-rated invoices.

The respondent argued that the purchases from the UK supplier were intra-Community acquisitions and that the margin scheme should not have applied to the subsequent sale. This was on the basis that as the appellant's Irish VAT number was provided, which is not required under the margin scheme rules, and the invoice issued did not contain the margin scheme narrative, the appellant was not eligible to use the margin scheme. The respondent argued that as the supplies were considered to be intra-Community acquisitions, VAT should have arisen on the full sales price.

A number of issues were to be considered by the Commissioner. First, in relation to the PE point put forward by the appellant, the Commissioner found that the argument was without merit taking into account the place-of-supply rule for goods. By reference to the place-of-supply rule involving goods that are transported, the Commissioner found that the place of supply was the UK as that was where transportation began.

It was also found that the argument that the invoices were not compliant with the requirements of the VAT legislation (s9 and s24 VATCA 2010 were referred to here) was without substance, as there was no requirement for a narrative referring to the reverse charge to be included on the invoice. As the invoice included both the Irish VAT number of the appellant and the UK VAT number of the supplier and VAT at the zero rate was applied, it was determined that the invoices qualified as intra-Community purchase invoices.

With reference to the appellant's eligibility to use the margin scheme, it was determined that because the UK supplier had not applied the margin scheme to its sale, as its invoice showed VAT and the invoice did not include a narrative indicating that it was a margin scheme supply, the margin scheme could not be used by the appellant. A request to state and sign a case for the opinion of the High court was received by the TAC.

VAT News

Ireland

Finance Bill 2022, published on 20 October 2022, contains a number of VAT amendments, and Finance Act 2022 is expected to be signed by the President on or before 25 December 2022.

Section 45 includes an amendment relating to input VAT deductions incurred in respect of dealing in new stocks, new shares, new debentures or new securities for raising capital where the general deduction provisions will apply going forward.

Section 46 introduces a requirement for a trader registered for domestic VAT to notify Revenue within 30 days where it subsequently engages in intra-Community transactions.

There were a number of amendments in relation to VAT rates and the flat-rate addition for farmers (which has been reduced to 5%). The 9% rate on the supply of electricity and gas is retained until 28 February 2023. The 0% rate has been extended to a number of specific items as per the amendment introduced by s54.

The amendment under s48 allows Revenue to request information from financial institutions where such information has been requested by another Member State under the provisions of Council Regulation (EU) 904/2010. Failure to comply will result in a penalty.

There were also some amendments in relation to the exemptions contained in Schedule 1, whereby the exemption from VAT currently in place for independent groups of persons is extended to members who also carry out taxable activities (recent case law from the CJEU resulted in this amendment). The medical services exemption was also amended to clarify those persons qualifying for the exemption by reference to specific legislative provisions.

There were a number of amendments related to funds and fund management. Financial funds that are subject to the UCITS Directive and the AIFM Directive and that are registered in other EU Member States will be exempt from VAT. Section 110 companies holding "qualifying assets" in the form of plant and machinery are, however, removed from the VAT exemption for fund management. The provision of agency services related to the management of a specified undertaking is no longer exempt from VAT under the amendment in s53.

EU

It is expected that the European Commission will publish its proposals in relation to "VAT in the Digital Age" in early December 2022. As noted in the previous edition of "VAT Cases and VAT News", the proposals will cover the single VAT registration and Import One-Stop Shop; the VAT treatment of the platform economy; and new digital reporting requirements.

Accounting Developments of Interest

Aidan Clifford
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Russian Sanctions

The EU imposed additional restrictions on trade with Russia and has now imposed sanctions aimed at the export of oil from Russia. Also targeted are steel, wood pulp and paper, cigarettes, plastics and cosmetics. There is also a full ban of the provision of crypto-asset wallet, account or custody services to Russian persons and residents, regardless of the total value of those crypto-assets. In addition to the earlier ban on accounting and audit services, there is a prohibition on the provision of architectural and engineering services, as well as IT consultancy services and legal advisory services, to Russia.

Clarification has still not been received on the exact scope of the restrictions on the provision of accounting, audit and tax services to persons and businesses established in Russia. What is clear is that it is an offence in Ireland to provide such services to a Russian national with an establishment in Russia, and this includes an indirect service such as the audit of a Russian-owned Irish-registered company. However, without clarification from the EU or the Government, it is impossible to provide definitive guidance on what is allowed and what is not.

Breaching sanctions is a serious offence in Ireland. Accounting practices will need to ensure that they are sanction checking their clients before undertaking any work for them and be able to demonstrate that the client was not a sanctioned person or business.

Credit Unions' ESG Reporting

The credit union movement has launched an information booklet on reporting by credit unions on their delivery of the UN Sustainable Development Goals (SDGs). Credit unions have for 60 years been operating under 12 operating principles. The booklet seeks to show how those 12 principles link very closely to the SDGs and provide a template for a credit union to tell its members about how it delivers on the SDGs.

The booklet provides a template directors' sustainability report, maps the operating principles to the SDGs and provides some examples of sustainability that all credit unions engage in but that they have not been telling their membership about.

Disclosing Commitments to Net Zero and Other Climate Commitments

Recent statements by regulators have mentioned the need for climate commitments disclosed in companies' financial statements to be reliable, honest and consistent. If a commitment is made in a directors' report to do some particular sustainable thing, that should be reflected in provisions and capital commitment notes and in the recognition of impairments etc. For example, if the directors' report committed to 100% renewable power usage, the oil-fired heating plant will need to show an impairment; and if there is a commitment to remediate some environmental damage, then that constructive obligation needs to be provided for.

Regulators have published guidance to assist companies make this disclosure, with the Financial Reporting Council in the UK publishing a report on disclosing net zero commitments. The Irish Auditing and Accounting Supervisory Authority (IAASA) has also published a report on the information requests that it has made to companies seeking clarification of the internal consistencies between the sustainability disclosures and other financial statements disclosures. Some of the areas that the IAASA has questioned companies about are:

- recognition and measurement of provisions,
- disclosures surrounding contingent liabilities,
- disclosures surrounding non-adjusting events after the reporting date,
- recognition and measurement of impairments,
- measurement of inventories,
- impact on capital expenditure commitments and
- sensitivity analysis.

Regulators have expressed concern at what is often described as "greenwashing", and that includes vagueness in statements by companies. For example, does a commitment to net zero include scope 1 or scope 2 emissions or even scope 3 (own emissions, indirect emissions from the generation of purchased energy and full supply chain emissions, respectively).

International Standard on Quality Management

The ISQM is effective as of 15 December 2022 and requires that an audit firm have in place a quality manual. The quality manual is similar to but a greatly enhanced version of the ISQC1 manual that all audit firms must have up to the 15 December changeover. The Irish Auditing and Accounting Supervisory Authority has produced some resources to assist practices become compliant, which include a fact sheet.

European Single Electronic Format

The European Securities and Markets Authority recently published an updated ESEF Reporting Manual applicable to the 2022 financial year. It is a reminder to companies in scope of ESEF that compliance is much harder than many thought. The Irish Auditing and Accounting Supervisory Authority (IAASA) recently discouraged companies from using PDF-to-HTML automatic conversion tools, recommending that "inline HTML" be used instead as this produces a cleaner solution.

The IAASA also issued an Observations Paper, in which issues with tagging were identified. These include matters such as dashes not being tagged as zeroes and not all numbers being tagged, especially when the same number is in multiple locations. The IAASA observed that some of these errors may have arisen due to the use of automated conversion tools.

Auditing Standards Updates

The Irish Auditing and Accounting Supervisory Authority has issued updates of all of the standards with conforming and inconsequential amendments following the revision of ISA (Ireland) 315: Identifying and Assessing the Risks of Material Misstatement. When a major auditing standard is updated, it results in minor, mostly inconsequential or conforming, amendments to other auditing standards. An inconsequential or conforming amendment might be as simple as a change to a reference. It is not standard practice to reissue every standard that has an inconsequential or conforming amendment. However, these conforming amendments accumulate, resulting in this update.

Consumer Rights Bill to Force Changes to Accountants' Engagement Letters

The Bill will radically reform consumer rights arising from the sale of goods or services. Of particular interest to accountants in practice will be s82, which includes a number of implied terms in contracts, and s94, which restricts certain limit-of-liability clauses in engagement letters A further and detailed consideration of the provisions of this bill will be featured in a later issue of the ITR when the legislation is in final form.

Corporate Sustainability Due Diligence Directive

In summary, this Directive will require companies in scope to audit their supply chains for human rights and environmental impact issues. The final text is due next year, and it is to be passed by the end of next year, for implementation by some companies as soon as 2025. See this link.

Small Pension Funds

Currently, small pension funds have an option to prepare "an alternative annual report", which is not audited, although there is a limited report from an auditor attached to it. Due to new legislation, such small schemes will now require a full audit. See a summary of the new provision on the pension regulator's website.

Sale and Leaseback Accounting

The International Accounting Standards Board has issued a narrow-scope amendment to the requirements for sale and leaseback transactions under IFRS 16. The amendment adds a requirement to explaining how a company accounts for a sale and leaseback after the date of the transaction. See this link.

Group Audits

The UK auditing standard on group audits has been updated. The standard is applicable to both component auditors and lead auditors and is available here. In a related announcement, the Financial Reporting Council has published its thematic review of the accounting and reporting for business combinations.

Reporting on Pensions and Investments in Credit Unions

The Central Bank of Ireland (CBI) has issued guidance for credit unions on accounting for pensions and investments in terms of both their prudential return and their annual financial statements. In terms of pensions, the CBI points out that provision needs to be made for the industry's defined-benefit scheme deficit and specifies that this should be a separate line item. The CBI also acknowledges that most credit unions will get a refund from the Savings Protection Scheme (SPS), and this is to be booked as a separate line item as well. Although it is not specifically addressed by the CBI, credit unions are splitting the SPS receivable into realised and unrealised reserves for the amount due within and after one year. This is notwithstanding that this splitting is required only for "investments" and is not strictly specified for other income such as SPS income. The treatments proposed are consistent with FRS 102.

Ukraine Conflict: Ethical and Independence Guidance

The International Ethics Standards Board for Accountants has released a Staff Alert, The Ukraine Conflict: Key Ethics and Independence Considerations. The paper identifies a number of provisions in the ethics code that are proving to be a challenging while the war in Ukraine continues. Issues such as dealing with sanctioned individuals and countries and disclosing the impact of the war in financial statements are addressed.

The position that Irish auditors of Russian-resident-owned Irish-registered companies found themselves in after the sixth package of sanctions is also addressed. In summary, the sixth package of sanctions banned the provision of accounting, audit and tax services directly or indirectly to any business or natural person "established" in Russia. For an Irish auditor part-way through such an audit at the time of the sanctions, this can lead to difficult decisions and difficult discussions with local management.

IAASA Observations on Financial Statements Disclosures

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published its 2022 Observations paper. The paper deals with some of the current uncertainties, such as increasing interest rates, inflation, Covid-19 recovery, the war in Ukraine and slowing economic growth. The recommendations from the IAASA are that preparers pay particular attention to the disclosure of:

- judgements, estimates and assumptions,
- the impact of Covid-19 on performance and cash-flows and
- the likely impact of climate change.

The IAASA also advised against the misuse of alternative performance measures and the practice of "greenwashing".

Employee Travel Expenses

From 1 September 2022, civil service mileage rates have been increased. These rates represent the maximum that an employer can pay an employee without prior Revenue approval. The new rates are at https://www.revenue.ie/en/employing-people/employee-expenses/travel-and-subsistence/civil-service-rates.aspx. All of the 12 rates have increased, some by as much as 15%, reflecting the increased cost of fuel. It was also confirmed that travel in an electric vehicle should be charged at band 2 rates. The rate for cycling is set at 8 cent per kilometre, which would hardly cover the cost of the calories needed to travel that distance, but at least it will make a contribution towards maintenance of the bicycle.

Restricting a Company Director

The Companies (Corporate Enforcement Authority) Act 2021 has amended s819 of the Companies Act 2014 and added more grounds for restricting a director of an insolvent company. The grounds for restriction now include failure by a director of an insolvent company to convene a general meeting of shareholders for the purpose of nominating a liquidator, failure to nominate a liquidator and failure to provide the required notice to employees that the company is winding up.

RBO Is Prosecuting for not Filing Beneficial Ownership Information

It has been reported that the Registrar of Beneficial Ownership has taken prosecutions against companies that have not filed their RBO details and that it recently secured five convictions against companies, with fines of €3,000.

Protected Disclosures

The Protected Disclosures (Amendment) Act 2022 has been signed into law but not yet commenced. The Act extends the definition of a worker protected by the Act to include directors, shareholders, trainees, job applicants and volunteers. It also extends the definition of what would constitute "penalisation" by an employer of a whistleblower, with a very extensive list included in s4. The matters that come within the definition of a "breach" the reporting on which is protected by the legislation now include GDPR and anti-money-laundering matters.

Employers with 50 or more employees are required to establish internal reporting channels and procedures to enable workers make protected disclosures. Employers will also have the burden of proof to show that any action taken or not taken against a whistleblower was not penalisation. A new Office of the Protected Disclosures Commissioner will be established to support the operation of the new legislation.

Virtual Asset Service Providers

VASPs are businesses that provide virtual wallets or exchanges to hold crypto- or virtual currency such as Bitcoin. A number of such businesses have located in Ireland. VASPs are designated persons for the purposes for anti-money laundering (AML) and are regulated by the Central Bank of Ireland (CBI). The July 2022 Anti-Money Laundering Bulletin from the CBI includes details of the registration requirements and ongoing AML requirements for VASPs.

The Financial Action Task Force has also issued an update on Implementation of the FATF Standards on Virtual Assets and Virtual Asset Service Providers. This is the third review of the rules applicable to financial activities involving virtual assets and VASPs. The review focuses on the "travel rules", which require customer due diligence to be done on virtual asset transfers. It also covers developments in the area, including non-fungible tokens and unhosted wallets.

Audit of Going Concern

The International Auditing and Assurance Standards Board has issued a Frequently Asked Questions Guidance Document on questions related to reporting going-concern matters in the auditor's report. The FAQs centre around the interplay between the reporting of key audit matters and emphasis-of-matter paragraphs when reporting material uncertainties related to going concern.

Employment Permits Bill 2022

In a welcome move for many industries and sectors, including the accounting profession, the Employment Permits Bill 2022 seeks to modernise the employment permit system in Ireland. The Bill will see:

- the introduction of a seasonal employment permit,
- revision of the labour market needs test,
- the streamlining of a number of requirements to make the grant process more efficient and
- the provision of additional conditions for the grant of an employment permit, such as training or accommodation support, in some circumstances, or making innovation or upskilling a condition of grant, where this may decrease future reliance on economic migration.

Central Bank Guidance on Avoiding Financial Scams

A YouTube video on protecting yourself from financial scams has been produced by the Central Bank of Ireland. The video is designed to help protect consumers from the increasingly sophisticated frauds being perpetrated in Ireland.

Workplace Relations Commission Annual Report

the WRC has published its 2021 Annual Report. The report outlines how it dealt with 12,000 complaints, 3,400 workplace inspections and a 75% increase in hearings, resulting in the recovery of just under €1m in unpaid wages. It can be easy for a large employer to be fully compliant as it has the resources to do so; however, it can be relatively resource-intensive for an SME to be fully compliant.

Table 4 in the report lists the inspection activity and outcomes by employment sector, with accounting and financial services having had 20 inspections and four employers in breach. Food service activities had 763 inspections and 34% in breach, and hair and beauty had 243 inspections with 24% in breach. Appendix 3 to the report lists the convictions for 2021, with the majority appearing to arise from SMEs in the food service industry and relate to "Employment Permit Acts 2003 to 2006". A number of case studies are set out in Appendix 4, which illustrate some of the issues arising after inspections or complaints.

Auditors – Reporting Category 1 and 2 Offences

The Corporate Enforcement Authority (previously, the Office of the Director of Corporate Enforcement) has published a list of the most common Category 2 offence reports by auditors.

	2021	%	2020	%
Directors' loans infringements	15	12	17	23
Failure to maintain proper accounting records	12	9	4	5
Provision of false statements to auditors	1	1	1	1
Unavailability of audit exemption	0	0	3	4
Signing of financial statements	1	1	0	0
Obligation to prepare group financial statements	4	3	2	3
Entity financial statements	91	69	45	60
Falsification of books or documents	7	5	3	4
Total	**131**	**100%**	**75**	**100%**

It should be noted that the "entity financial statements" category refers to an error's being discovered in a prior year's financial statements. This sort of report arises most frequently when there is a change in auditor and can arise where the incoming auditor has a different interpretation of the requirements of an accounting standard and encourages the directors to make a prior-year adjustment. The Corporate Enforcement Authority notes that entity financial statements reports are usually dealt with administratively and would not normally result in a prosecution.

Revenue Commissioners' Update: Reviewing the Effectiveness of the Co-operative Compliance Framework in Revenue

Vincent Walsh
Large Corporates Division, Revenue

Introduction

The Co-operative Compliance Framework (CCF) was introduced by Revenue in 2005 with a view to managing the tax risks within the Large Cases Division case base more efficiently and effectively. In 2016 a full review of the process was undertaken in Large Corporates Division (LCD), the successor of Large Cases Division. The 2016 Review made recommendations for reform which were implemented, including a relaunch of the CCF in 2017.

In 2021 LCD conducted a further extensive review of the CCF. The purpose of the review was primarily, to establish whether the CCF, as relaunched in 2017, was working as intended. The 2021 review sought to:

- establish whether the Framework was being administered consistently by the various sectoral Branches in LCD
- establish whether the Framework was delivering on its primary objective of improving voluntary compliance
- identify why some corporate Groups have decided not to enter the Framework
- identify areas for improvement.

What is the CCF?

Co-operative Compliance, also described internationally as "Enhanced Relationship" and "Horizontal Monitoring", is the creation and development of a relationship between the taxpayer and the tax administration based on trust and co-operation from both parties in order to achieve the highest level of voluntary tax compliance and certainty. The CCF, as operated by Revenue, encompasses a mutually supportive relationship between Revenue and large corporate taxpayers, with the aim of ensuring that the taxpayer is fully compliant with their tax, excise, and customs obligations.

Given the complexities of tax law and regulation, unintentional errors can sometimes arise. CCF aims to minimise these errors and involves Revenue and the taxpayer agreeing actions to ensure the highest possible level of tax compliance. It is a voluntary programme. The taxpayer can opt out of the programme at any stage. Likewise, Revenue can withdraw from co-operative compliance with any taxpayer that does not honour the requirements of the Framework. Formal or legal agreements are not necessary as the system is built on a high degree of mutual trust.

The CCF Review

The efficiency and effectiveness and the costs and benefits of a co-operative compliance programme can be difficult to assess. A recent book published on co-operative compliance "Cooperative Compliance: A Multi-stakeholder and Sustainable Approach to Taxation"[1] noted that current indicators of costs and benefits of a co-operative compliance programme are primarily based on factors that focus on the effectiveness of the compliance process rather than on an evaluation of the compliance outcomes that are achieved by the programme. The book concluded that the factors that should be used to evaluate the efficiency and effectiveness of a co-operative compliance policy include:

- the frequency and length of tax audits and access to APAs and advanced rulings
- cost efficiency measures such as "cost in terms of time taken to risk assess the return"
- methods to measure effectiveness such as comparisons between tax payments by large businesses inside co-operative compliance and those outside it, together with customer satisfaction surveys
- assessing the quality of the relationship between participants and the tax administration and the level of trust achieved between the parties by way of regular surveys of large taxpayers and of staff working in the Large Business Division of the tax administration.

The 2021 review used some of these factors in addition to some Irish specific factors (such as an analysis and comparison of the nature of the compliance yield as between participants in CCF and non-participants) to help evaluate the efficiency and effectiveness of Revenue's CCF. The review report has been published on the Revenue website.

Conduct of the Review

The review was conducted by the LCD Divisional Office in conjuction with the LCD Sectoral Branches, incorporating the following steps:

- analysing tax payments by participating and non-participating Groups to identify trends
- analysing statistics on the number of self-corrections, self-reviews and unprompted voluntary disclosures received from participating CCF Groups compared with non-participating Groups
- analysing the procedures actually used for implementing CCF by LCD Branches compared with the relevant Tax and Duty Manual[2], to assess the consistency of approach for administering the Framework
- surveying a selected sample of current CCF Groups to identify reasons for participation and any possible areas for improvement
- surveying a sample of eligible LCD Groups that are not particpating in CCF to identify reasons for non-participation
- surveying a selected sample of agents to gain insights into the CCF program from their perspective.

1 Published by Kluwer Law International B.V. © 2021 Jeffrey Owens & Jonathan Leigh Pemberton.

2 https://www.revenue.ie/en/tax-professionals/tdm/compliance/cooperative-compliance/cooperative-compliance-framework.pdf

CCF Review Survey

All current participating CCF Groups (125) were included in the first survey and full responses were received from 77 (61% response rate). The majority of repondents indicated that they were satisfied with the additional benefits of participation in CCF and, in particular, noted the benefit of having access to a Dedicated Case Manager. The participating Groups were also asked to suggest improvements to the Framework.

A further survey was issued to 43 non-participating Groups and full responses were received from 38 (88% response rate). The majority indicated that they were aware of the CCF and cited various reasons why they had decided not to participate. The decisions were, in the main, due to internal factors rather than any issue with the Framework.

A third survey was issued to eight large accountancy practices that represent clients whose tax affairs are dealt with in LCD, including both participating and non-participating Groups. Of the eight surveys issued, only one full response was received. However, discussions were undertaken on an informal basis with some of the other firms and their views and observations helped inform the review.

The CCF Review Conclusions

In summary, the Report[3] concluded that the CCF is being operated by both Revenue and participants in accordance with the principles set out in the 2017 relaunch, which are codified in the CCF TDM. This is evidenced both from the survey results of participants, non-participants and agents and by internal LCD experience. A previous Irish Tax Review article on CCF[4] also bears out this positive view. It is very clear that the role of the dedicated Case Manager is crucial to the success of the Framework. The value and importance of the annual risk review meeting is also crucial to the success of the Framework for both Revenue and CCF participants. The Framework is generally being administered and applied consistently across LCD.

The indications are that the Framework is also contributing to improved voluntary compliance among participating Groups. The following findings either directly support, or help to support, this conclusion:

- the percentage of tax payments by participants as against payments by non-participants has tended to increase over time. While this, to some extent, may represent the gradual increase in participating Groups, the fact is that over the last number of years more non-participating Groups than participating have been allocated to the LCD case base. Groups managed by LCD are not eligible to join CCF where the entire sector is in LCD, but the Group, otherwise, does not meet the thresholds to be assigned to LCD; that is, financial services (for example, some aircraft leasing), insurance companies, remote bookmakers and remote betting intermediaries.

- the source of the compliance yield from CCF Groups derives primarily from self-reviews, self-corrections, Annual Risk Reviews (ARRs), Expressions of Doubt (EoD), and Unprompted Voluntary Disclosures. It is, however, accepted that some of the unprompted disclosures would most likely have originated from contacts initiated by Revenue rather than purely taxpayer initiated disclosures

3 https://www.revenue.ie/en/companies-and-charities/documents/co-operative-compliance-framework-review-report-2021.pdf

4 Irish Tax Review Issue 3 2021 available at - https://www.taxfind.ie/document/ITR_Issue_3_2021_XML_28092021-C19-226532538

- the composition of the compliance yield from non-CCF participating Groups is primarily from active interventions initiated by Revenue, for example, Revenue audits and repayment challenges. It is also likely that a proportion of the Unprompted Voluntary Disclosures in non-CCF Groups arise from Revenue initiated contacts.

Based on survey responses, it seems that the perceived cost of participation may be the biggest disincentive to participation in the CCF. The survey responses also suggested that the demands of the annual risk review meeting may be a disincentive for some participants, particularly those with less complex tax affairs or those with relatively low tax liabilities.

CCF Review Recommendations

The recommendations from this review include initiatives designed to improve the operation of the Framework and to improve participation rates. These include writing to Groups, that were not previously invited to join the Framework or that recently moved into the LCD case base, to inform them that they can apply to join.

An outreach programme is also envisaged for agents and tax advisers to raise awareness of CCF. Other recommendations include setting a formal timeline for issuing the agenda for upcoming ARR meetings and formalising the procedure for the removal of Groups from the Framework where Revenue is of the view that the Group is not fulfilling its obligations under the Framework.

The review found that the CCF is largely working as planned and successfully.

Conclusion

The CCF is an essential part of Revenue's approach to compliance management for the largest taxpayers in the State. The benefits of CCF are accruing to both the participating Groups and to Revenue. The CCF will continue to evovle and this approach to compliance for large taxpayers is being adopted by an increasing number of Tax Administrations globally. In recent times the Medium Enterprise Division (MED) of Revenue has launched a pilot CCF for some of the larger public sector bodies. Co-operative compliance can also play a role in cross border Transfer Pricing dispute resolution and both the OECD and the EU have launched high level Transfer Pricing Risk Assessment programmes that are both voluntary in nature and operate on the basis of trust and co-operation between the taxpayer, usually large Multi-National Groups, and the tax administrations.

Revenue will continue to monitor the effectiveness of the CCF and to improve the attractiveness and effectiveness of the Framework.

Further information can be found on Revenue's website, www.revenue.ie, including:

- a detailed report on the 2021 CCF Review
- a supplementary paper with full details of the three surveys conducted, as well as their results, and some additional information
- the Tax and Duty Manual that sets out the procedures and operation of the CCF.

Legal Monitor

Caroline Austin
Partner, Tax Department, Matheson

Selected Acts Signed into Law 1 August–31 October 2022

No. 35: Development (Emergency Electricity Generation) Act 2022

The purpose of this Act is to provide for emergency measures for the development of electricity generation to meet challenges that have arisen in the market and others arising from the conflict in Ukraine. This legislation allows for the disapplication of legislation such as the Planning and Development Act 2000 and the EU's Environmental Impact Assessment Directive to designated developments under the Act.

No. 32: Electricity Costs (Domestic Electricity Accounts) Emergency Measures and Miscellaneous Provisions Act 2022

This Act establishes a scheme to make payments to domestic electricity accounts. This scheme, to be known as the Electricity Costs Emergency Benefit Scheme II, is designed to help consumers with rising energy prices and the increased cost of living. It follows a similar scheme that was passed earlier in the year. The scheme is intended to run from November 2022 until March 2023, with three payments to be made to households.

Selected Bills Initiated 1 August–31 October 2022

No. 103: Credit Guarantee (Amendment) Bill 2022

The purpose of this Bill is to amend the Credit Guarantee Act 2012 and to establish a Ukraine Credit Guarantee Scheme. This scheme allows businesses to avail of additional finance in light of the economic challenges caused by the war in Ukraine.

No. 101: Finance Bill 2022

This Bill provides legislative underpinning for the measures set out in Budget 2023[1]. Referred to as a "cost of living Budget", the Finance Bill includes targeted measures to support households and businesses with increasing expenses, including a Temporary Business Energy Support Scheme, a rent tax credit, the extension of the Help to Buy scheme and an increase in the USC 2% rate band ceiling to take account of the national minimum wage increase.

No. 92: Work Life Balance and Miscellaneous Provisions Bill 2022

The purpose of this Bill is to give further effect to the EU Work–Life Balance Directive on work–life balance for parents and carers. The Bill amends the Parental Leave Act 1998, allowing leave for medical care purposes, as well as providing for a right to request flexible working arrangements for caring purposes.

1 See below Irish Tax Institute information on Finance Bill 2022:
https://www.taxfind.ie/document/TaxFax1370-top_doc-770803237
https://www.taxfind.ie/document/ITI27062022-top_doc-1862687773
https://taxinstitute.ie/event/finance-bill-act-2022/

No. 86: Communications Regulation Bill 2022

This Bill will transpose Directive 2018/1972 establishing the European Electronic Communications Code (Recast). The legislation will update the enforcement regime for the Commission for Communications Regulation and introduce new consumer protection measures, such as an enhanced alternative dispute resolution process, compensation schemes and a "Customer Charter". The legislation will also amend the Communications Regulation Act 2002.

No. 85: Regulation of Lobbying (Amendment) Bill 2022

The purpose of this Bill is to amend the Regulation of Lobbying Act 2015. The Bill extends the definition of lobbying to bring certain informal business groups that have no employees within the scope of the Act and to improve the functionality of the Lobbying Register. The Bill will also introduce an anti-avoidance clause and will enhance the operation and enforcement of s22 of the Act, strengthening restrictions on post-term employment as a lobbyist.

No. 77: Screening of Third Country Transactions Bill 2022

The purpose of this Bill is to give further effect to Regulation (EU) 2019/452, and it will allow for certain transactions that might present security or public risks to the State to be reviewed by the Minister for Enterprise, Trade and Employment. Under the legislation, the Minister will be empowered to require data from investors in order to screen, and take actions in relation to, certain transactions. The legislation will also establish an Investment Screening Advisory Panel to advise the Minister in relation to certain transactions.

Selected Statutory Instruments 1 August–31 October 2022

No. 510: Protected Disclosures (Amendment) Act 2022 (Commencement) Order 2022

Under this Commencement Order the Protected Disclosures (Amendment) Act 2022 will come into operation on 1 January 2023. The Act transposes the EU's Whistleblower Protection Directive, enhancing the protections for whistleblowers. The Act provides that entities with 50 or more employees must establish formal procedures for workers to make protected disclosures. Protections for workers who have been penalised as a result of making a protected disclosure will be enhanced under the Act by reversing the burden of proof in civil proceedings, providing for criminal penalties for such penalisation and expanding the provision for interim relief to include types of penalisation other than dismissal.

No. 500: National Minimum Wage Order 2022

This Order replaces the National Minimum Wage Order 2021 and will continue in operation until the next National Minimum Wage Order comes into operation (currently €10.50 per hour).

No. 493: Planning and Development Act 2000 (Exempted Development) (No. 3) Regulations 2022

These Regulations extend, until 31 December 2025, the exempted development provisions of Article 10(6) of the Planning and Development Regulations 2001, as amended, exempting development consisting of the change of use, and any related works, from an existing specified use class to residential use, in certain circumstances and subject to conditions and limitations, from the requirement to obtain planning permission. The Regulations also add a new use class (Class 12: public houses) to the specified use classes that can qualify to avail of the planning exemption, subject to certain conditions and limitations.

No. 491: Double Taxation Relief (Taxes on Income) (Isle Of Man) Order 2022

This Order sets a Protocol between the Isle of Man amending the agreement of 24 April 2008 for affording relief from double taxation with respect to certain income of individuals and establishing a mutual agreement procedure in connection with the adjustment of profits of associated enterprises.

No. 490: Double Taxation Relief (Taxes on Income) (Guernsey) Order 2022

This Order sets a Protocol between Ireland and the States of Guernsey amending the agreement of 26 March 2009 for affording relief from double taxation with respect to certain income of individuals and establishing a mutual agreement procedure in connection with the adjustment of profits of associated enterprises.

No. 476: Credit Union Fund (Stabilisation) Levy Regulations 2022

These Regulations apply to all credit unions as of 1 January 2023 and provide that they must pay a levy for the Credit Union Fund at the rate of 0.001484% of the total assets of the credit union. Payment of the levy must be not later than 28 February 2023.

No. 449: National Oil Reserves Agency Act 2007 (Delegation of Climate Action Fund Grant Payment Functions) Order 2022

This Order delegates to Pobal certain functions related to the management of the Community Climate Action Supports within the Climate Action Fund.

No. 444: European Union (Electronic Communications Code) Regulations 2022

These Regulations give effect to Directive (EU) 2018/1972 establishing the European Electronic Communications Code (EECC). The EECC addresses developments in the electronic communications sector, particularly the emergence of "over-the-top" service providers, as well as updating a number of key areas to ensure that the EU's regulatory framework is suitable for the digital age. Under these Regulations, the Commission for Communications Regulation is appointed as the national regulatory authority to oversee and enforce the rules.

No. 442: European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) (No. 2) Regulations 2022

Commission Delegated Directive 2021/1270 (the UCITS amending Directive) sets out a number of new obligations for UCITS management companies in relation to sustainability risks as part of the Commission's Action Plan on "Financing Sustainable Growth". These Regulations amend the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, requiring that management companies, or investment companies, consider the adverse impacts of investment decisions in relation to sustainability factors, integrate sustainability risks to comply with the Directive's requirements, and retain any necessary resources and expertise for the purpose of integrating sustainability risks.

No. 435: European Union (Pan-European Personal Pension Product) Regulations 2022

These Regulations give effect to Regulation (EU) No 2019/1238 of the European Parliament and Council of 20 June 2019 and designate the Central Bank of Ireland as the competent authority in the State responsible for supervising PEPP providers and PEPP distributors and for carrying out the functions of a competent authority provided for in the PEPP Regulation.

No. 421: European Union (Environmental Impact Assessment) (Environmental Protection Agency Act 1992) (Amendment) Regulations 2022

These Regulations give further effect to Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 and further effect to Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014. The amendment concerns the deletion of a term in s87(1B).

No. 420: Circular Economy and Miscellaneous Provisions Act 2022 (Commencement of Certain Provisions) Order 2022

This SI commences Part 1, other than s5, and Part 6 of the Circular Economy and Miscellaneous Provisions Act 2022. This Act gives statutory footing to the government's Whole-of-Government Circular Economy Strategy, building on commitments set out in the Waste Action Plan, which will support Ireland's transition from a "take-make-waste" economic model to one that focuses on repair, reuse and recycling. The substantive provisions of the Act await commencement.

No. 419: Planning and Development (Amendment) Regulations 2022

These Regulations seek to streamline the public participation element of transboundary consultations by allowing members of the public in the State to send submissions directly to the competent authority in a transboundary state when public consultation is being held on a proposed development in that state. The Regulations also provide for the Minister to nominate a planning authority in the State to coordinate such transboundary consultations in certain circumstances.

No. 412: Employment Permits (Amendment) (No. 2) Regulations 2022

These Regulations amend the Employment Permits Regulations 2017 to introduce a new quota of general employment permits and new application requirements for vehicle roadworthiness testers. These regulations may be cited as the Employment Permits (Amendment) (No. 2) Regulations 2022.

Tax Appeals Commission Determinations

Tara Duggan
Tax Technical Author, Irish Tax Institute

Determinations of the Tax Appeals Commission Published from 3 August to 31 October 2022

VAT – 99TACD2022

Appeal regarding invoicing and evidential requirements for zero-rating intra-Community supplies of goods

s66 VATCA 2010; Schedule 2, Part 1, VATCA 2010; Regulation 29, Value-Added Tax Regulations 2010 (SI 639 of 2010)

Case stated requested: Unknown

VRT – 100TACD2022

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

s133 Finance Act 1992

Case stated requested: Unknown

CAT – 101TACD2022

Appeal regarding the classification of certain cash advances, loans, and family and household expenses as inheritances and their exemption from CAT

s10 CATCA 2003; s82 CATCA 2003

Case stated requested: Unknown

Income Tax – 102TACD2022

Appeal regarding determination that the appellant is not a "qualifying company" as it does not meet the requirements of the General Block Exemption Regulation

s494(4A) TCA 1997; paragraphs 5 and 6 of Article 21 of Commission Regulation (EU) No. 651/2014

Case stated requested: Unknown

VAT – 103TACD2022

Appeal regarding repayment of VAT in circumstances where the provision of passenger transport services is an exempt supply under VATCA 2010 and Article 371 of the VAT Directive. Appeal against a determination that the appellant is not a "qualifying person" engaged in the business of carriage for reward of tourists by road under contracts for group transport

Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266 of 2012)

Case stated requested: Unknown

PAYE – 104TACD2022

Appeal regarding taxation of termination payment on a paid basis

s112 TCA 1997

Case stated requested: Unknown

Income Tax – PAYE – 105TACD2022

Appeal regarding the refusal to allow a deduction for apartment rental costs as an expense incurred wholly, exclusively and necessarily in the performance of employment duties

s114 TCA 1997

Case stated requested: Unknown

VAT, PRSI – 106TACD2022

Appeal regarding treatment of a director's travel and subsistence expenses and the refusal to allow a deduction on the basis that the normal place of work of an intermediary is the premises of the intermediary's client and not the appellant's registered office, which was the home office of the director

s114 TCA 1997; s117 TCA 1997

Case stated requested: Unknown

Income Tax – USC – 107TACD2022

Appeal regarding underpayment of USC that became apparent on the encashment of a private pension

s531AM TCA 1997

Case stated requested: Unknown

Income Tax – 108TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

Income Tax, DIRT – Help to Buy Scheme – 109TACD2022

Appeal against the partial clawback of relief under the Help to Buy scheme where the property ceased to be occupied by the appellant within five years

s477C TCA 1997

Case stated requested: Unknown

CAT – 110TACD2022

Appeal regarding the refusal to allow a claim for favourite nephew relief on the basis that the appellant failed to furnish sufficient evidence to prove that he satisfied the necessary criteria to be eligible for the relief

Schedule 2 CATCA 2003

Case stated requested: Unknown

Income Tax – PAYE – 111TACD2022

Appeal regarding application of PAYE

Income Tax (Employments) (Consolidated) Regulations 2001 (SI 559 of 2001)

Case stated requested: Unknown

Corporation Tax – 112TACD2022

Appeal regarding definition of a car for benefit-in-kind purposes

s121 TCA 1997

Case stated requested: Unknown

Corporation Tax – R&D Tax Credit – 113TACD2022

Appeal regarding the refusal to grant the R&D tax credit on the basis that the application was made outside of the prescribed time limit

s766(5) TCA 1997

Case stated requested: Unknown

PAYE – 114TACD2022

Appeal regarding a lump sum payment of supplementary pension arrears charged to income tax in the year of receipt

s112 TCA 1991

Case stated requested: Unknown

Stamp Duty – 115TACD2022

Appeal regarding the consideration on which stamp duty is chargeable on deeds of transfer/assignment transferring a 50% interest of one tenant-in-common co-owner to the appellant co-owner, who already had a 50% interest in the properties, where the properties are subject to a mortgage over which receivers had been appointed and the entire consideration paid to the receiver to provide a deed of release of its security is recited in the deed of transfer/assignment

s2 SDCA 1999; s41 SDCA 1999; Schedule 1 SDCA 1999

Case stated requested: Unknown

CGT – 116TACD2022

Appeal regarding entitlement to relief under s536(1) TCA 1997 in respect of certain sums received on disposal of farmland under the terms of a compulsory purchase order and whether a valid claim for the repayment of tax paid was made in time

s536(1) TCA 1997

Case stated requested: Yes

Income Tax – 117TACD2022

Appeal regarding treatment of once-off payment in respect of the loss of use of a company car

s112 TCA 1997; s123(1) TCA 1997; s480 TCA 1997; Schedule E TCA 1997

Case stated requested: Unknown

VRT – 118TACD2022

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

s133 Finance Act 1992

Case stated requested: Unknown

Income Tax, USC – 119TACD2022

Appeal regarding entitlement to married person's tax treatment while spouses are legally separated

s1015 TCA 1997; s1019 TCA 1997; s1026 TCA 1997

Case stated requested: Unknown

VAT, Customs and Excise – 120TACD2022

Appeal against charges imposed on foot of changes introduced on 14 January 2021 by the United Kingdom government to the VAT margin scheme for used cars imported from Great Britain to Northern Ireland

Case stated requested: Unknown

CGT, Income Tax – 121TACD2022

Appeal regarding quantum of losses incurred on disposal of shares

s546 TCA 1997

Case stated requested: Unknown

PAYE – 122TACD2022

Appeal regarding statutory conditions for joint assessment of separated individuals

s1015 TCA 1997; s1018 TCA 1997; s1026 TCA 1997

Case stated requested: Unknown

Income Tax – 123TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

PAYE, USC – 124TACD2022

Appeal regarding tax treatment of State Contributory Pension when in receipt of other income

s126 TCA 1997

Case stated requested: Unknown

Relevant Contracts Tax – 125TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

PAYE, PRSI – 126TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Yes

Income Tax, CGT – 127TACD2022

Appeal against two alternative assessments made in relation to the same transaction. The assessment to CGT relates to the denial of retirement relief on a sale of shares and a refusal to treat a share-for-share exchange as a reorganisation of share capital, on the basis that the transactions were not made for bona fide commercial reasons and the main purpose, or one of the main purposes, of the transactions was to avoid a liability to tax. The assessment to income tax relates to the refusal to allow a sale of shares in a close company to be treated as a capital transaction, on the basis that it was not a bona fide commercial transaction and was part of a scheme or arrangement the purpose, or one of the purposes, of which was the avoidance of tax.

s584 TCA 1997; s586 TCA 1997; s598 TCA 1997; s817 TCA 1997

Case stated requested: Unknown

PAYE – 128TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

VAT – 129TACD2022

Appeal regarding the place of supply of goods, the interaction of intra-Community acquisitions legislation and the margin scheme for second-hand goods

s9 VATCA 2010; s24 VATCA 2010; s29 VATCA 2010; s87 VATCA 2010

Case stated requested: Yes

Income Tax – 130TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

PAYE – 131TACD2022

Appeal regarding charge to USC

s531AN TCA 1997

Case stated requested: Unknown

Customs and Excise – 132TACD2022

Two appeals arising from an alleged failure by the appellant to comply with the conditions under which it was authorised to operate a suspensive customs procedure known as processing under customs control (PCC)

Article 497 of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code

Case stated requested: Unknown

Income Tax, VAT – 133TACD2022

Appeal regarding VAT deduction on intra-Community purchase of rally cars as stock-in-trade, commencement of the trade of purchase and sale of rally cars, charge to benefit-in-kind (BIK) in relation to the appellant's use of the rally cars and computation of the amount chargeable to BIK where the rally cars are for the appellant's own personal use

s60 VATCA 2020; s118 TCA 1997, s119 TCA 1997

Case stated requested: Unknown

Income Tax – 134TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

Income Tax – 135TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

CAT – 136TACD2022

Appeal regarding the denial of dwelling-house exemption and whether the appellant was, at the date of the gift of the dwelling-house, beneficially entitled to any other dwelling-house or to any interest in any other dwelling-house; whether the CAT look-through anti-avoidance provisions pierce the corporate veil to deem the appellant entitled to a dwelling-house in circumstances where the appellant was a shareholder in a close property holding company, holding a large portfolio of property assets, including a residential property purchased at market value from the appellant

s43 CATCA 2003; s86 CATCA 2003

Case stated requested: Unknown

Income Tax – 137TACD2022

Appeal regarding treatment of unrecorded sales as taxable emoluments from the exercise of an office or employment

s58 TCA 1997; s112 TCA 1997; s811C TCA 1997

Case stated requested: Unknown

PAYE – 138TACD2022

Appeal regarding treatment of Australian employment income of an appellant who was Irish resident, ordinarily resident and domiciled

s819 TCA 1997; s820 TCA 1997; double taxation treaty between Ireland and Australia

Case stated requested: No

Income Tax, PRSI, USC – 139TACD2022

Appeal regarding a deduction for business-related support services provided by a company of which the appellant was a director and 99% shareholder and whether the sum claimed qualifies as a tax-deductible expense on the basis of being wholly and exclusively laid out or expended for the purposes of the trade or profession

s81(2) TCA 1997

Case stated requested: Yes

Income Tax – 140TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

Income Tax – 141TACD2022

Appeal regarding the taxation as remuneration in the year of payment of a lump sum payment in respect of arrears of salary following a successful claim for unfair dismissal by virtue of a compulsory contractual retirement age

s112 TCA 1997

Case stated requested: Yes

Income Tax – 142TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: No

Corporation Tax – 143TACD2022

A determination on a preliminary issue regarding whether a valid claim for relief on a specified intangible asset was made in the prescribed form within 12 months of the end of the accounting period in which the purchase of goodwill attributable to a trade name and brand of a partnership was incurred

s291A TCA 1997; s884 TCA 1997; s959I TCA 1997; s959K TCA 1997

Case stated requested: Unknown

VAT – 144TACD2022

Appeal regarding application of the four-year statutory limitation period

s99(4) VATCA 2010

Case stated requested: Unknown

Income Tax, DIRT – Help to Buy Scheme – 145TACD2022

Appeal against the clawback of relief under the Help to Buy scheme where it was not correctly due as the appellants had entered into a contract for the purchase of the property outside of the qualifying period

s477C TCA 1997

Case stated requested: Unknown

CGT – 146TACD2022

Appeal regarding ownership of property disposed of at a loss and the date of disposal for the purposes of determining the entitlement to offset the loss against gains

s546(5) TCA 1997

Case stated requested: Unknown

Income Tax – 147TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: No


Customs Update – Winter 2022

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A quick flight through the complex world of customs and aviation

Introduction

It is often taken for granted that the cross-border movement of aircraft and other aviation assets can occur without import taxes arising. Although this is often the case, it is not an inevitability, and a variety of factors need to be considered before deciding on the most appropriate import or export arrangement. And that is before the customs formalities and documentation requirements are addressed. With over 60% of the world's leased aircraft being managed from Ireland,[1] tax personnel in the sector often grapple, directly or indirectly, with the onerous requirements of moving products across customs borders and of having to satisfy themselves regarding the customs status of a particular asset. The assumption that leasing companies never act as importer or exporter is not always accurate, and when such scenarios arise, they can prove challenging. Customs issues can often be triggered due to the lifecycle of an aircraft, associated leasing arrangements and the wider geopolitical landscape.

Similarly, it is an area of complexity for those in the wider aviation industry, such original equipment manufacturers ('OEMs'), airlines, maintenance, repair and overhaul organisations (MROs), and logistics partners.

This article, while not exhaustive, examines some of the key customs issues faced by the various stakeholders in the aviation industry.

Background

The Plurilateral Agreement on Trade in Civil Aircraft provided for, *inter alia,* the abolition of customs duties on the importation of aircraft and aircraft parts. The Agreement has 33 signatories,[2] including the EU and Ireland in its own right. It is given effect in EU law through Regulation 952/2013, as amended ("the Union Customs Code", or UCC). It provides the basis on which civil aircraft and many specified aircraft parts can be imported to many countries exempt from customs duties ("civil aircraft exemption"). In addition to this, a plethora of other reliefs are provided for under EU customs law.

Notwithstanding the availability of such reliefs, there are many challenges associated with the cross-border movement of aviation assets. Reliefs, such as the civil aircraft exemption, are not automatic, and they do not obviate the need for documentation to be presented or for customs formalities. Moreover, the civil aircraft exemption applies only to customs duty; import VAT needs to be considered separately.

In this regard, the precise purpose of the cross-border movement often needs to be understood and, particularly, whether an asset is moving on a temporary (e.g. for storage, repair or maintenance) or a permanent basis (e.g. for teardown or a new lease with an operator in-country). The customs

1 See https://www.ibec.ie/connect-and-learn/industries/financial-services-leasing-and-professional-services/aircraft-leasing-ireland/ireland-a-global-centre-for-aircraft-leasing.

2 See https://www.wto.org/english/tratop_e/civair_e/civair_e.htm.

considerations will therefore vary depending on purpose of the movement of the asset.

This article examines some of the key challenges associated with such movements and some of the pain points that arise for different actors in the aviation sector. For ease of categorisation, we consider separately below movements of assets on a permanent basis (so-called full importation) and on a temporary basis.

"Full Importation" of Aircraft and Aviation Assets

Typically, aircraft will change their base and move to new operator where a new lease agreement is put in place with an operator that is based in the European Union (EU). Where such an event occurs, the aircraft usually needs to be imported to the EU and be declared to the free circulation procedure – to ensure that it can move unencumbered from a customs perspective.

In accordance with Article 201 of Regulation 952/2013, as amended (the Union Customs Code), release for free circulation entails, *inter alia,* the collection of any import duty due and "the completion of other formalities in respect of the import of the goods". Importantly, the release for free circulation confers on "non-Union goods" the customs status of "Union goods".[3]

Let us consider, therefore, the following aspects that relate to "full importation": the collection of import duties and other charges; the completion of customs formalities; and the customs status of goods.

Import duties and other charges

The release for free circulation of goods onto the EU market entails assessment of both customs duty and import VAT. In terms of whole aircraft (including helicopters), the standard rates of customs duty in the EU range from 2.7% to 7.7%. The rates of customs duty applicable to an aircraft will depend on its tariff classification in the EU's Combined Nomenclature, which is primarily driven by the weight of the aircraft.[4] However, relief from these customs duties is also provided for in the EU's Combined Nomenclature.

Before 1 January 2018 this relief was subject to onerous and burdensome end-use conditions. Under the new rules introduced in 2018, however, relief from customs duties applies where civil aircraft falling under the relevant subheadings of the EU's Combined Nomenclature:

> "have been duly entered on a register of a Member State or a third country in accordance with the Convention on International Civil Aviation dated 7 December 1944 and reference is made in the customs declaration for release for free circulation to the relevant certificate of registration".[5]

This somewhat eased the administrative burden associated with the full importation of aircraft and meant that an end-use authorisation was no longer required from the relevant EU customs authority.

Aircraft parts

Relief from customs duty is also applicable to specified aircraft parts. Such relief is provided for in the EU's Combined Nomenclature but is subject to end-use control, and prior authorisation must be obtained from the customs authorities in the form of an end-use authorisation.[6]

3 Article 201(3) of Regulation 952/2013, as amended ("the Union Customs Code").

4 Commission Implementing Regulation (EU) 2021/1832 of 12 October 2021 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff ("Combined Nomenclature"). See, in particular, Chapter 88 of the Combined Nomenclature.

5 *Ibid*. See Part B, Section II (Special Provisions), Part One of Annex I.

6 *Ibid*.

Alternatively, relief from customs duty may be obtained under certificate-of-airworthiness provisions. This offers more flexibility for operators who are in possession of a certificate of airworthiness[7] at the time of importation and who can refer to that certificate on the customs declaration.[8] In 2018 the EU amended the regime, and it now provides that where a defective part was previously issued with a valid airworthiness certification, the previously issued certificate can also be used to claim relief.[9]

Import VAT

Although this article does not address in detail the associated implications of import VAT, it is important to note that, unlike customs duty, import VAT and its treatment at the time of importation may vary depending on the relevant EU Member State of importation.

For lessors and operators, the EU Member State of importation therefore becomes an important consideration. The EU VAT Directive provides for an exemption from import VAT for aircraft used by airlines operating for reward chiefly on international routes ("qualifying aircraft exemption").[10] However, the transposition of this exemption into domestic law and its interpretation can vary across Member States.

Where the qualifying aircraft exemption is not met, it may be possible to examine cash-flow mitigation options whereby import VAT does not need to be paid at the time of importation – for instance, by looking at the Article 23 regime in the Netherlands or the recently introduced postponed accounting regime in Ireland.

Customs formalities on release for free circulation

Once the customs duty and import VAT treatment has been determined, it is important to ensure that customs formalities are appropriately executed in the Member State of importation. This will almost always involve the appointment of a customs broker acting as a customs representative on behalf of importer. The customs broker will prepare the customs declaration based on the documentation provided. The customs broker is a significant stakeholder in the process, so choosing a broker familiar with aviation assets is an important consideration.

A customs broker may act, with certain exceptions, in the capacity of a direct or an indirect representative.[11] In the former case, this means that they do not assume responsibility for any post-importation customs debt. In the latter case, both parties are responsible for any customs debts. The consequence of this is that most agents will act in the capacity of a direct representative – an important consideration for aircraft operators given the significant values associated with the movement of such assets.

In the context of aircraft leasing transactions, and imports of aircraft specifically, the responsibility for arranging the importation formalities, being the importer/declarant and appointing a customs broker will usually, although not always, rest with the lessee airline. This is probably a sensible approach as the lessee will typically be experienced with import/export activities, have relationships with a local customs broker and hold the requisite customs authorisations.

There is no provision in the Union Customs Code that the importer (i.e. "the declarant") must be the owner of the goods.[12] However, the importer/declarant must be established in the customs territory of the EU. Practical challenges could therefore arise if the importing entity were a non-EU entity (e.g. if a non-EU lessor had to act as importer). In such a case

7 Otherwise known as an Authorised Release Certificate.

8 Commission Implementing Regulation (EU) 2018/1517, as amended.

9 Article 1 of Council Regulation (EU) 2018/581, as amended.

10 Article 148 of Council Directive 2006/112/EC, as amended.

11 Article 18 of the Union Customs Code.

12 Although where import VAT is payable, this becomes an important consideration and, in practice, will be a necessity in some EU Member States and in the UK.

the non-EU entity would need to consider the appointment of a customs broker, or an EU-based entity, as an "indirect representative".[13] Many customs brokers will be unwilling to voluntarily act in this capacity given the associated risks. For example, if a customs broker incorrectly applied the airworthiness certificate exemption, it could be held liable for a customs debt (including penalties and interest). Where they are willing to do so, they are likely to demand increased fees and indemnities.

Customs declaration process

The declaration process involves the submission of the customs declaration and associated documentation (which may need to be provided to the customs authorities). Given that there are multiple data elements on the customs declaration, advance planning is crucial to avoid delays. Among the most important particulars to be declared to customs are the tariff classification, origin and customs value of the assets being imported.

In terms of the customs value, Article 70 of the Union Customs Code provides that the primary basis for the customs value is the transaction value, which "is the price actually paid or payable for the goods when **sold** for export to the customs territory of the Union [emphasis added]".[14] Given that most leasing transactions will not involve a sale, accurately determining the customs value can be challenging and needs to be carried out in accordance with the five alternative methods of customs valuation.[15]

In this regard, commentaries by the World Customs Organization in relation to leased goods can be instructive with regard to the treatment to apply to the relevant asset at the time of importation.[16]

Customs status and returned goods relief

The customs status of the goods is an important consideration for full importations of aircraft. Once the appropriate customs duty/import VAT have been determined and the customs formalities have been completed by the importer, questions can sometimes arise regarding how to prove the free circulation status of an aircraft.

For instance, the movement of aircraft to third countries for a short period of time, e.g. on a routine flight or for undergoing basic maintenance, can pose questions for both operators and asset owners. In a similar manner, questions can arise where an aircraft has not been formally exported from the EU and is re-entering the EU having previously been in free circulation in the EU's customs territory.

Returned goods relief

Article 203 of the UCC provides that non-Union goods that have originally been exported from the EU customs territory and are returned to that territory within a period of three years and released into free circulation shall be granted relief from import duty. This is interesting to examine further in the context of aircraft. Questions arise regarding whether the returned goods relief provisions apply to aircraft and, if so, what customs declarations are required for export and re-import. These questions have become more pertinent in the context of Brexit.

The answer would appear to be more straightforward where a routine flight or stopover of an aircraft registered and in free circulation in the EU occurs. The UCC provides that aircraft that leave the customs territory of the EU temporarily are deemed to be exported and re-imported under the rules applicable to means of transport. In fact, the standard customs formalities and declarations do not apply – these are deemed to occur at the time that the aircraft crosses the border.[17]

13 Article 170(2) of the UCC.

14 Article 70 of the UCC.

15 Article 74 of the UCC.

16 World Customs Organization, *Customs Valuation Compendium*, Study 2.1 on the Treatment of Rented or Leased Goods.

17 See Articles 140 and 141 of Regulation (EU) 2015/2446, as amended.

Of course, the applicability of returned goods relief is subject to certain key conditions, including that the aircraft is re-imported to the state from which it was exported and, to ensure that an import VAT liability does not arise, that the importer and exporter are the same person. With the number of different stakeholders potentially involved in respect of a movement of an aircraft (e.g. lessor, airline, ferry flight company, MRO), this becomes an important consideration.

This will be uncontroversial where the same operator is involved but could lead to issues where a transfer of ownership or possession of the aircraft has arisen when the aircraft was outside the EU's customs territory. Where there is a change in operator, the conditions applicable to returned goods relief are likely to be breached as the original operator is unlikely to be the person re-importing the aircraft. In effect, this means that a full importation of the asset needs to be considered, and a reassessment of whether the aircraft or parts thereof are qualifying from an import VAT perspective needs to be undertaken by the importer.

In cases where returned goods relief applies, the original import declaration verifies the free circulation status of the aircraft and the subsequent "deemed declaration" means that the aircraft regains its free circulation status in the EU, provided, of course, that no major overhaul of the aircraft has taken place while it was outside the customs territory of the EU.[18]

In other cases, where relying on returned goods relief to potentially re-import the aircraft into free circulation, importers need to exercise caution, and consideration needs to be given to how long the aircraft has remained outside the EU (it cannot generally be longer than three years).[19] A breach of the conditions is likely to mean that the aircraft cannot be-imported into free circulation using returned goods relief.

Brexit and movements of aircraft

The customs status of aircraft is also to be considered in the context of Brexit. What happens, for instance, to aircraft that had been imported to the EU via the United Kingdom and remain based in the United Kingdom? Guidance published by the European Commission before Brexit is instructive and, in summary, indicates that:

- goods located in the EU on 1 January 2021 that were imported through the UK before 1 January 2021 retain their EU free circulation status; but
- goods located in the UK on 1 January 2021 lose their EU free circulation status but may potentially re-enter the EU under returned goods provisions.

In relation to the second bullet above, European Commission guidance provides that:

> "where Union goods are brought from the Union to the UK before the end of the transition period and where then such goods move back to the Union before the end of the transition period, the provisions of Article 203 UCC apply if the economic operator can provide evidence that the Union goods: were transported to the UK prior to end of the transition; and return in an unaltered state in accordance with Article 203(5) UCC and Article 158 UCC DA".[20]

The guidance provides examples of evidence to claim returned goods relief at re-import, such as transport documents.[21]

18 Article 203(5) of the Union Customs Code.

19 Article 203(1) of the Union Customs Code.

20 European Commission, "Guidance Note: Withdrawal of the United Kingdom and EU Rules in the Field of Customs, Including Preferential Origin (REV4)" (Brussels, 23 December 2020), p. 18.

21 As the UK was part of the EU customs territory before 1 January 2021, a customs declaration will not be available as evidence.

In terms of EU-based aircraft, questions also arise about movements to the UK and whether free circulation status is required in both customs territories. The UK's temporary admission regulations are worth considering here; these provide that an aircraft registered and owned in the EU can enter the UK on a temporary basis and under a declaration "by conduct" to the customs authorities.[22] In addition, the UK's own provisions on returned goods relief could potentially be consulted.

Nonetheless, consideration should be afforded to whether returned goods relief provisions could apply, and now in the context of Brexit, multiple factors, such as registration, ownership and base of the aircraft, need to be carefully considered to determine whether importation is required to either the UK or the EU, or both, where the aircraft is moving between the two customs territories. In many cases provisions relating to temporary admission can apply where an aircraft based in one jurisdiction temporarily enters the other, e.g. on routine flight, and returns to the country of import (i.e. the EU under returned goods relief rules as outlined above).

Challenges with Imports of Assets on a Temporary Basis

"Temporary import" is a term often used for assets that are undergoing maintenance or overhaul or are in storage. It should be noted that under the Union Customs Code there is no regime known as "temporary importation". However, there are a range of special procedures under the UCC that allow aircraft and aircraft parts to be imported temporarily to the EU, with suspension of both customs duty and import VAT.[23] The placing of an asset into these regimes is typically driven by import VAT concerns – for example, where the "qualifying aircraft exemption" will not apply because an aircraft is off-lease and requires storage or maintenance.

Where maintenance and storage are required, an airline or lessor will generally be engaged with an MRO. In such circumstances the MRO will usually be authorised by the customs authority for a particular customs special procedure (often referred to as a duty suspension regime). Many MROs will, for example, be authorised for inward processing. Inward processing allows goods to be imported to the EU and for such goods to be used in certain processing operations with suspension of customs duty and import VAT. The regime is closed or "discharged", within a specified timeframe set out in the authorisation, when the processed product is re-exported (with no duty applicable) or released onto the EU market (whereby customs duty and import VAT must be accounted for at the rate applicable to the finished product).

In the context of aviation, it allows for significant overhaul and processing of an asset under duty suspension pending its re-export or subsequent release for free circulation on the EU market.[24] It is an extremely beneficial regime and stimulates economic activity within the EU. However, the regimes are strictly controlled, and the holder of the authorisation is obliged to adhere to the conditions of its authorisation. The authorisation and its conditions will specify permitted activities, processing locations, the products that are permitted to be imported under the procedure and the timeframe in which processing must be concluded etc.

Although the MRO will, usually, as holder of the authorisation and special procedure, be ultimately answerable to the customs authorities for any non-compliance events, engagement with the MRO is critical for lessors and/or operators of aircraft. Any breach of a condition could give rise to a revocation of an authorisation, a customs debt, a penalty and/or a restriction in respect of the movement of an asset. For the MRO this presents both reputational and tax risks. For the operator

22 See https://www.gov.uk/guidance/check-if-you-can-get-import-duty-relief-on-goods-using-temporary-admission#means-of-transport.

23 See Article 141 of Regulation 2015/2446, as amended.

24 See Article 256 of Regulation 952/2013, as amended.

or lessee it could mean that it is contractually responsible for a liability and/or it could impede the movements of its assets.

Issues typically arise where there has been poor communication between the MRO and the operator/lessee regarding the nature of the customs regime in which they are operating and poor internal communication between technical and tax personnel in the lessor's, or operator's, business.

For example, inward processing is always time restricted, and processing of the asset must not exceed the prescribed timeframe.[25] Where it does, the aircraft will generally need to be re-exported to avoid a customs debt arising. If it needs to remain in the EU, to avoid a customs debt it needs to be placed into another inward processing procedure (if required) or placed into customs warehousing. Operationally, however, this is much easier said than done. For example, the MRO might not have an authorisation for customs warehousing or be able, logistically, to move the asset to another location that is authorised for another customs procedure.

Such scenarios can be avoided with advance engagement with the MRO and by ensuring that tax and technical personnel are aligned. Critically, understanding the conditions of the customs authorisation for which the MRO is authorised is a key factor in avoiding such issues.

Temporary admission

The temporary admission (TA) regime applies to air transport fulfilling the following conditions:

- registered outside the customs territory of the EU, under the name of a person established outside of that territory, or where they are not registered, owned by a person outside the EU; and
- used by a person established outside the EU.[26]

The regime is designed for non-EU persons using aircraft in the EU and it is typically seen in the context of business jets. It is often also the basis on which, from a customs perspective, non-EU aircraft temporarily fly within the EU. Aircraft that meet the relevant provisions can enter the EU without incurring customs duty and import VAT provided they meet the foregoing conditions.[27] However, interpreting the TA provisions can be a source of confusion. For example, uncertainty exists regarding to what extent EU persons are permitted on flights taking place in the EU under TA. Similarly, operators sometimes struggle to determine to what extent maintenance is permitted for assets under TA. At different times, the European Commission has provided guidance to assist with interpreting these areas. In 2014, albeit in the context of legislation in force before the Union Customs Code, the Commission provided guidance for non-EU operators flying into the EU under TA. It clarified, *inter alia*, that only "the residence of the pilot/co-pilot matters". The guidance assisted in determining to what extent EU persons were permitted to be on a flight in the EU under TA.[28]

Where maintenance is concerned, the guidance in this area is not completely clear, but it appears that maintenance that arises incidentally to the flying of the aircraft is permitted. EU guidance has provided examples of what might be acceptable: repairing an air-conditioning system, replacing the turbines of the aircraft, replacing the brakes, oil etc.

The lack of very detailed guidance for TA and other special procedures where aviation is concerned means that caution should be exercised by all stakeholders when the use of such regimes is being considered.

25 Article 257 of the UCC.

26 Under the UCC, the importer can also elect to pay customs duty and import VAT on the originally imported materials.

27 The regime is time restricted.

28 European Commission (Working Paper) 2014, Customs Code Committee, Temporary Importation: Commercial and Private Use of Means of Transport, p. 7.

Conclusion

Although there are a myriad of customs reliefs available to all stakeholders involved in the movement of aviation assets, there is significant complexity in adhering to the conditions associated with such reliefs. In addition, maintaining and monitoring the customs status of aviation assets can be challenging. Stakeholders in the aviation space need to make sure that there is sufficient knowledge within their organisations to ensure that the opportunities are not missed and to ensure that interventions by the customs authorities are minimised. There are many other issues that have not been addressed above that relate to the area of customs and impact aviation, such as exports and export controls, “private” and “commercial” use in the context of temporary admission, and imports for domestic use only. Further customs guidance from the European Commission, for all involved in the aviation industry, would be extremely beneficial given the unique nature of such assets.

UK and Northern Ireland Update – Winter 2022

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Introduction

After an unprecedented and turbulent few months in UK politics, the UK Chancellor announced tens of billions of pounds of spending cuts and tax rises in the Government's Autumn Statement, the third set of tax announcements in as many months. The impact of the measures announced will be far-reaching – every household and business will be affected as a result of decisions taken in an attempt to fill the £50bn "black hole" that hangs over the UK's public finances.

However, if we put the Autumn Statement to one side (for now), there have also been a plethora of changes and developments in UK tax law and practice in the second half of 2022 – the main areas of interest are highlighted and examined below.

HMRC Late Payment and Repayment Interest Rates Increase Again

Due to the further increase in the Bank of England base rate on 3 November 2022, HMRC announced that the late payment and repayment interest rates applied to the main taxes, effective from 22 November 2022, are as follows:

- late payment interest rate – 5.50% and
- repayment interest rate – 2.00%.

The increase to HMRC interest on late-paid tax should serve as a reminder and warning to both individuals and businesses who are not up to date with their tax liabilities to make payments quickly, as the interest cost arising on outstanding tax balances will become very expensive.

Increased HMRC Scrutiny of R&D Claims

It is becoming clear that HMRC is increasing scrutiny of research and development (R&D) claims. While R&D tax relief is a key part of the Government's strategy for increasing investment in innovation, HMRC wants to ensure that claims for this support are valid and correctly targeted. HMRC has invested in additional resources to check the accuracy of R&D relief claims. Accordingly, an increase in "nudge" letters issued and enquiries being opened into R&D claims are expected. Businesses must ensure that they can demonstrate the accuracy of any R&D claims submitted and are prepared to respond to any questions that HMRC may ask on review of the claim. If this is not done it could result in a longer, more detailed enquiry, potentially requiring significant management resources and delayed receipt of any payment.

Register of Overseas Entities

“Overseas entities” owning land/property in the UK are now required to register on a new Register of Overseas Entities (ROE). An overseas entity is defined as a “legal entity that is governed by the law of a country or territory outside of the UK”. To the extent that this applies to existing land owned in the UK, entities will need to register with Companies House and inform it of who their registrable beneficial owners or managing officers are by 31 January 2023. Once registered, an overseas entity must update its information annually, until it successfully applies to be removed from the register after disposal of the UK land interest. As the register will be kept and maintained by Companies House, this is likely to be an administrative matter to be managed by the company/company secretary, company administrator or lawyers.

Statutory Residence Test

One of the first reported tax cases dealing with the statutory residence test (SRT) at the First-tier Tribunal helpfully clarifies a number of aspects regarding when days in the UK may be disregarded under “exceptional circumstances”. Up to 60 such days may be excluded from the day count in the SRT’s calculations. The judgment brings into focus the interpretation of the statutory exemption, highlighting that:

- exceptional circumstances can apply even in situations where the circumstances are foreseeable;
- a wide view should be taken of the meaning of being prevented from leaving the UK – according to the tribunal, this applies not only to physical restrictions but also to legal, moral and conscientious obligations; and
- the exemption applies to individuals who come to the UK due to the exceptional circumstances, not only to those who are already in the UK.

Easing of Tax Rules for Divorcing Couples

Married couples and civil partners can transfer chargeable assets between them such as property, shares and business interests without giving rise to capital gains tax under a “no gain, no loss” transfer. However, in circumstances where they separate, the current rules allow the couple to benefit from this treatment only until the end of the tax year in which separation occurs. So, for example, a couple who separated in February 2022could transfer assets without a charge to capital gains tax only up to 5 April 2022. Following this date, transfers of property and assets could result in capital gains tax liabilities.

From 6 April 2023, couples will have a more generous window of up to three tax years from the year in which they separate to transfer assets on a “no gain, no loss” basis – and essentially an unlimited period if the transfer is made as part of a formal divorce agreement. In terms of the former matrimonial home, a spouse or civil partner who retains an interest therein will be given an option to claim private residence relief when it is sold; and individuals who have transferred their interest in the former matrimonial home to their former spouse or civil partner and are entitled to receive a percentage of the proceeds when that home is eventually sold will be able to apply the same tax treatment to those proceeds, when received, that were applied when they transferred their original interest in the home to their former spouse or civil partner.

These changes will make the capital gains tax rules that apply to spouses and civil partners who are in the process of separating much fairer. Making the CGT exemption reliant on a transfer's occurring only within the tax year of separation has proved to be increasingly unfair as couples' financial affairs become ever more complex and some divorces take longer to complete. The changes will give couples more time to plan and transfer assets between themselves without incurring a charge to capital gains tax.

Changes to UK VAT Penalty Regime

The existing UK VAT default surcharge regime will be replaced from 1 January 2023 with a new points-based regime for late VAT returns and payments. Under the new scheme a VAT-registered business will receive a penalty point for each occasion that it submits a VAT return late. Once the business reaches a set number of penalty points over a stated period of compliance (determined by the frequency of VAT return submissions), penalties will be charged by HMRC, as follows:

Submission frequency	Penalty points threshold	Period of compliance
Annual VAT returns	2	24 months
Quarterly VAT returns	4	12 months
Monthly VAT returns	5	6 months

Once the relevant penalty threshold has been reached, the VAT-registered business will receive a flat-rate, £200 penalty. Although no further penalty points will be added, an additional £200 penalty will be charged for each subsequent late submission.

In addition, variable penalties will apply in relation to the late payment of VAT based on the amount of time for which the VAT debt remains outstanding. No late payment penalty will be charged where the VAT debt is paid within 14 days of the due date. Thereafter, a penalty will be charged at 2% of the VAT outstanding at day 15 and a further 2% of the VAT outstanding at day 30. Daily penalties at a rate of 4% per annum will then be charged from day 31 until the VAT debt is paid in full.

It is also important to note that it will be possible for a VAT-registered business to reset its penalty points tally and reduce its accrued penalty points to zero. However, this will happen only if HMRC has received all outstanding VAT returns for the previous 24 months and the business has submitted VAT returns on time for its "period of compliance".

Making Tax Digital (MTD): Changes from 1 November 2022

HMRC has updated its guidance (www.gov.uk/guidance/when-to-start-using-making-tax-digital-for-vat-if-youve-not-before) to confirm that, from 1 November 2022, businesses will not be able to use existing HMRC online accounts to submit quarterly or monthly VAT returns. Instead, users will need to use their own MTD-compatible software to keep their VAT records and file VAT returns with HMRC.

Update from HMRC on Option to Tax (OTT) Notification Process

HMRC recently ran a test-and-learn trial against the OTT notification and OTT Charter enquiry processes. Previously, a customer notifying an option to tax property would be acknowledged by HMRC, which would also carry out an extensive check on the notification itself. Under the new process, the acknowledgement letter issued by HMRC to a person notifying an option to tax will be replaced by a receipt confirming that a notification of an option to tax has been received by HMRC. HMRC will no longer carry out checks on the validity of the notification of the option to tax as, in its view, this has always been, and will continue to be, the responsibility of taxpayers themselves. Should it transpire at a later stage that the notified option to tax is invalid, appropriate corrective action will be taken by HMRC depending on the circumstances surrounding each case. In addition, changes are being introduced to streamline the Charter enquiry process for historical notified options to tax to free up HMRC resources.


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Key CAT Compliance Obligations in 2022

Introduction

Given the potentially significant cost to the taxpayer of failing to fulfil their compliance obligations, it is important to be aware of the capital acquisitions tax (CAT) and discretionary trust tax (DTT) filing requirements. With no changes proposed to the pay and file requirements for CAT in Finance Bill 2022, we set out the key compliance obligations for the year ahead.

Group Thresholds and CAT Rate

Unless reliefs or exemptions are available, a beneficiary pays CAT on the taxable value of their benefit that exceeds their tax-free, or group, threshold. This excess over the group threshold is subject to CAT at the current rate of 33%. The level of the threshold that applies to the benefit is determined by the relationship between the beneficiary and the disponer. Every beneficiary has three group thresholds:

Group A, Group B and Group C. The current thresholds for gifts/inheritances received on or after 9 October 2019 are:

- Group A: €335,000 (i.e. typically benefits received by children from their parents);
- Group B: €32,500 (i.e. typically benefits received by siblings, grandparents, nephews and nieces); and
- Group C: €16,250 (i.e. benefits received from persons who do not fall within Group A or B).

Spouses and civil partners are not included within the group thresholds as gifts and inheritances between spouses and civil partners are exempt from CAT.

Date of Benefit and Valuation Date

The rate of CAT and the group thresholds that apply are determined on the date of the benefit. For gifts, this is generally the date of the gift. For inheritances, this is generally the date of death. The payment and filing obligations, however, arise on the valuation date. For gifts, this is generally also the date of the gift. However, for inheritances it is more complex, and for most inheritances it is determined in accordance with s30(4) of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) as the earliest of the following dates:

- the earliest date on which a personal representative or trustee or successor or any other person is entitled to retain the asset for the benefit of the beneficiary (or any person in his/her right or on his/her behalf);
- the date on which the assets is so retained; and
- the date of delivery, payment or other satisfaction or discharge of the asset to the beneficiary (or to or for the benefit of anyone in the beneficiary's right or on his/her behalf).

In practice, the valuation date for an inheritance is often the date on which the grant of administration issues, as most assets cannot be retained or transferred to the beneficiary until the grant has issued. The valuation date can also arise at the date of death, if an individual receives a gift in anticipation of the death of another, or there is a failure to exercise a power of appointment or the property is jointly held and passes by survivorship.

Pay and File Date

At present, a beneficiary is required to file a CAT return, a Form IT38, once 80% of the beneficiary's group threshold has been exceeded. A beneficiary is required to aggregate all benefits taken on or after 5 December 1991 that are in the same group as the current benefit to determine when the 80% threshold is met.

A Form IT38S can be filed manually or online using Revenue's Online Service (ROS) (and is available from the local Revenue Districts and from Revenue's website). It can be used only if:

- no relief or credit or exemption (other than the small gift exemption) is being claimed;
- the interest taken is an absolute interest without conditions or restrictions; and
- the benefit is taken from one disponer and is not part of a larger benefit.

A Form IT38 is more commonly used, and must be used unless the beneficiary falls within the category of return outlined above. It is required to be filed electronically via ROS. It is best practice for the accountable person to sign the return and thereby declare that the information provided is true and complete.

As outlined above, the valuation date determines when a beneficiary's CAT return is required to be filed and any CAT paid. If the valuation date falls between:

- 1 January and 31 August in any tax year, the CAT return must be filed and CAT paid on or before 31 October in that year;
- 1 September and 31 December in any tax year, the CAT return must be filed and CAT paid on or before 31 October in the following year.

In practice, Revenue each year extends this deadline to mid-November where the payment is made and the return is filed online via ROS. This year's extension was to 16 November 2022.

To file a CAT return, a Personal Public Service Number (PPSN) is required for both the disponer and the beneficiary. The Department of Social Protection provides a registration service for non-resident applicants. It accepts applications from a solicitor acting on behalf of a non-resident person who requires a PPSN for capital tax purposes. It permits certification by the solicitor that the identity documents submitted are correct and original and represent the non-resident person. This service, however, can take several weeks. Therefore, once it is established that a return must be filed, it is prudent to obtain the relevant documentation to apply for a PPSN and then register the PPSN for CAT through ROS or by writing to the CAT unit in Revenue to avoid any delay in filing, which could give rise to interest and penalties.

If no reliefs are being claimed, it is possible to prepare and file a form IT38S without the PPSN of the non-resident disponer/beneficiary and submit the form to Revenue incomplete in order to pay and file on time. On receipt of the PPSN, an amended return can be submitted to Revenue to include any outstanding details. An IT38S does not benefit from the filing period extension and must be filed by 31 October of the relevant year.

Where a PPSN has two alpha characters one of which is a "W", a new PPSN must be applied for.

If registered for ROS, payments can be made online using:

- a debit card or credit card;
- a "single debit instruction", which is a once-off debit using a bank account capable of accepting a direct debit; or
- a ROS debit instruction, for ROS customers.

If not registered for ROS, payments can be made via:

- myAccount;
- a single debit instruction; or
- a debit card or credit card.

If a non-resident beneficiary does not have a SEPA-reachable bank account, the tax can be paid by electronic funds transfer to the Office of the Revenue Commissioners – UTD EFT – Public Bank Account. The non-resident beneficiary must include their name and registration number in the bank's narrative box to ensure correct and prompt allocation of funds. As soon as the payment is made, an email should be sent to moneytrans@revenue.ie with the following details:

- customer name;
- PPSN;
- amount of payment;
- whether the payment is for gift or inheritance tax; and
- period covered by the payment.

Interest Surcharges

If a beneficiary fails to pay his/her CAT liability by the specified payment date, simple interest is charged on the benefit.

If the valuation date occurs in the period from 1 January to 31 August in any year, simple interest is charged from 1 November in that year to the date the tax is paid. If the valuation date occurs in the period from 1 September to 31 December in any year, simple interest is charged from 1 November in the following year to the date the tax is paid.

The current rate, which applies with effect from 1 July 2009, is 0.0219% per day or part thereof. Where CAT is being paid by instalments on certain agricultural and business assets, the rate of interest is reduced by c.25%. Any interest payable is chargeable and recoverable as if it were CAT.

Where a clawback event arises in respect of a relief claimed, interest is charged from the date of the event that gives rise to the clawback, i.e. the date on which the relief/exemption ceases to apply.

Surcharge for Late Returns

A surcharge is imposed where a return is not filed by the specified return filing date. A 5% surcharge applies, subject to a maximum of €12,695, where the return is delivered within two months of the filing date. A 10% surcharge, to a maximum of €63,485, applies where the return is not delivered within two months of the filing date. The surcharge increases the tax liability and therefore is liable to interest as a tax unpaid.

Surcharge for Undervaluation

CAT is a self-assessed tax. Section 53 CATCA 2003 imposes a surcharge where an accountable person undervalues property in his/her CAT return and the value given is less than 67% of the "ascertained value". The surcharge is subject to interest under s51 CATCA 2003 as if it were tax.

The "ascertained value" means the market value, subject to the right of appeal. The level of surcharge is determined by the extent of the undervaluation and is based on a percentage, as outlined below

Estimate of the market value of the asset in the return, expressed as a % of the ascertained value of that asset	Surcharge
Equal to or greater than 0% but less than 40%	30%
Equal to or greater than 40% but less than 50%	20%
Equal to or greater than 50% but less than 67%	10%

The surcharge imposed for undervaluation is in addition to the CAT liability and interest charged on the undervaluation.

Penalties

A range of penalties can be imposed on a person who fails to comply with his/her obligations under CATCA 2003. A taxpayer who is liable to a penalty is not automatically charged with same. Practically, the penalty is often agreed between the taxpayer, Revenue and the taxpayer's adviser.

Section 58 CATCA 2003 imposes a penalty of €3,000 plus a further penalty of €30 for each day for which the contravention continues. It arises in a number of circumstances, including where:

- a person primarily accountable for tax fails to deliver a return within the time specified;
- an accountable person becomes aware of a defect in a return delivered to Revenue and does not correct the return within 90 days of becoming aware of the defect;
- a person accountable for tax receives a notice in writing from Revenue to deliver a return and fails to do so; and
- an accountable person, having delivered a return, does not comply with a written request by the Revenue for an additional return.

Penalties may also be imposed pursuant to s58 where a person "deliberately or carelessly" fails to comply with a requirement to deliver a return or additional return under s46 CATCA 2003. A penalty of €3,000 will also be imposed where:

- a person obstructs inspection of any property by a person authorised to do so for the purpose of valuing it (s58(2)) or
- a person assists in or induces a false statement or return (s58(7)).

An increased penalty of €6,345 (plus the difference in tax involved) will be imposed where:

- an accountable person makes an incorrect statement or deliberately or carelessly delivers an incorrect return or
- a person becomes aware that he/she has delivered an incorrect return, statement, declaration, evidence or valuation (albeit that it was not done deliberately or carelessly), which will be treated as having been deliberate and careless, unless the error is corrected without unreasonable delay.

Penalties can now be recovered from a deceased person's estate only where, before the deceased's death:

- the deceased had agreed in writing that he/she was liable to a penalty;
- Revenue had agreed to accept a specified amount in respect of the penalty from the deceased; or
- a court had determined that the deceased was liable to a penalty.

Discretionary Trust Tax

DTT imposes an initial levy of 6% on the market value of the trust fund. However, the legislation provides for a refund of 50% of the initial levy if the trust is wound up and all of the trust assets are appointed absolutely to beneficiaries within five years.

The initial levy arises on property that is subject to a discretionary trust on the later of:

- the date on which the property becomes subject to the discretionary trust;
- the date of death of the disponer; or
- the date on which there ceases to be a principal object under 21 years of age (where property is settled on/after 31 January 1993).

A principal object is defined to include a spouse or civil partner of the settlor, the children of the settlor or of his/her civil partner/spouse, or any children of a predeceased child of the settlor or of his/her civil partner/spouse.

In addition to the initial levy, an annual levy is charged on the value of the assets comprised in a chargeable discretionary trust on 31 December in each year. The 1% annual levy will not arise in the same 12-month period as the initial levy.

Property will be treated as being subject to a discretionary trust on the date of the disponer's death where the discretionary trust is created by his/her will. This essentially means that where a discretionary trust is created under a will, the initial charge to DTT will arise on the date of death of the disponer and the annual charges will arise on 31 December in each subsequent year during the period of the administration (assuming that all principal objects (if any) are over 21 and no interest in possession arises). The charges, however, will not become payable until four months after the valuation date arises.

Claims for refunds of DTT should be made within the four-year period starting on the later of the valuation date and the date of payment of the tax concerned where that tax has been paid within four months of the valuation date.

Discretionary Trust Compliance

If the discretionary trust is liable for tax, a Form TR1 should be completed and submitted to Revenue by the trustees in order to register the trust for tax and obtain a trust tax number. Every year thereafter an annual tax return (Form 1) should be completed and submitted to Revenue by the trustees. It will detail the reporting income and chargeable gains of the trust. It will also record distributions into and out of the trust, including cash transfers.

Section 46(15) CATCA 2003 provides that where a person who is resident or ordinarily resident in the State makes a disposition as a result of which property becomes subject to a discretionary trust, the disponer must file a return (a Form DT1) with Revenue within four months of the date of the disposition.

Therefore, a Form DT1 should be filed within four months of the establishment of the discretionary trust, irrespective of whether the discretionary trust is liable to DTT, and within four months of further value being added to the discretionary trust over its lifetime.

The Form DT1, is required to contain:

- the terms of the discretionary trust;
- the names and addresses of the trustees and objects of the discretionary trust; and
- an estimate of the market value of the property, at the date of the disposition, becoming subject to the discretionary trust.

On filing the first Form DT1 and registration of the trust, Revenue will issue the trust with a DTT number, which will be necessary to complete the Forms IT32 and IT4.

Where DTT is payable, the Form IT32 is the self-assessment return for the 1% initial DTT. It must be delivered by the accountable person, i.e. the trustees, or an agent acting on their behalf. The Form IT4 is the self-assessment return for the 6% once-off charge. Again, it must be delivered by the accountable person, i.e. the trustees, or their agent.

Interest will not be charged if the returns are filed within four months of the relevant valuation date. In addition to being liable to interest for late filing, DTT returns are liable to the surcharge provisions (discussed above) if not filled within four months of the relevant valuation date.

DTT can be paid by electronic funds transfer (EFT) to the Capital Taxes No. 3 Public Bank Account, Allied Irish Banks, 7–12 Dame Street, Dublin 2, D02 KX20, IBAN IE32 AIBK 932086 16946049, BIC AIBKIE2D. As soon as a payment is made by EFT, an email should be sent to: moneytrans@revenue.ie with the following details:

- name and address of the person making the payment (trustee, solicitor or accountant);
- settlor's or disponer's name;
- file reference and name of trust;
- period covered by the payment; and
- amount of the payment.

DTT can also be paid by cheque or bank draft with the above details to The Revenue Commissioners, Capital Acquisitions Tax Unit, Block F, Athy Business Campus, Castlecomer Road, Athy, Co. Kildare, R14 FE81.

Other Trust Reporting Requirements To Be Aware of

Section 896A of the Taxes Consolidation Act 1997 includes a reporting requirement for professional persons, which would include solicitors and tax advisers. The reporting requirement arises where a professional person is "concerned with the making of a settlement" in which the settlor is resident or ordinarily resident in Ireland and the trustees of the settlement are non-resident. The report must be submitted on a Form 8-S and made within four months of the date on which the settlement was created.

In addition to tax filing requirements, practitioners should be aware that the trustees may have reporting obligations under the Foreign Account Tax Compliance Act and/or the Common Reporting Standard in respect of financial accounts held by the trust and obligations in relation to a beneficial ownership register under the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021.

Secondary Accountability Re Non-resident Beneficiaries

Secondary accountability in relation to CAT was largely abolished by Finance Act 2010; however, it is still relevant in relation to non-resident beneficiaries of deceased estates. Under s45AA CATCA 2003, where one or more of the personal representatives is Irish resident and a non-resident beneficiary fails to comply with their CAT pay and file obligations, the personal representative shall be assessable and chargeable for the non-resident beneficiary's CAT liability.

Under s48(10) CATCA 2003, where all of those intending to extract a grant of probate or letters of administration are non-resident, a non-resident beneficiary's inheritance exceeds €20,000 and a CAT return would be required to be delivered if the valuation date in respect of the inheritance were the date of death of that person, an Irish practicing solicitor must be appointed to act in connection with the administration of the deceased person's estate. If a solicitor is not appointed in such a case, the Probate Office will not issue the grant of probate or letters of administration. Under s45AA(1A), that solicitor will be assessable and chargeable for the non-resident beneficiary's CAT if the non-resident beneficiary fails to pay their CAT liability and file a return.

Under s48(10), the personal representative or solicitor is required to give Revenue 30 days' written notice of their intention to distribute the benefit to the non-resident beneficiary. The letter can now be submitted via MyEnquiries on ROS, and Revenue eBrief No. 091/2022 updated the relevant Revenue manual to detail the new online process.

An automated reply will now be generated through ROS to confirm that if a response is not received within the 30 days, the distribution may proceed. However, if Revenue indicates within that time that it is considering conducting a compliance intervention on the CAT return or pursuing the non-filing of a return by that beneficiary, the resident personal representative or solicitor should, under s48(10), retain control of the assets relating to that beneficiary's benefit (in so far as he/she has control) until the matter has been dealt with.

If Revenue does not raise a query within the 30 days, it does not preclude Revenue from carrying out an intervention against the non-resident beneficiary within the usual statutory time limits, but the non-resident beneficiary will then be responsible for all aspects of the compliance intervention process under the Code of Practice for Revenue Audit and Other Compliance Interventions.

Gifts/Inheritances of an Intangible Nature

Free use of property

Under s40 CATCA 2003, where a person is allowed to have the use, occupation or enjoyment of another person's property free or for less than market value, this constitutes a gift for CAT purposes. However, Revenue has clarified in its "Guide to the CAT Treatment of Receipts by Children from their Parents for their Support, Maintenance or Education" that the non-exclusive occupation of the family home by a child (and their spouse/partner, as the case may be) at any age does not constitute a gift for CAT purposes.

Interest-free loans

The interest-free element of an interest-free loan constitutes a taxable benefit for CAT purposes. Finance Bill 2021 had introduced a proposal to value the free use of money by reference to the lowest borrowing rate available in the market for an equivalent sum; however, this was removed from the Bill before enactment. In its CAT Manual Part 19 "Miscellaneous Issues", Revenue states that its view is that the best price referred to in s40(3) CATCA 2003 is the highest price that a prudent lender/depositor could get in the open market from prospective prudent borrowers; however, it goes on to note that "in practice, Revenue accepts the highest rate of return the person making the loan could obtain on investing the funds on deposit".

Recent Updates

Revenue eBrief No. 163/2022 updated the relevant Revenue manual regarding rights of residence to explain the CAT treatment of an exclusive right to occupy a dwelling and a general non-exclusive right to occupy a dwelling.

Revenue eBrief No. 018/2022 updated the relevant Revenue manual to provide that the exemption from CAT for bona fide winnings applies to winnings in non-cash form, as well as winnings in cash form.

Revenue published guidance on 4 April 2022 on what a valid claim for repayment of an overpayment of CAT should include. No repayment will be made unless a valid claim is submitted within the period of four years commencing on 31 December in the year in which the tax was due to be paid; the valuation date, in the case of DTT; or the date of payment, where DTT was paid within four months of the valuation date.

Conclusion

With filing dates remaining largely the same each year, one should ensure that one has the necessary information, authority and registrations completed before the filing deadline to ensure that the required returns can be filed through ROS.


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Taxation of Non-Resident Corporate Landlords

Introduction

A common trait among taxation systems across the globe is that, invariably, income derived from land or buildings will be taxed in the country where that land or those buildings are located. Due to the marked increase in the number of foreign landlords in Ireland over the last 20 years or so, rent will often be paid to a foreign corporate landlord, which will then find itself within the scope of the Irish tax system even if it has no other business in or connection to Ireland.

As the dust settles on corporation tax pay and file deadlines for companies with a year-end in 2021, thoughts will quickly turn to the preparation of 2022's tax return. Due to changes introduced in Finance Act 2021, many non-resident corporate landlords will now be within the charge to Irish corporation tax for the first time.

Pursuant to s18 of Finance Act 2021, which introduced s25(2A) into the Taxes Consolidation Act 1997 (TCA 1997), non-resident corporate landlords (NRCLs) are now no longer subject to income tax and instead are subject to corporation tax at the rate of 25% on rental profits arising in Ireland on or after 1 January 2022.

The new s25(2A) TCA 1997 reads as follows:

> *"(a) Where a company not resident in the State is chargeable to tax under Case V of Schedule D in respect of any profits or gains, that company shall be chargeable to corporation tax on those profits or gains.*
>
> *(b) Where a company not resident in the State disposes of an asset in respect of which the company was chargeable to tax under Case V of Schedule D on any profits or gains therefrom, or would have been but for an insufficiency of such profits or gains, the company shall, subject to section 649, not be chargeable to capital gains tax in respect of gains accruing to it on the disposal so that it is chargeable in respect of them to corporation tax.*
>
> *(c) This subsection shall apply to profits and gains accruing on or after 1 January 2022."*

This represents a significant shift from the previous approach to the taxation of NRCLs that do not trade via a branch or agency in Ireland.

Taxation of NRCLs Before 1 January 2022

NRCLs generating rental income from Irish property and that did not otherwise carry on a trade in the State through a branch or agency were previously subject to income tax at the standard rate of 20% on such rent receivable. This created something of a disparity between NRCLs and Irish-resident corporate landlords, who were subject to the higher corporation tax rate of 25%.

Due to the obvious difficulties that Revenue may have collecting tax from an entity with no presence in Ireland, special rules applied to the collection and payment of an NRCL's tax liability. The income tax charge should have been collected in one of two ways:

- The tenant was obliged to withhold income tax at the standard rate (20%) from rental payments and return this amount to Revenue. The tenant was then obliged to provide the NRCL with a Form R185, which evidenced the tax deducted and allowed the NRCL to claim an equivalent credit in its own income tax return for the year.
- Alternatively, the NRCL could have appointed an Irish collection agent (typically, an estate agent or management company) to collect the rent, without any withholding by the tenant. The NRCL was assessable and chargeable to income tax in the name of the collection agent, which would register under a separate tax reference number. Tax returns would be filed and tax paid on the NRCL's behalf. Revenue guidance provided that the collection agent "may" have retained a sufficient portion of the rents to satisfy the tax payable. In practice, rent collection agents would typically have looked to withhold a portion of the rent in any event or would have sought an indemnity to cover them for any potential liability for unpaid taxes.

Taxation of NRCLs from 1 January 2022 onwards

As discussed above, NRCLs are no longer subject to income tax on their rental profits and instead are subject to corporation tax at the rate of 25% on rental profits arising in Ireland on or after 1 January 2022. The new regime will operate as follows:

- Under the new collection system, tenants are still obliged to withhold 20% of the rent payable in the absence of a collection agent being appointed by the NRCL. The NRCL can then claim a credit for the tax withheld, in line with the pre-1 January 2022 system. At a high level, Finance Bill 2022 proposes to amend section 1041 TCA 1997. The first part of the amendment to section 1041 TCA 1997 provides that the person making the payments (i.e. the tenant) will also be required to give certain information as required by the Revenue Commissioners concerning the landlord and the rental income in respect of which tax is being withheld.

- Collection agents can still be appointed by NRCLs. Where a collection agent has been appointed, the rent is paid to the collection agent and there is no withholding obligation on the tenant's part. The collection agent registers for corporation tax under a separate tax reference number and files the corporation tax return (and arranges payment) on behalf of the NRCL. Again, this is broadly in line with the previous regime. However, the Explanatory Memorandum to Finance Bill 2022 states *"[t]he amendment to section 1041 also relieves" collection agents" of the obligation of being chargeable and assessable for the income of a non-resident landlord, if the collection agent deducts withholding tax from rental payments and remits that tax the Revenue Commissioners, and gives the Revenue Commissioners certain information related to the payments".* Based on the Explanatory Memorandum, it appears the intention of the proposed amendment is that a collection agent can "opt out" of being the chargeable and assessable person provided certain conditions are met. However, this does not seem to be the effect of the draft legislation as currently worded and clarity from Revenue may be required in this regard. The proposed amendment contained in the Finance Bill is subject to a ministerial commencement order and may also be subject to some further modification before the Bill is enacted.

Interaction with the New Interest Limitation Rule

The purpose of bringing NRCLs within the charge to the higher, 25%, corporation tax rate is not merely to subject resident and non-resident corporate landlords to the same headline rate of tax but also to provide a mechanism for NRCLs to be subject to new anti-avoidance rules relating to interest deductibility.

Previously, there had effectively been no restriction on an NRCL's entitlement to deduct interest on borrowings employed in the purchase, improvement or repair of a rental property, subject to the interest meeting arm's-length principles in certain circumstances.

The new corporation tax regime for NRCLs was implemented in part to ensure that NRCLs would be within the scope of the EU Anti-Tax Avoidance Directive (ATAD)[1] interest limitation rule (ILR), which was transposed into Irish law by Finance Act 2021. Although a detailed analysis of the ILR is beyond the scope of this article,[2] there are a number of points that NRCLs (and prospective NRCLs) should be aware of as these two intertwined regimes take shape.

The ILR applies to accounting periods beginning on or after 1 January 2022 and limits interest deductibility for a company that is within the charge to Irish corporation tax, including an NRCL, to 30% of EBITDA (earnings before interest, tax, depreciation and amortisation), subject to a number of exceptions. The most notable exceptions from an NRCL's perspective are the following.

De minimus threshold

Where the net interest expense of a company is less than €3m in an accounting period (or, where the accounting period is less than 12 months, a pro-rated amount), the company will be exempted from the ILR. Therefore, depending on the quantum of the relevant interest expense, it may be worth considering the incorporation of a new entity for each property acquisition so that each entity might be considered independently.

1 Council Directive (EU) 2016/1164 of 12 July 2016 as amended by Council Directive (EU) 2017/952 of 29 May 2017 (collectively known as the Anti-Tax Avoidance Directive, or ATAD).

2 See Emma Arlow, "Interest Limitation Rules: Key Provisions and Areas To Watch", *Irish Tax Review*, 35/1 (2022).

Where the *de minimus* exemption will not be available and an NRCL is a member of a worldwide group (generally, a group with consolidated accounts), or a member of an Irish loss group under s411 TCA 1997, it may elect to be part of an "interest group". The benefit of forming an interest group is that other group companies may have no or a minimal interest expense in the period and the 30% EBITDA limit can be assessed on a group basis.

Legacy debt

At a high level, debt the terms of which were agreed before 17 June 2016 is ignored for the purpose of the ILR (i.e. it is fully deductible). There are more detailed rules in relation to interest on principal sums not advanced before this date but for which there was a legal obligation on the lender to provide the said principal on the passing of certain milestones.

Long-term public infrastructure project exclusion

Interest incurred on borrowings to fund the provision, upgrade, operation or maintenance of certain long-term public development projects is exempted from the ILR (see s835AY(1) TCA 1997 under the definition of "large scale asset" for the full list of qualifying developments). Of particular note to NRCLs is the "strategic housing development" (SHD) within the meaning of Chapter 1 of Part 2 of the Planning and Development (Housing) and Residential Tenancies Act 2016 approved by:

- an Bord Pleanála, under s9 of that Act, or
- a local authority, under s170 of the Planning and Development Act 2000.

Where planning permission meets the above criteria, this can be a very beneficial exemption for NRCLs to the extent that they are involved in the provision, upgrade, operation or maintenance of SHD projects. The exemption operates by ignoring any income or expenses directly connected with a qualifying long-term infrastructure project (s835AZ TCA 1997).

The SHD planning process lapsed in February 2022 and was replaced by the "large-scale residential developments" (LRD) regime, defined in section 2 of the Planning and Development Act 2000, as amended. For this reason, Finance Bill 2022 has extended the definition of "large scale asset" to include LRDs.

Tax Deductibility of Expenses for NRCLs

General expenses

NRCLs should not assume that all company expenses relating to an Irish property will be deductible under Case V.[3] The deductions available from Case V income under s97(2) TCA 1997, and also by way of concession pursuant to Revenue guidance, are limited to the following:

- rent paid by the NRCL on the property (if any),
- local authority rates (but not local property tax),
- property insurance,
- costs of maintenance and repair,
- costs of management of the property,
- accountancy fees to the extent that they are incurred in the preparation of a rent account,
- qualifying costs between lettings and
- certain limited pre-letting expenses.

Expenses generally need to be incurred during a period of rental occupation and not before letting in order to be allowable deductions from Case V income. However, advertising costs and legal costs (usually those incurred in preparing leases) are generally allowable pre-letting expenses. Expenses incurred between lettings should also be allowable but only to the extent that the property is available for rental and is not vacant for a protracted period of time, for instance, in the context of refurbishment works.

If a property is vacant for at least 12 months and subsequently rented out as a residential

3 For a more detailed analysis of the Case V computation, see Paul Dunlea, "Back to Basics: Case V Income – Rules of the Road", *Irish Tax Review*, 33/3 (2020).

property, expenses during that 12-month period that would otherwise have been allowable if incurred during a period of rental occupation are (up to the end of 2022) also deductible. Such expenses are allowable to a maximum of €5,000, and the allowance is clawed back if the landlord stops leasing the property as a residential property in the subsequent four-year period (s97A TCA 1997). As proposed under Finance Bill 2022, it is understood that from 1 January 2023 such expenses will be allowable against rental income on a property that had been vacant for six months with a cap of €10,000.

Under the new corporation tax regime for NRCLs, there may also now be scope for some "expenses of management" to be deductible under s83 TCA 1997, which may give broader scope for deductibility beyond the limits imposed under s97 TCA 1997.

Renovations/refurbishment

Certain expenses incurred on a property renovation or refurbishment can constitute repairs and be treated as revenue expenses if not capitalised in the accounts. For such costs to be deductible as expenses (and so deductible in full in the year incurred), they must be incurred on an actual repair or a replacement on a like-for-like basis with the nearest modern equivalent. This is a complex area of tax law that needs to be carefully considered before classifying any renovation or refurbishment cost as a repair.

If, on review, the expenditure is not considered a repair, then renovation and refurbishment costs should be capitalised in the accounts such that the expenditure goes towards the base cost of the property and reduces the chargeable gain on a future disposal (currently charged at 33% under CGT rules). Capital allowances may also be available to the extent that the expenditure incurred relates to qualifying plant and machinery.

Capital allowances

Capital allowances should be available for offset against taxable profits based on the cost of qualifying plant and machinery (including fixtures and fittings) at 12.5% per annum over a minimum eight-year period. This can result in a significant cash-flow saving for the NRCL by reducing tax liabilities over a number of years.

If there is a significant gain on the sale of the property and the proceeds attributable to qualifying plant and machinery exceed their tax-written-down value, a balancing charge may arise. This may be managed in conjunction with a purchaser to agree on the attribution of proceeds and the value of plant and machinery on sale.

In the context of the acquisition of a property, capital allowances based on the value of integrated plant and machinery contained therein should be available based on a just and reasonable apportionment of the purchase price. This can result in significant value for plant and machinery attributable to capital allowances but would need to be validated and verified based on a reconstruction estimate for the building (undertaken by chartered surveyors/estimators), and the value of qualifying plant and machinery contained therein in the context of a bare site valuation.

Accelerated capital allowances (ACAs) on certain energy-efficient plant and machinery may also be available (100% deduction in year 1). However, in our experience, the practicalities of claiming ACAs tend to be somewhat undermined by trying to identify whether, at the time that the expenditure on the provision of a particular item of plant was incurred, it was in fact specified on the detailed list maintained by the Sustainable Energy Authority of Ireland (the "SEAI"), which is a prerequisite to its qualification for ACAs.

Carry-forward of excess capital allowances and losses

As NRCLs had previously been subjected to income tax on rental income earned, an NRCL may have had unused losses or capital allowances available to carry forward to 2022. Sections 308 and 399 TCA 1997, as amended by Finance Act 2021, provide, respectively, that where an NRCL has such unused losses or excess capital allowances at the end of the year of assessment ending on 31 December 2021, those losses or capital allowances may be claimed in the corporation tax return for the first accounting period ending after 1 January 2022.

Finance Act 2021 also addressed a potential issue in relation to a balancing charge or allowance arising after 1 January 2022 but in relation to which capital allowances were granted before 1 January 2022. Any balancing allowance or charge made to or on an NRCL in respect of a capital allowance made to the company in a chargeable period ending on or before 31 December 2021 is adjusted on a value basis (i.e. 20/25ths) such that the value of a balancing charge does not exceed the value of the capital allowance given and the value of any balancing allowance (in respect of the pre-2022 allowances) is given at the 20% tax rate. In other words, in terms of balancing allowances or charges, the NRCL should not benefit or suffer from the changeover from the 20% income tax rate to the 25% corporation tax rate.

New tax incentive to encourage small-scale landlords to undertake retrofitting works

As proposed in Finance Bill 2022, this measure is to provide for a tax deduction of up to €10,000 per property, against Case V rental income, for certain retrofitting expenses incurred by a landlord on rented residential properties, for a maximum of two rental properties. The expenses that qualify for deduction are those in respect of which the landlord has received a home energy grant from the SEAI. As such, the tax deduction is in addition to the SEAI grants. However, the tax deduction is conditional on the landlord having claimed an SEAI grant for the same retrofitting works.

Although this deduction is aimed primarily at small-scale domestic landlords, NRCLs should take note of the potential for further tax savings where the relevant conditions are satisfied.

Practical Considerations for NRCLs

Filing of tax returns

Normal corporation tax payment and filing rules apply to NRCLs for accounting periods commencing on or after 1 January 2022. It is also understood that iXBRL filing requirements will be the same for NRCLs as for any other Irish company. Where accounts are not prepared under Irish GAAP or IFRS, NRCLs should use the taxonomy that has the most overlap with their local GAAP as is feasible and should fully tag the file insofar as is possible using that taxonomy. This may cause difficulty in practice, and further guidance from Revenue may be required as the administration of the regime takes shape.

It should be noted that s25(2A) TCA 1997 applies to "profits and gains accruing on or after 1 January 2022". This should not be confused with "accounting periods beginning on or after 1 January 2022". For example, an NRCL with an accounting period beginning on 1 April 2022 cannot choose to pay tax at 20% for the first three months of the year and 25% for the remaining nine months.

For Irish tax purposes, regardless of an NRCL's accounting year-end, a new accounting period will begin for all NRCLs on 1 January 2022 as they will come within the charge to Irish corporation tax for the first time (assuming that an NRCL does not already operate a branch or agency in Ireland). Those NRCLs that do not operate a 31 December year-end will likely have at least two corporation tax returns to file for 2022.

Preliminary tax

Revenue guidance confirms that where a company has paid preliminary tax in respect of the year of assessment ending 31 December 2022 under income tax, the Collector-General's Division should be contacted to arrange the transfer of the payment from preliminary income tax to preliminary corporation tax. It is important that NRCLs and their advisers take this positive action, as payments will not automatically be transferred.

Under s959AN(4) TCA 1997, an NRCL coming within the charge to Irish corporation tax for the first time by virtue of s25(2A) TCA 1997 should not have to pay preliminary tax for that first accounting period if its corporation tax liability for that first period does not exceed €200,000 (or a proportionate amount if the accounting period is less than 12 months).

Where the corporation tax liability for the first period is more than €200,000 (or a proportionate amount if the accounting period is less than 12 months), the NRCL should pay preliminary tax on the basis of its being a large company. Large companies pay preliminary tax in two instalments. Where the NRCL pays and files via the Revenue Online Service (ROS), the first instalment is due on the 23rd day of the sixth month of the relevant accounting period and is calculated as follows:

- 50% of the corporation tax and income tax liability (combined) for the previous accounting period or
- 45% of the tax liability for the current accounting period.

The second instalment is due on the 23rd day of the eleventh month of the period (when pay and file is via ROS) and must bring the total amount of preliminary tax paid for the period up to either:

- 100% of the corporation tax and income tax liability (combined) for the previous accounting period or
- 90% of the tax liability for the current accounting period.

The NRCL must pay 90% of the preliminary tax in one instalment if the accounting period is less than seven months.

Filing third-party returns

A Form 46G must be filed each year in respect of payments in excess of €6,000 (annually) made by Irish companies carrying on a trade to any Irish-resident third parties for services rendered. Although NRCLs do not for all intents and purposes carry on a trade in Ireland, it is not clear from Revenue guidance at this stage whether NRCLs will be required to file a Form 46G (Companies) return. To the extent that it is required, this return should be filed within nine months of the end of an accounting period.

Rent collection agents

Revenue guidance has confirmed that where a collection agent is registered for income tax in respect of tax due by an NRCL, by virtue of s1034 TCA 1997 that agent must now register for corporation tax under the same tax reference number. Collection agents must be proactive in this respect, as the transfer of tax numbers across to corporation tax will not be undertaken by Revenue. This may lead to the unusual scenario whereby a non-incorporated entity is required to register for corporation tax in Ireland, albeit specifically as a collection agent on behalf of the NRCL.

Registration

NRCLs must now register for corporation tax with effect from 1 January 2022. As a corollary to this, the income tax registration should be cancelled as of 31 December 2021. Revenue notes that any cancellation should be considered on a case-by-case basis, depending on any other activities that the NRCL may have in Ireland. From a practical perspective, the income tax registration should be cancelled only after the income tax return for 2021 has been filed and the NRCL is satisfied that all correspondence with Revenue in relation to same has concluded.

Capital Gains on Disposal

Before the introduction of s25(2A)(b) TCA 1997, NRCLs that do not trade via a branch or agency in Ireland were subject to CGT payment and filing requirements on disposals of Irish land and buildings. In general, the capital gain on a disposal of Irish land by an

NRCL is now subject to corporation tax. As capital gains are re-grossed in calculating the corporation tax liability, the effective rate on such chargeable gains will remain 33%. However, the payment and filing obligations are now rolled into the corporation tax pay and file regime.

This change does not apply to disposals of development land by an NRCL, which remain subject to CGT pay and file requirements (i.e. a Form CG1 will need to be filed and any liability paid in accordance with the CGT regime).

Other Considerations for NRCLs and Irish Real Estate Owners

Away from corporation tax, NRCLs (indeed all real estate owners) should be aware of some other recent developments in the taxation of Irish real estate, particularly in the area of stamp duty.

Stamp duty

To discourage the bulk purchasing of dwelling-houses in Ireland, Finance Act 2020 introduced s31E Stamp Duties Consolidation Act 1999 (SDCA 1999). Where a person (being an individual or a corporate entity) acquires 10 or more dwelling-houses (not including apartments) in a consecutive 12-month period, a 10% stamp duty charge is retrospectively applied to those purchases (whereas the residential rate is usually between 1% and 2%). This 10% charge can arise even where a person acquires shares in a company (which typically incurs 1% stamp duty) such that the person acquires control of a company that derives some value from relevant residential units.

There is a refund mechanism available where houses are leased to a local authority or an approved housing body for the purposes of providing social housing. A clawback of this refund can arise where the lease is terminated within 10 years.

Another notable change in recent times came by virtue of s31C SDCA 1999, which was inserted by Finance Act 2017. This is an anti-avoidance provision to prevent indirect sales of non-residential land being charged to stamp duty at 1% (usually via a share sale).

This anti-avoidance provision applies where:

- the greater part of the value of the transferring company is derived from Irish non-residential land;
- the non-residential land is held as trading stock or was acquired/developed with the sole or main object of realising a gain on disposal; and
- the transfer of shares in the company results in a change in control over the underlying land.

Local property tax

An owner of residential property is generally liable to local property tax (LPT), based on the valuation of individual units. Where property is leased on the open market for more than 20 years, the tenant will typically be liable for the LPT. However, where property is leased to a local authority or an approved housing body, this will generally cause the LPT liability and filing obligations to switch from the local authority/approved housing body to the property owner – something that NRCLs should be aware of. A failure to discharge LPT on time can inadvertently cause significant surcharges to arise under other tax heads (e.g. corporation tax).

Residential zoned land tax

Section 80 of Finance Act 2021 inserted a new Part 22A into TCA 1997. Residential zoned land tax (RZLT) will be an annual 3% tax charge on the market value of certain sites that are zoned as suitable for residential development and that are serviced. Although the tax will not be charged until 2024 at the earliest, it will apply to land that, on or after 1 January 2022, is zoned as being suitable for residential development and it is reasonable to consider may have access to, or be connected to, the infrastructure and facilities necessary for residential development to take place. Existing residential property is exempted from the tax (although such property will be included on the maps prepared by local authorities). Landowners should consider the potential impact of this tax now and the potential mechanisms for its deferral if they wish to mitigate the annual charge in the future.

Conclusion

Obviously, NRCLs will be subject to increased tax with the transition from income tax at 20% to corporation tax at 25% on net rental profits for accounting periods commencing on or after 1 January 2022. However, there may be some scope for additional deductibility of expenses to mitigate some of this increased tax liability. There are a number of uncertainties concerning the application of the new regime, in respect of which additional clarity from Revenue would be welcomed in order to assist collection agents, NRCLs and practitioners in complying with the new regime going forward.

Those provisions contained in Finance Bill 2022 and referenced herein will need to be fully considered upon the publication of Finance Act 2022.

Tax Policy & Representations Team
Irish Tax Institute

Debt Warehousing Scheme: Key Developments and Dates Over the Months Ahead

Introduction

On 17 October 2022 Revenue announced an extension to the timeframe to pay the tax debts included in the debt warehousing scheme (DWS). Businesses will not have to pay their warehoused debt or enter into a payment arrangement with Revenue until 1 May 2024.

Most businesses with warehoused debt would have been required to engage with Revenue about their debt before the end of 2022. Therefore, this welcome reprieve alleviates the immediate pressure on businesses already dealing with a challenging and uncertain economic environment and eases the pressure on tax advisers who are managing the heavy workload of tax compliance season.

Although the immediate need for businesses to consider how to deal with their warehoused debt has abated, there are some key developments and significant dates to be aware of over the months ahead in relation to the DWS. We provide a reminder of these issues below.

Revenue Writing to Taxpayers with Warehoused Debt in December 2022

Revenue will write to all DWS participants in early December 2022. Each business will be provided with a statement of its warehoused debt. These letters will also note the 1 May 2024 extension and remind businesses of the importance of filing current tax returns and paying related liabilities on time, as they arise.

Many businesses participating in the DWS have already received correspondence from Revenue outlining their warehoused debt. In a communication campaign in March 2022, Revenue wrote to DWS participants who were fully up to date with their tax returns to outline the amount of tax debt that the business had warehoused to date.

Revenue published statistics in October on the DWS, which provide an overview of the overall debt that has been warehoused. Tax debt amounting to €2.6bn has been warehoused by 74,000 businesses. However, almost 50,000 of the 74,000 businesses have an outstanding balance of less than €5,000, and 18,000 businesses have an outstanding balance of less than €100. The bulk of the warehoused debt, €2.2bn, is owed by 7,500 businesses.

The 3% Rate of Interest Starts Accruing from 1 January 2023

Businesses are not required to begin paying the warehoused debt until May 2024; however, as Period 2 (the zero-interest phase) will end on 31 December 2022 for most DWS participants, interest will start to accrue at 3% per annum from 1 January 2023.[1] Having considered the amount of debt warehoused and their financial circumstances, some businesses may decide to start paying off their debt during 2023, to minimise interest charges.

Revenue's online phased payment arrangement (PPA) system has the flexibility to cater for situations where a business enters a PPA but subsequently needs a payment break, for example, if its financial circumstances change or the economic outlook deteriorates, impacting cash-flow.

Appendix 9 of Revenue's Guidelines for Phased Payment Arrangements outlines the temporary changes introduced to PPAs during the Covid-19 pandemic, which currently remain in place. These include an extension to the maximum duration of a PPA; an increase in the permitted number of requests for payment deferrals; an extension to the duration of a payment break; and an increase to the number of failed payments permitted before a PPA will be cancelled.

The Self-Review Opportunity for Period 1 Closes on 31 January 2023

In September Revenue sent Level 1 Revenue Compliance Intervention Notifications to taxpayers who were participating in the DWS (or who were eligible to participate). The notifications provide eligible taxpayers with an opportunity to self-review their taxes eligible for warehousing in Period 1 and make an unprompted qualifying disclosure in relation to any additional undisclosed liabilities, if necessary.

Provided the unprompted qualifying disclosure is submitted by 31 January 2023, additional eligible tax liabilities in respect of Period 1 can be warehoused interest-free up to the end of Period 2 and benefit from the 3% rate of interest from 2023.

It is not obligatory for taxpayers to conduct a self-review. However, Revenue warns that if a tax default is subsequently discovered in Period 1, it will compromise the taxpayer's debt warehouse, resulting in a crystallisation of the warehoused debt (which would become immediately due for payment at the normal interest rates of 8%/10%).

This self-review opportunity is limited to businesses with warehoused debt or who

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1 In December 2021 the Government announced an extension to the DWS for businesses affected by reimposed Covid-19-related trading restrictions. Period 1 for these businesses was extended to 30 April 2022, with Period 2 to end on 30 April 2023. For other DWS participants Period 2 ends on 31 December 2022.

were automatically eligible for warehousing (i.e. taxpayers in the Personal and Business Divisions case base). As there has been a significant movement of cases between the Business and Medium Enterprises Divisions since the DWS was introduced, the Institute's Tax Policy & Representations Team sought clarity from Revenue on the criteria used to identify cases to receive these Level 1 notifications. The Institute's Debt Warehousing Scheme – Self-Review of Period 1 Liabilities webpage outlines the criteria that Revenue applied when issuing these notifications.

There were changes to the scope of Period 1 (the taxes and periods that could be warehoused by eligible businesses) as the DWS evolved since its introduction in 2020. Revenue's Level 1 Compliance Programme – Debt Warehousing Scheme manual includes a list of the tax heads and periods to which this DWS qualifying disclosure opportunity relates:

- VAT returns for the relevant periods from 1 January 2020 to 31 December 2021 (or to 30 April 2022 where the extension announced in December 2021 applies to the business);
- employer PAYE returns for the relevant periods from 1 February 2020 to 31 December 2021 (or to 30 April 2022 where the December 2021 extension applies);
- 2019 balancing payment due on 31 October 2020 (income tax return 2019);
- 2020 preliminary tax payment due on 31 October 2020 (income tax return 2020);
- 2020 balancing payment due on 31 October 2021 (income tax return 2020); and
- 2021 preliminary tax payment due on 31 October 2021 (income tax return 2021).

We asked Revenue about circumstances in which an individual who warehoused his/her Schedule E liability due for payment in 2021 (i.e. individuals with a material interest for the purposes of s997A TCA 1997) could avail of the self-review opportunity. Revenue advised that where taxpayers have warehoused their Schedule E liability that was due to be paid by October 2021 (November 2021 where the ROS extension applied) and they subsequently realise that they have not disclosed the full Schedule E liability, they may avail of the self-review process for making an unprompted qualifying disclosure by 31 January 2023, subject to the conditions outlined in the relevant Revenue manual.

We asked Revenue a number of questions in respect of debt warehousing and s997A before this year's pay and file deadline. Our questions and Revenue's responses are available here.

The provisions of the legislation and the guidance in the Code of Practice for Revenue Compliance Interventions apply regarding the application of tax-geared penalties to any unprompted qualifying disclosure made. On a concessional basis, a tax-geared penalty in relation to the disclosure can be warehoused with the additional liabilities for Period 1, provided that the unprompted qualifying disclosure is submitted by 31 January 2023 and the penalty is agreed with the Revenue caseworker.[2]

At the time of writing, Revenue has advised the Institute that the Level 1 Compliance Programme – Debt Warehousing Scheme manual is being updated to reflect the extension to the date for payment of warehoused debt (to 1 May 2024). The date for submission of an unprompted qualifying disclosure remains unchanged at 31 January 2023.

The Institute's Tax Policy & Representations Team will keep members informed of developments relating to the debt warehousing scheme, including updates on Revenue's communication programme and the disclosure initiative, over the months ahead through TaxFax.

2 Revenue Tax and Duty Manual, Level 1 Compliance Programme – Debt Warehousing Scheme (September 2022), paragraph 4.6.

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Non-EU Imports and Exports: VAT Considerations

Introduction

It has been almost two years since the UK left the EU, and many Irish- and UK-based businesses have adapted to the new legal and customs implications of trading between the UK and Ireland in a post-Brexit environment. However, it is also important to ensure that all businesses continue to focus on the Irish VAT implications of trade with non-EU businesses so that they remain compliant.

In 2021 Revenue processed more than 27.1 million import declarations, compared to just over 1 million in 2020. This significant increase was attributed mainly to Brexit and the increase in online shopping as a result of the Covid-19 pandemic.

Due to the rise in volume of imports to Ireland, as well as the introduction of postponed accounting for VAT, it is likely that there will be an increase in Revenue queries and interventions in this area. This article considers the VAT compliance implications for Irish businesses of trading in goods with businesses in non-EU countries, with a particular focus on import VAT.

Commercial Agreement

For a business to determine its VAT-related obligations in respect of a particular transaction, it is essential that both parties, i.e. the seller and the buyer, are aware of the commercial agreements in place and the associated responsibilities, which should be clear from the agreed Incoterm. The International Chamber of Commerce's (ICC) Incoterms are a set of eleven international standardised terms that are used in contracts for the sale and transit of goods and define the responsibilities (e.g. paying for and managing the shipment, insurance, customs clearance) of the seller and the buyer in respect of the transaction.

Of the current eleven Incoterms 2020, seven can be used for any mode of transport and four for sea or inland waterway transport:

- Any mode of transport:
  - **EXW**: Ex Works
  - **FCA**: Free Carrier
  - **CPT**: Carriage Paid To
  - **CIP**: Carriage and Insurance Paid To
  - **DAP**: Delivered at Place
  - **DPU**: Delivered at Place Unloaded
  - **DDP**: Delivered Duty Paid
- Sea or inland waterway transport only:
  - **FAS**: Free Alongside Ship
  - **FOB**: Free on Board
  - **CFR**: Cost and Freight
  - **CIF**: Cost Insurance and Freight

Where the Incoterm agreed between the seller and the buyer is Delivered Duty Paid (DDP), this means that the seller should be responsible for all shipping arrangements, clearing the goods for import and paying the customs duty (if any) and the import VAT. Once the goods are imported, the seller should make a domestic supply of the goods to the buyer.

From a buyer's perspective, therefore, a DDP supply is generally most favourable as all responsibility relating to the import rests with the seller. However, where the Incoterm agreed between the seller and the buyer is any of the other ten, i.e. a non-DDP Incoterm, the buyer can be the responsible party for various elements of the transaction depending on the specific Incoterm agreed (e.g. insurance, carriage), but in all cases the buyer should be responsible for clearing the goods for import and paying the customs duty (if any) and the import VAT.

Where a buyer imports goods under a non-DDP Incoterm, there should not be any Irish VAT considerations for the seller, as all responsibility relating to the import rests with the buyer. It is therefore particularly important for businesses, at the time that commercial contracts are being entered into, to be familiar with the VAT- and customs-related obligations that arise because of the specific commercial arrangements and the agreed Incoterm.

In addition to the VAT and customs obligations, consideration should be given to supplementary costs that may be incurred by each party as a result of the agreed Incoterm, e.g. administration costs, shipping, insurance.

Imports to Ireland

For VAT purposes, an import is where goods are acquired in an EU Member State from outside the EU, e.g. goods are acquired in Ireland from the USA. With effect from 1 January 2021, the acquisition in Ireland of goods from the UK (with the exception of Northern Ireland, which remains subject to the same EU VAT rules on goods as EU Member States from 1 January 2021 under the Northern Ireland Protocol – further detail on which is set out below) should be an import for VAT purposes.

Importer establishment status

Once it has been identified, based on the commercial arrangements, which party is responsible for the import of the goods to Ireland, consideration needs to be given to whether the responsible party can import the goods directly/directly via a direct representative or whether an indirect representative needs to be appointed. This is dependent on the customs establishment status of the party that is responsible for the import.

Where a business is established in the EU for customs purposes, i.e. it has a registered office, a permanent business establishment or its main headquarters in the EU, it should be possible for the business to import the goods to the EU directly itself. Alternatively, the EU-established business can appoint a direct representative, i.e.

a customs agent who acts in the name of and on behalf of the importer. A direct representative is not jointly liable for the customs debt or the related obligations, and the importer remains exclusively liable for same.

However, for a business that is not established for customs purposes in the EU, it should not be possible for the business to import the goods directly itself, and instead it should be obliged to appoint an indirect representative, i.e. a customs agent who acts in its own name and on behalf of the importer and is jointly liable for the customs debt and related obligations.

As you can imagine, from 1 January 2021 there has been a significant increase in the demand for indirect representatives, as UK businesses that are not established for customs purposes in the EU but that wanted to continue supplying goods on a DDP basis post-Brexit to Irish, and indeed other EU-based, customers required the appointment of an indirect representative. Demand has been high, and the availability of indirect representatives has been a challenge for some businesses.

Import VAT

Before 1 January 2021, Irish import VAT was due to be paid at the point of entry (unless the business had a deferment account and payment could be deferred to the 15th day of the next month). Once the import VAT was paid or deferred, the business should have been entitled to recover the import VAT in its periodic Irish VAT return (subject to the normal rules on deductibility) provided the business had appropriate supporting documentation and depending on its VAT recovery entitlement. As such, there was a potential negative VAT cash-flow impact for all businesses involved in the import of goods, even where a business had full VAT recovery entitlement.

To alleviate some of the burdens on business as a result of Brexit, Revenue introduced VAT postponed accounting with effect from 1 January 2021. VAT postponed accounting permits a business to account for the import VAT in its VAT return on the reverse-charge basis, i.e. charge itself VAT at the rate of VAT that should apply if the goods were acquired locally, in Box T1, and take a simultaneous VAT input credit in Box T2 (subject to the business's VAT recovery entitlement), as opposed to paying the import VAT upfront at the point of entry, or deferring it to the 15th day of the next month, and later reclaiming the VAT in the relevant VAT return.

Therefore, where a business has full VAT recovery entitlement, there should be no negative VAT cash-flow impact (subject to the normal rules on deductibility) of importing goods where VAT postponed accounting is availed of. This development has been overwhelmingly welcomed by business in Ireland.

To use VAT postponed accounting, the business (or its customs agent on instruction) should insert the relevant code on the import declaration. Alternatively, if the importer does not wish to avail of VAT postponed accounting (it is not mandatory) and would like to pay VAT at the point of entry, the relevant code should not be entered.

To avail of VAT postponed accounting, the VAT-registered business, once registered for same, must comply with certain conditions and requirements, e.g. be tax complaint across all relevant tax heads, maintain records as set out in VAT legislation, not have been convicted of an offence. Where the VAT-registered business fails to demonstrate compliance with the conditions and requirements to avail of VAT postponed accounting, a Notice of Exclusion will be served, and the VAT-registered business will be excluded from availing of VAT postponed accounting.

It should be emphasized that it is the importer of the goods and not the customs agent that is obliged to account for the import VAT in its VAT return under VAT postponed accounting. If VAT postponed accounting is not correctly reported in the relevant VAT return, the business could be liable to pay the import VAT that should have arisen upfront at the point of entry if VAT postponed accounting had not been availed of, together with interest (currently, at a rate of 0.0274% per day or part of a day) and penalties.

VAT return updates

As a result of the introduction of VAT postponed accounting, updates were made by Revenue to the VAT3 return and the Annual Return of Trading Details (ARTD) in 2021 to capture transactions where VAT postponed accounting was availed of. A new box, Box PA1, was added to the VAT3 return, which should include the customs value of goods imported under VAT postponed accounting, as per the customs declarations, plus customs duty. The ARTD was also updated to include additional fields PA2, PA3 and PA4 to capture the customs value of goods imported under VAT postponed accounting, as per customs declarations, plus customs duty.

Practical VAT matters

Where import VAT is paid at the point of entry or deferred to the 15th day of the following month, to be entitled to claim the import VAT in the relevant VAT return, the goods should have been imported for business purposes and the business should retain evidence of all import VAT paid, such as the relevant customs declarations, AEP monthly statements, customs clearance slips.

Where VAT postponed accounting has been availed of, it is important to ensure that the VAT has been correctly accounted for in the VAT return on the reverse-charge basis, i.e. VAT charged at the rate of VAT that should apply if the goods were acquired locally, in Box T1. To be entitled to claim simultaneous input VAT credit on the import VAT in the VAT return, the goods should have been imported for business purposes and the business should retain evidence that VAT postponed accounting was correctly availed of, such as the customs declarations.

If a business has engaged a customs agent to assist with clearing goods for import to Ireland, the customs agent should be able to provide the business with the details of the transactions where VAT was paid at the point of entry and where VAT postponed accounting was availed of for a particular VAT return period, which should enable the business to include these transactions in the VAT return. However, in practice, some businesses engage various third-party customs agents, and therefore additional administrative work is required to collate the detail from different service providers. Businesses have also experienced delays in receiving the requested detail, which can result in the late filing of the VAT return.

It is therefore helpful that the Revenue Online Service (ROS) permits businesses to download Custom & Excise weekly statements, which should detail all transactions (imports and exports) in that week using the business's Economic Operators Registration and Identification (EORI) number. The postponed VAT amounts can then be extracted from these weekly statements and be included in the relevant VAT return.

Post-importation: VAT

It is, of course, important to ensure that all businesses importing goods to Ireland are compliant from a VAT perspective – i.e. pay the appropriate VAT at the point of entry, have the correct evidence if a VAT reclaim is being made, account correctly for VAT postponed accounting in the relevant VAT return etc. – but it is also very important that all local, Irish, VAT obligations are complied with once the goods are cleared into Ireland.

As outlined above, the specific circumstances of each case should be analysed to ensure that the business is Irish VAT compliant, but the following are matters to consider:

- Is the correct VAT rate being charged on the domestic supply of the goods?
- Is the VAT charged being correctly accounted for in the relevant VAT return?
- Are VAT invoices being issued in a timely manner as set out in the VAT legislation, i.e. within 15 days of the end of the month in which goods are supplied?

- Are the VAT invoices valid in accordance with the Value-Added Tax Consolidation Act 2010 and the VAT Regulations 2010?

Exports from Ireland

For VAT purposes, an export is where goods are directly dispatched to a destination outside the EU, e.g. goods dispatched from Ireland to the USA. With effect from 1 January 2021, shipments of goods from Ireland to the UK (with the exception of Northern Ireland – further detail on which is set out below) should be an export for VAT purposes.

VAT at the 0% rate should apply to the export of goods, provided that the goods leave the EU and the seller has sufficient evidence to support this. Examples of evidence could include an export notification message, bill of lading, certificate of shipping and signed copy of the waybill. In all cases of evidence, the full name and address of the consignee, i.e. the buyer, must be clearly shown.

As VAT Information Exchange System (VIES) returns and Intrastat Dispatch returns record intra-EU transactions only, exports from Ireland should not be recorded on a business's Irish VIES return, Intrastat Dispatch return or in Box E1 of the VAT3 return.

Registration Obligations

If you are a business that imports or exports goods to or from the EU, an EORI number is required. The EORI number should be valid throughout the EU, and therefore a business should only have one valid EU EORI number.

A registration for Customs & Excise is required before a business applies for an EORI number. A business can check to see if it is registered for EORI by inserting the VAT number prefixed by IE under "Validate EORI numbers" at the following website: https://ec.europa.eu/taxation_customs/dds2/eos/eori_validation.jsp

If the business is not already registered for Irish VAT, it is likely that it will be obliged to register for Irish VAT, on the assumption that the goods will either be onward supplied in Ireland after import or will be used as part of the business's supply of goods or services in Ireland. However, as always, the specific circumstances of each case should be analysed to ensure that the business is VAT compliant.

All businesses that were registered for VAT and Customs & Excise at 11pm on 31 December 2020 were given automatic entitlement to avail of postponed accounting, and therefore there was no requirement for these businesses to apply for postponed accounting.

Businesses that were registered for VAT but not for Customs & Excise at 11pm on 31 December 2020 but that subsequently register for Customs & Excise should be given automatic entitlement to avail of postponed accounting.

For businesses that have a tax number but would like to register for VAT and avail of postponed accounting, a new "Postponed Accounting" heading is available on the VAT registration/re-registration screens on ROS to allow them to apply for postponed accounting with the online application for VAT registration.

If a business has no Irish tax number and would like to register for Irish VAT and avail of VAT postponed accounting, the business must complete the VAT and Customs & Excise registrations before the application for VAT postponed accounting can be processed. Once the VAT registration number is issued, the business should then register for Customs & Excise using the VAT registration number. When both the VAT and Customs & Excise registrations are approved by Revenue, the business should notify Revenue via MyEnquiries or email, and the postponed accounting application should then be processed.

Northern Ireland

As part of the EU–UK negotiations, the Northern Ireland Protocol was entered into, which resulted in Northern Ireland remaining part of the EU Single Market for goods purposes and therefore subject to the same VAT rules on goods as all EU Member States.

The movement of goods between Ireland and Northern Ireland remains unchanged because of Brexit and should continue to be treated as intra-Community supplies and intra-Community acquisitions, with the exception that VAT-registered businesses in Northern Ireland were assigned a new prefix XI in their UK VAT number. With effect from 1 January 2021, Irish VAT-registered businesses supplying goods to VAT-registered businesses in Northern Ireland should quote XI, as opposed to GB, before the VAT number.

Finally, where goods are shipped from the UK to Ireland via Northern Ireland and vice versa, complex VAT and customs rules apply, and the specific circumstances of each case should be analysed to ensure that the business is VAT compliant both from a UK and an Irish VAT and customs perspective.

Ireland to Northern Ireland

The movement of goods from Ireland to Northern Ireland should not be an export for VAT purposes and should continue to be treated as an intra-Community supply for VAT purposes. In general, the 0% rate of VAT should apply to the supply of goods from Ireland to Northern Ireland, provided that the following conditions are met:

- The seller's Irish VAT number and the recipient's XI VAT number are quoted on the invoice.
- There is a reference to reverse-charge VAT applying on the sales invoice.
- The seller ensures that the movement is recorded on its VIES return.
- The net value is included in Box E1 of the appropriate VAT return.
- The goods are transported to Northern Ireland, and the seller retains evidence of the movement of the goods.

It should also be noted that if the seller is obliged to file Intrastat Dispatch returns (i.e. intra-Community supplies are at least €635,000 per calendar year), supplies to Northern Ireland should also be recorded on the Intrastat Dispatch return.

Northern Ireland to Ireland

Where an Irish VAT-registered business acquires goods from Northern Ireland, it should not be an import for VAT purposes and should continue to be treated as an intra-Community acquisition. In general, no UK VAT should be charged, and instead the Irish VAT-registered business should be obliged to self-account for the VAT on the reverse-charge basis in its VAT return, i.e. charge itself VAT at the rate of VAT that should apply if the goods were acquired locally, in Box T1, and take a simultaneous VAT input credit in Box T2 (subject to the business's VAT recovery entitlement). In addition, the Irish VAT-registered business should include the net value in Box E2 of its VAT return.

Finally, it should also be noted that if the Irish VAT-registered business is obliged to file Intrastat Arrival returns (i.e. intra-Community acquisitions are at least €500,000 per calendar year), acquisitions from Northern Ireland should be recorded on its Intrastat Arrival return.

Conclusion

As you can see from the above, Brexit has caused significant changes to the VAT treatment of the supply of goods between businesses in Ireland and the UK. The introduction of VAT postponed accounting in 2021 was a very welcome development as it removed the negative VAT cash-flow implications associated with importing goods to Ireland from outside the EU, which for some traders, especially SMEs, could have been detrimental to the success of their businesses when the UK became a non-EU, or "third", country.

However, it is important that businesses availing of VAT postponed accounting are compliant and correctly account for the transactions in the relevant VAT3 returns and ARTDs, as otherwise the business could be liable to pay the import VAT that should have arisen upfront at the point of entry if VAT postponed accounting had not been availed of, together with interest and penalties.

In addition, it is imperative that all businesses ensure that the customs-related paperwork correctly reflects the appropriate party as the importer of record to ensure that the importer is entitled to reclaim any import VAT paid or claim the simultaneous VAT input credit in its VAT return where the VAT is self-accounted for on the reverse-charge basis (subject to the business's entitlement to VAT recovery).

Where VAT is incorrectly reclaimed by a business on the basis that the supporting documentation is not valid, Revenue can deny a VAT reclaim and potentially apply interest and penalties. In addition, amended documentation may be required where errors are identified, which can lead to unnecessary administrative costs and delays.

Therefore, it is important that taxpayers periodically self-review and, where needed, self-correct their VAT affairs to identify and correct any errors in order to minimise potential latent VAT liabilities, together with interest, penalties and reputational risks.

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VAT on Property Considerations

Introduction

Property transactions are a unique and complex area of VAT law that can give rise to potentially costly consequences for both purchasers and vendors. This article takes a helicopter view of the current landscape of the VAT on property rules and provides an overview of some of the common pitfalls which often require careful consideration as part of property transactions.

The issues around VAT on property transactions are many. This article focuses on the following:

- the impact of development undertaken to part of a property being sold;
- the sale of residential properties by a developer **or** parties connected with a developer;
- the VAT treatment of movable/white goods sold as part of a residential development;
- the surrender/assignment of a lease – VAT consequences; and
- some notable legislative anomalies.

Impact of Development Undertaken to Part of a Property Being Sold

As some readers may be aware, the sale of Irish immovable property is generally treated as exempt from VAT when it is considered "old" for VAT purposes. There are, however, a number of exceptions, including where the development of a property has not been completed, where a property has been "completed" within five years before sale or where a previously completed property has been "significantly developed" within the five years before sale (e.g., the property was developed for a materially altered use **or** the cost of the development exceeds 25% of the sale price of the property). In these circumstances, the sale of such properties would be VATable at the reduced rate (currently 13.5%).

Without delving further into these exceptions, the key point to note is that the development of part of a property can sometimes make the entire plot subject to VAT. As an example, if John owns a 10-acre greenfield site, develops a commercial building to completion on one of his 10 acres and proceeds to sell the entire property within five years of this development, the sale of the entire 10 acres would be subject to VAT. A potential solution to this issue could be to consider splitting the property into two lots (e.g. the commercial 1 acre and the remaining 9 acres of greenfield land), resulting in an apportionment of the consideration between VATable and exempt parts of the property. As ever, this is not straightforward and commercial reality must determine this allocation, especially as this is always subject to Revenue scrutiny/challenge.

The same is true for development undertaken by other parties, as any and all development of a property needs to be taken into account. Where a tenant undertakes "significant development" of a property, the sale of the property by the landlord within five years of this development could give rise to a VAT charge, given that the property would be regarded as "new" for VAT purposes. Accordingly, landlords need to be aware of the purpose and value of any works that a tenant is undertaking to the occupied property, especially if they are considering selling the property at some point in the future.

This might be illustrated by a recent transaction where an old property was let under a VAT-exempt occupational lease. The owner/landlord was selling subject to and with the benefit of the lease. The purchaser was an accountable person. The tenant had carried out major works in the recent past, the cost of which was in excess of 25% of the sale price. Thus, the sale qualified for transfer-of-business relief and would have been chargeable to VAT but for same. As a result, had the transaction proceeded, the purchaser would have had an immediate VAT cost, under the Capital Goods Scheme (CGS), equal to 13.5% of the purchase price, as the property was being used for VAT-exempt purposes. The solution could be a variation of the lease to include the landlord's option to tax but the example above illustrates the potential impact of tenant development works on future sales.

Furthermore, the development of part/all of a property has other implications under the CGS. This scheme provides that the VAT "life" of a property needs to be considered over a long period of time (potentially as long as 10 or 20 years). Therefore any VAT recovered in respect of development undertaken to a property, say, 18 years ago would need to be taken into account when selling a property now, as it could potentially trigger an adjustment/clawback. Careful consideration of the VAT history of the property is therefore needed before proceeding with a sale.

As an aside, development does not necessarily need to take place for a sale of a property to become subject to VAT. The sale of land in connection with a development agreement is another example of an automatically VATable sale.

Sale of Residential Properties by a Developer or Parties Connected with a Developer

We have touched on a number of instances of VATable property sales. Another notable exception to the general property rules is the anti-avoidance provision in s94(8) of the Value-Added Tax Consolidated Act 2010 (VATCA 2010), which contains a measure that applies specifically to sales of residential properties by developers or persons connected to developers.

Importantly, the sale of a residential property, without any time limits, will be subject to VAT where the following conditions have been met:

- the immovable goods are designed or capable of being used as a dwelling;
- the person either developed the immovable goods in the course of a business of developing immovable goods or is connected to that person; and
- the person who developed the immovable goods was entitled to deduct the VAT incurred on their acquisition or development of the building.

Revenue has helpfully confirmed that "in the course of a business of developing immovable goods" is meant to deal with persons who own the property and whose business is the development of the property for the purposes of **sale**. Furthermore, it has also clarified that where a person who is a connected person to the owner builds the property, that connected person is simply carrying out a construction service and is not regarded as developing the land in the course of a business of developing immovable goods.

However, the definition of "connected", as outlined in s97 VATCA 2010, is very broad and an area of concern in terms of the potential application of these provisions. In practice, people tend to focus on the concept of common ownership and control of different entities, and in our experience, Revenue generally agrees with this approach. However, it is noteworthy that this section also provides that "a body of persons is connected with another body of persons – if both bodies of persons act in pursuit of a common purpose", which is a significantly broader definition and could potentially bring parties to all types of commercial agreements into the scope of these provisions. As a consequence, this is an area that needs careful consideration.

Additionally, this is an extremely important VAT provision to consider as the VAT being charged is very likely to be an absolute cost for a private purchaser and, as such, could have significant commercial implications and impact the overall achievable sale price.

VAT Treatment of Movable/White Goods Sold as Part of a Residential Development

The sale of movable/white goods as part of a residential development also needs careful consideration. The key point to note is that movable goods can be divided into two distinct categories: a fixture or a fitting. This is especially important from a VAT perspective, as a fixture and a fitting give rise to different VAT treatments.

Revenue has stated "[a] fixture is something when installed, cannot be removed without causing structural damage to the building or damage to the item/fixture itself. Rate always subject to 2/3rds rule. Does not include fittings."[1]

Accordingly, to the extent that an item constitutes a fixture, it is generally treated as being a part of the underlying property and therefore is taxable at the same rate of VAT (i.e. 13.5%).

The rate applicable to the sale of fittings/white goods is the standard rate, currently 23%. Generally, there is a single consideration payable for a residential property, including movable/white goods. In this context, the sale price must be apportioned between the property at the 13.5% rate and the movable/white goods at the 23% rate. Typically, the amount applicable to the movable/white goods should be the equivalent of the cost of same, with the balance attributable to the underlying property. Therefore careful consideration of the above is required to determine the appropriate rate of VAT chargeable.

1 https://www.revenue.ie/en/vat/vat-rates/search-vat-rates/F/fixtures-supply-and-install-.aspx.

Surrender/Assignment of a Lease – VAT Consequences

The surrender or assignment of a lease can give rise to significant implications for future transactions, especially where a tenant has claimed VAT recovery in respect of refurbishment works to the property that they have undertaken in the last 10 years, where these are a refurbishment capital good. In particular, under VAT law, the tenant is obliged to pay back, under the CGS, a portion of the VAT that was initially recovered on such development works when a surrender or assignment of a lease takes place (this clawback could be a significant amount). However, where a tenant has an entitlement to full VAT recovery, the tenant and the landlord/assignee can enter into a written agreement whereby the landlord/assignee would take on or inherit the tenant's CGS obligations in respect of that refurbishment capital good. In general, this can be agreed at the time when the lease is granted or at a later date. Note that there is no requirement for a landlord/assignee to do so under VAT law.

Where there is an agreement in a lease for a landlord to take over any tenant refurbishment capital good(s), such an obligation can have a drastic impact on the future sale of property subject to the lease, as it can result in potential VAT costs in the future. Furthermore, where a landlord takes over a tenant refurbishment capital good, any exempt use during the remainder of the adjustment period (e.g. exempt letting/exempt sale) would trigger an adjustment/VAT liability for the landlord based on the VAT previously recovered by the tenant.

One further point of note is that a refurbishment capital good can be taken over by a landlord/assignee only where the developing tenant was entitled to 100% VAT recovery in relation to same. If the tenant's VAT recovery was less than 100%, the refurbishment capital good cannot be taken over, and the tenant will have a VAT cost if the surrender/assignment is within the adjustment period for that capital good.

It is notable that the VAT legislation restricts this passing of obligations between tenant and landlord to situations where the tenant is entitled to full VAT recovery. Given that the premise of the CGS system is to consider the VAT use of property over its lifespan/adjustment period, this restriction creates potentially unnecessary VAT costs, as well as appearing to be artificial and potentially without a basis under broad EU VAT principles.

Notable Legislative Anomalies

Many of the practices and principles surrounding VAT on property rules are long established and generally do not change drastically. However, a notable anomaly which was recently rectified is the definition of "immovable goods" under Irish VAT law.

Until recently, "immovable goods" literally meant land, and this was taken from the Interpretation Act 2005. Interestingly, it was decided to bring this definition in line with the EU Directive and Implementing Regulations by expanding the definition to include:

> *"(a) any specific part of the earth, on or below its surface, over which title and possession can be created;*
>
> *(b) any building or construction fixed to or in the ground above or below sea level which cannot be easily dismantled or moved;*
>
> *(c) any item that has been installed and makes up an integral part of a building or construction without which the building or construction is incomplete, such as doors, windows, roofs, staircases and lifts;*
>
> *(d) any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction."*

Another notable anomaly in Irish VAT legislation is the existence of two different joint options to tax the sale of otherwise exempt immovable property. Sections 94(5) and (6) VATCA 2010 outline the general option to tax, while s94(7) provides for a standalone option to tax where a mortgagee-in-possession/receiver is involved. The sole distinction between these two options is that the latter requires that the purchaser is not connected to either the original borrower or the mortgagee-in-possession/receiver in the event of the forced sale of a mortgaged property.

The anomaly emerges from the fact that there does not appear to be any basis for the difference in the provisions. This was discussed at the time when s94(7) was introduced but it has not been amended or revised since and there is little sign that it will change in the future.

A final interesting anomaly relates to the waiver of exemption on the letting of property. The waiver of exemption was a facility under the old VAT on property rules (before 1 July 2008) whereby a taxpayer could elect to waive their right to exemption and to charge VAT on the letting of all properties subject to that waiver. This was provided for under the old s7 of the 1972 VAT Act. Most readers will be aware that from April 2007, new waivers of exemption were not granted to taxpayers (with some notable exceptions for certain commercial property which had an extended deadline of 30 June 2008).

However, the point to note here is that on consolidation of VAT legislation in 2010, certain parts of the old s7 were not carried across, those being s7(1A) and 7(5). The former disallowed the application of the waiver of exemption to lettings of residential property that was acquired or developed on or after 2 April 2007. The latter provided that a waiver of exemption would not apply to lettings where the property was acquired or developed on or after 1 July 2008. There is a view, however, that, as a matter of law, these provisions should have been included as part of the consolidated Act as they were never legally repealed. Furthermore, as a matter of law, existing legislation cannot change upon consolidation.

Some might therefore argue that existing waivers should apply to properties acquired or developed after 1 July 2008. However, in law and in practice, this is not the case. Additionally, it is generally accepted and understood that Revenue continue to operate as if these provisions were consolidated into the 2010 Act, and therefore, there is no basis for a taxpayer to argue that existing waivers can extend to commercial properties that were not owned by the end of June 2008.

Conclusion

This article, in so far as it addresses the VAT treatment of certain transactions, is not intended to be a comprehensive analysis of the current VAT on property rules – this would likely take several hundred pages! Rather, it is meant to serve as a high-level overview of some of the more common factors which occur in considering these types of transactions. As ever, the devil is in the detail with VAT on property, so if ever in doubt, it is advisable to obtain professional assistance on the matter as early as possible to help avoid unnecessary complications or VAT costs.

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Exemption from VAT and Medical Services: Who, What and Why?

Introduction

Earlier this year, the Tax Appeals Commission (TAC) had to assess whether VAT exemption applied in two separate cases involving a variety of services provided in the medical sphere. The cases highlight the complexity around ascertaining when the exemption from VAT is correctly applicable. Although the focus of this article is on the two TAC determinations, it also covers, where relevant, earlier jurisprudence of the Court of Justice of the European Union (CJEU). A review of the legislative provisions and the case law interpreting those provisions make it clear that the key questions to be addressed in assessing whether the exemption applies are – who is supplying the service, what is the nature of the service being supplied and why is the service being supplied?

Legislative Provisions

To put the case law in context, the legislative provisions are key to assessing whether a particular "medical"-type service comes within the scope of the exemption from

VAT. The exemption for medical services is set out in Schedule 1 of the Value-Added Tax Consolidation Act 2010 (VATCA 2010) and includes at paragraph 2(1) "[h]ospital and medical care or treatment provided by a hospital, nursing home, clinic or similar establishment"; paragraph 2(3) "[p]rofessional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods" and paragraph 2(7) "[o]ther professional medical care services that, on 1 January 2010, were recognised by the Revenue Commissioners as exempt activities". The provisions that are relevant to this article are paragraphs 2(3) and 2(7).

The equivalent provisions are set out in the EU VAT Directive under Article 132(1)(b–c), previously Article 13(A)(1)(b–c) of the Sixth VAT Directive. Article 132(1)(c) allows Member States to define the medical and paramedical professions covered by the exemption, and this is highlighted in the TAC determinations. The wording used in the legislation is specific, and as the exemptions are exceptions to the requirement to charge VAT on a supply of goods or services provided for consideration by a taxable person acting as such, they are to be interpreted strictly, as per numerous decisions of the CJEU. Determining the "who" and "what" is largely fact based and, one would assume, straightforward, but the TAC cases emphasise that the "who" can also be a complicated question.

Case Law

There are numerous decisions dealing with the question of whether exemption from VAT applies to a particular service, and in the medical sphere this is particularly true. In September 2002 the CJEU stated in *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* C-141/00 that:

> "it follows that Article 13(A)(1)(b) and (c) of the Sixth Directive, which have separate fields of application, are intended to regulate all exemptions of medical services in the strict sense. Article 13(A)(1)(b) exempts all services supplied in a hospital environment while Article 13(A)(1)(c) is designed to exempt medical services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place.
>
> With regard to determination of the type of care falling within the concept of the provision of medical care used in Article 13(A)(1)(c) of the Sixth Directive, as noted in paragraph 28 of this judgment the terms employed to specify the exemptions envisaged in Article 13 of the Sixth Directive are to be interpreted strictly."

Referring to earlier case law (namely, *D. v W.* C-384/98), it stated that:

> "the concept of provision of medical care does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.
>
> Accordingly, services not having such a therapeutic aim must, having regard to the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13(A)(1)(c) of the Sixth Directive."

In November 2003 the court stated in the case of *Margarete Unterpertinger v Pensionsversicherungsanstalt der Arbeiter* C-212/01 that:

> "in relation to the concept of provision of medical care, the Court has already held in paragraph 18 of its judgment in *D. v W.*, and restated in paragraph 38 of its judgment in *Kügler*, that that concept does not lend itself to an interpretation

which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders".

At paragraph 42 it stated that:

> "as the Advocate General correctly pointed out in paragraphs 66 to 68 of her Opinion, **it is the purpose of a medical service which determines whether it should be exempt from VAT**. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to taking a decision with legal consequences, the exemption under Article 13A(1)(c) does not apply to the service [emphasis added]".

In the case *Peter d'Ambrumenil and Dispute Resolution Services Ltd v Commissioners of Customs and Excise* C-307/01, released on the same day as the *Margarete Unterpertinger* case above, the court indicated in relation to the concept of provision of medical care that that concept does not lend itself to an interpretation that includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders. It held that:

> "Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that the exemption from VAT under that provision applies to medical services consisting of – conducting medical examinations of individuals for employers or insurance companies; the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers, or certification of medical fitness, for example, as to fitness to travel, **where those services are intended principally to protect the health of the person concerned** [emphasis added]".

These cases introduced an approach requiring an examination of the aim/purpose of the service being provided by the medical practitioner or service provider, and critically, being a medically qualified practitioner was no longer sufficient to guarantee VAT exemption, but the purpose/aim of the service was equally relevant. This led to a major shift in interpretation in Ireland of the exemptions for medical services, when Revenue published its guidance on the subject in November 2011 in the Information Leaflet "Medical Services". The guidance fully adopted the approach outlined by the CJEU in the above cases. This leaflet has since been updated, most notably to include clarification of the VAT position for counsellors and psychotherapists and guidance on incorporation of medical practices and medical locum services. Although the guidance follows the CJEU purposive approach, it also sets out the "who" and "what" requirements.

The CJEU decision in the case of *Skatteverket v PFC Clinic AB* C-91/12 went further still and, although accepting that the patient's view of the service being provided is relevant, indicated that it is not decisive. It held that:

> "the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose. Since that is a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose."

The court noted that the purpose of the services is relevant in order to determine whether those services are exempt from VAT. The exemption is therefore intended to apply to services whose purpose is diagnosing, treating or curing diseases or health disorders or to protect, maintain or restore human health.

Tax Appeals Commission Determinations

33TACD2022

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

The appellant argued that his services should be exempt from VAT under paragraph 2(3) for professional medical care services and paragraph 2(7) for other professional medical care services recognised by Revenue as exempt activities on 1 January 2010.

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

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

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

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

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

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

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

With respect to the provision of psychological services, the Commissioner was not satisfied that the appellant carries on the profession of psychologist within the meaning of HSCPA 2005, nor was he satisfied that the psychology element of treatments constitutes professional medical care services recognised as such by the Department of Health and Children. Consequently, the exemption under paragraph 2(3) did not apply, but instead the services came within the reduced rate as services consisting of the care of the human body.

32TACD2022

The second TAC determination, 32TACD2022, arose as a result of a decision by Revenue not to allow exemption for psychotherapy and counselling services provided by the appellant. The appellant was a member of the Irish Association of Counsellors and Psychotherapists, which is the body that accredits counsellors, psychotherapists and supervisors. During an audit, Revenue informed the appellant that her services were liable to VAT at the reduced rate as it considered the services to come within paragraph 21(1) of Schedule 3 VATCA 2010, i.e. as services consisting of the care of the human body.

It also indicated that although s4 HSCPA 2005 included the profession of psychologists as a designated profession, it did not include psychotherapists. Revenue submitted that as psychotherapists are not a designated profession under s4 HSCPA 2005, the appellant did not provide professional medical care services that were recognised as such by the Department of Health and Children, and the services were therefore not exempt from VAT.

Similarly to the determination above, the Commissioner indicated that the services provided by the appellant amounted to medical care within the plain and ordinary meaning of those words and that her services amounted to professional medical care services (again, within the plain and ordinary meaning of the word "professional"). However, the question was whether the services came within the exemption provided for in paragraph 2(3) and, if so, whether the services were recognised by the Department of Health and Children. Having reviewed and considered the appellant's qualifications, the Commissioner found that her services were so recognised.

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

> "I believe this to be an overly narrow interpretation, and one that cannot be reconciled with the literal meaning of paragraph 2(2) of the First Schedule.

> I further believe that it is founded upon a misinterpretation of the 2005 Act; that Act does not 'recognise' any professions, but rather provides for their being made 'designated professions' for the purposes of the Act. Recognition by the Department of Health is not in my view synonymous with designation under the 2005 Act, and I believe that the Respondent has fallen into error in seeking to treat them as meaning the same for VAT purposes."

The Commissioner commented that at the time that the changes were made to VATCA 2010 Schedule 1, in 2010, HSCPA 2005 had already been enacted, so that the VAT legislation could have referred to HSCPA 2005 to restrict the professional medical care services that are exempt from VAT. He was of the view that as the legislation did not include this reference it extended the exemption to persons who are not registered on a statutory professional register, provided that the services are recognised by the Department of Health and Children as professional medical care services. The appellant's psychotherapy and counselling services were found to be exempt from VAT as professional medical care services.

Finance Bill 2022

The Finance Bill 2022 which was published on 18 October 2022 introduces an amendment to paragraph 2(3) of VATCA2010 by substituting the following for the current sub-paragraph which was outlined above. The new paragraph 2(3) provides exemption for "*Professional medical care services (other than dental or optical services) supplied by – (a) a member of a designated profession (within eh meaning of section 3 of the Health and Social Care Professionals Act 2005) whose name is entered in the register of members of that professional under and in accordance with that Act, (b) a registered medical practitioner (within the meaning of section 2 of the Medical Practitioners Act 2007), or (c) a registered midwife or registered nurse (both within the meaning of section 2 fo the Nurses and Midwives Act 2011), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods*." So rather than professional medical services being recognised as such by the Department of Health and Children, this recognition will be by reference to the relevant Acts thereby bringing some clarity to the exemption under paragraph 2(3). The Finance Act 2022 is expected to be signed by the President on or before 25 December 2022. In the absence of any changes in the interim to the proposed legislation, this new wording will be effective from the date of the signed of the Finance Act 2022.

Conclusion

As noted at the outset, three key questions arise when assessing whether medical services qualify for VAT exemption: who is the provider of the service, what is the nature of the service being provided and why is the service being provided? Add to this new technological developments in the sector, different contractual arrangements and who the recipient of the service is, and it makes the question of whether a medical service is exempt from VAT quite a complicated one.


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Arderin Distillery: Legitimate Expectation and Judicial Review of Revenue

Introduction

The recent decision of the High Court in *Arderin Distillery Limited v The Revenue Commissioners* [2022] IEHC 267 ("*Arderin*") is the latest consideration by the Irish courts of a judicial review challenge against a decision by the Revenue Commissioners.

Most tax practitioners will look primarily to the tax legislation in determining the correct answer to any tax issue for their clients. It is often said that Revenue's guidance, and any representation that it may make on the application of the law, is not binding and cannot be relied on by the taxpayer. However, this position is not always strictly correct. As a public authority, Revenue is subject to various obligations as a matter of public law, including the requirement to act fairly towards taxpayers. In some cases, Revenue's statements or dealings can give rise to a legitimate expectation that Revenue will behave in a certain way, which is enforceable by a taxpayer in the courts.

In this article we consider when a legitimate expectation may arise, and how this can be enforced, in light of the recent judgment in *Arderin*. In *Arderin*, the High Court held that the taxpayer had a legitimate expectation that it was entitled to relief from excise duty when producing hand sanitiser from alcohol during the Covid-19 pandemic, even though as a matter of fact the court accepted that the required authorisation had not been granted by Revenue.

Judicial Review and Legitimate Expectation

Judicial review

Judicial review is an application made to court to challenge the legality of acts and decision-making processes of public and administrative bodies. It is not an appeal of the decision. Judicial review proceedings will scrutinise the decision-making process as opposed to the merits of the decision itself. In *Sweeney v District Judge Fahy* [2014] IESC 50 the Supreme Court (Clarke J) described the overall role of the High Court in judicial review and stated that "judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged".

Judicial review applications are governed by Order 84 of the Rules of the Superior Courts 2011. A number of specific reliefs can be sought from the court, including (1) an order quashing the decision (*certiorari*), (2) an order compelling the performance of a duty (*mandamus*), (3) an order restraining action from being taken (prohibition), (4) a declaration on the rights of the parties and (5) an injunction preventing or compelling an action.

No application for judicial review can be made unless leave of the court is first obtained. An application for leave for judicial review must be brought within three months from the date on which the grounds for the application first arose. The courts will strictly apply this time limit unless there is a good and sufficient reason to extend the time. The applicant must establish that there is an arguable case in law for the reliefs sought before leave will be granted. Once leave is granted, the substantive judicial review application will proceed. An application can be made to enter judicial review proceedings into the Commercial List of the High Court where there are commercial elements to the proceedings and provided the relevant thresholds are met. Commercial Court proceedings benefit from being actively case-managed and are likely to be dealt with more expeditiously than in the High Court Judicial Review List. Costs in judicial review proceedings usually follow the event, meaning that the successful party should be entitled to recover a significant proportion of its costs from the other party.

The relevant grounds for judicial review include irrationality/unreasonableness, procedural unfairness, illegality/acting *ultra vires*, bias, failure to be heard and, for present purposes, breach of legitimate expectation.

Legitimate expectation

Legitimate expectation is a public law principle based on the assumption that if a public body represents that it will exercise its powers in a certain way, then the public body should not act inconsistently with that representation. In tax cases the principle is often relied on to try to establish a more favourable form of tax treatment, usually arising from the taxpayer's engagements with the Revenue Commissioners.

In *Arderin*, Phelan J referred to the oft-quoted three principles enunciated by Fennelly J in *Glencar Exploration v Mayo County Council* [2002] 1 IR 84 to be established in a claim of legitimate expectation against a public body, namely:

(1) The public authority must have made a statement or adopted a position

amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity ("the representation");

(2) The representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation;

(3) It must be such as to create an expectation reasonably entertained by the person or group that the public body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.

These criteria have been consistently applied in subsequent case law, including the Supreme Court decision in *Cromane Seafoods Ltd v. Minister for Agriculture, Fisheries and Food* [2017] 1 IR 119. The authorities also suggest there are negative factors that may weigh against the existence of a legitimate expectation even where the *Glencar* criteria are satisfied. In the High Court decision in *Lett & Co. Ltd v. Wexford Borough Council* [2012] 2 IR 198, Clarke J observed:

> "The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley v. The Revenue Commissioners* [1994] 2 IR 160, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall v. Minister for Environment* [1994] 2 IR 20, legitimate changes in executive policy to take place."

There has been some debate in the case law whether the Irish courts have yet gone so far as to recognise substantive – as opposed to procedural – legitimate expectation.

This issue was relevant in *Perrigo Pharma International DAC v McNamara* [2020] IEHC 552, where Perrigo sought to establish a legitimate expectation that a certain transaction should be taxed as part of its trade rather than as a capital transaction. However, the High Court in *Perrigo* considered it was unnecessary to resolve this issue, as it held that Perrigo had not established the existence of a clear representation by Revenue (the first of the *Glencar* criteria set out above).

In most claims the bar will be high to successfully establish a claim of legitimate expectation and much will turn on the specific facts of the case, and this is nowhere more evident than in *Arderin*.

Arderin Distillery Limited v Revenue Commissioners

Introduction

Arderin Distillery was involved in the distillation of spirits and was approved by Revenue as a tax warehouse keeper. Alcohol products are normally subject to excise duty in the form of Alcohol Products Tax (APT), although in certain circumstances relief may be obtained from APT under s77 Finance Act 2003 where it is shown to the satisfaction of Revenue that the alcohol is to be used in certain ways. To obtain this relief, a warehouse keeper must obtain approval from Revenue as an "authorised receiver" (under Regulations 35 and 40 of the Alcohol Products Tax Regulations 2004).

At the onset of the Covid-19 pandemic in March 2020, Arderin was approached by a hospital with a request that it supply hand sanitiser. Arderin's dispute with Revenue concerned whether it had been granted due authorisation to release this hand sanitiser to the market without APT arising.

Facts in detail

The detailed facts and timeline of events are important to the court's decision, so we set them out here.

On 18 March 2020 Arderin contacted Revenue by email to request approval to produce hand sanitiser from ethanol without liability to excise duty. A Revenue official spoke to Arderin and advised it to submit a Form APT1. This form was duly submitted on 20 March, requesting authorisation to process 80,000 litres of ethanol into hand sanitiser.

Arderin claimed that in a phone call on 24 March the Revenue official confirmed verbally that Arderin had approval to use ethanol to manufacture hand sanitiser, subject to the condition that approval was also obtained from the Department of Agriculture, Food and the Marine (DAFM).

Unfortunately for Arderin, Revenue denied that this conversation took place and categorically denied that any approval had been given. However, Revenue accepted that there was a telephone conversation on 25 March, during which the Revenue officer never suggested that there was any issue with Arderin's application.

Approval from the DAFM was received on 30 March, and Arderin then made and supplied to a HSE hospital an amount of hand sanitiser.

On 1 April 2020 Arderin submitted a fresh APT1 application seeking authorisation to process an annual quantity of 800,000 litres of ethanol. On 2 April Revenue reverted to Arderin with a number of queries, which were not raised on receipt of the first application. In the event, Arderin only produced hand sanitiser on the basis of its original application, understood by it to have been approved, for up to 80,000 litres. It did not reply to the queries raised by Revenue on 2 April because it no longer required the authorisation for the increased amount.

In June 2020 Revenue contacted Arderin ordering it to immediately cease manufacture of hand sanitiser because it was not authorised to do so.

Arderin brought proceedings by way of judicial review in the High Court in August 2020. Revenue's position was that Arderin's entitlement to relief from APT remained under consideration, and no decision had yet been made at the time of the High Court hearing in 2022.

Issues

Against this background, the court had to decide:

- whether Arderin had received verbal authorisation from Revenue that it was permitted to produce duty-relieved hand sanitiser; and
- even if no verbal authorisation was given, whether Arderin had, nonetheless, a legitimate expectation to an entitlement to relief from APT based on its course of dealing with Revenue and the wider circumstances.

Did Revenue authorise relief from excise duty?

The High Court noted that this first issue was simply a dispute of fact. Given that the parties did not make an application to cross-examine the relevant witnesses, this fell to be determined on the strength of the affidavit evidence. A party who wishes to contradict affidavit evidence must serve notice of intention to cross-examine the relevant witness; otherwise, it will not be possible for the court to choose between the two conflicting versions of fact, and the issue will be resolved against the party that carries the onus of proof.

Accordingly, in the absence of cross-examination and because the onus of proof was on Arderin as the party bringing the judicial review proceedings, Phelan J held that she was bound to accept Revenue's categorical assertion that no verbal authorisation was given. If the Revenue officer had been called to give evidence, Arderin may have been able to challenge this version of events.

Did Arderin have a legitimate expectation?

The High Court referred to the Supreme Court's decision in *Wiley v Revenue Commissioners* [1994] IR 160 as authority against any court intervention that might be considered tantamount to telling Revenue that a concession should be granted to which the taxpayer was not entitled. However, Phelan J noted that the APT legislation does not require a written authorisation or any particular formality, and that although Revenue has a power to impose conditions on any authorisation, it also has a power not to impose conditions. This meant that the finding of a legitimate expectation would not result in Arderin benefitting from a relief to which it was not entitled under the law.

Phelan J referred to the three requirements that must be established in a claim based on a failure of a public authority to respect legitimate expectations set out in *Glencar Exploration v Mayo County Council* (see above).

(1) On the first requirement, Phelan J held that there was evidence of an implied representation, arising from the course of dealing, to the effect that Arderin's production of hand sanitiser in the smaller quantity set out in its first APT1 application would be relieved from APT without further condition. This was based on a number of factors:

- Arderin was not counselled by the Revenue official during its contacts to wait for formal authorisation or told that there was any issue with its application, even though it was obvious that Arderin was urgently trying to respond to the national health crisis;
- the fact Arderin's second APT1 application resulted in an enquiry from Revenue highlighted the lack of enquiry over the first application and supported the reasonableness of Arderin's belief that there was no issue with the first application; and
- the fact that other distillers received authorisation from Revenue and were producing hand sanitiser in response to the health crisis on condition only of approval from the DAFM appears to have been common knowledge in the industry.

(2) This implied representation was conveyed to Arderin both directly (via its dealings with Revenue) and indirectly (based on what was known within the industry).

(3) On the final requirement, Phelan J's view of the reasonableness of Arderin's position was heavily influenced by the prevailing public health crisis:

> "it must also be recalled [that] these events unfolded at a time of national health emergency and the requirement for an authorisation [in] writing is not prescribed by law in section 77. The reasonableness of the Applicant's belief has to be seen in this context. If ever there were a situation where there was a need for prompt decision making by the Revenue, this would appear to have been such an occasion…
>
> Revenue practice is well established and the Applicant should not properly have proceeded without securing a formal commitment in writing from Revenue confirming authorisation with no special conditions. Were it not for the situation of a health emergency, the failure to do so would in my view be fatal to any claim to legitimate expectation. To my mind the existence of the health emergency is the single biggest factor in this case. It weighed in favour of the urgent grant of authorisation and a reduced need for formality."

Arderin's belief that relief from APT would be applied without any formal authorisation in writing from Revenue was therefore a reasonable one; and so Arderin was entitled, as a matter of legitimate expectation, to relief from APT provided it could satisfy Revenue as to the production of hand sanitiser on an *ex post facto* basis.

Implications for Judicial Review Claims Against Revenue

Undoubtedly, the context of the Covid-19 health crisis played an important part in the court's reasoning, and the urgency of Arderin's need for approval influenced the reasonableness of its belief that authorisation had been granted without formal written approval. However, this does not mean that a claim based on legitimate expectation should be seen as an exceptional remedy that depends on an emergency situation. The key factors remain the requirements set out in *Glencar*: that a representation is made by Revenue to a taxpayer, and that this creates a reasonable expectation that Revenue will abide by this representation.

Such a representation could arise from a taxpayer's engagement with Revenue whether generally, through guidance notices, guidelines and statements, or more specifically, through direct contact, advance rulings or (as in *Arderin*) a course of dealings. In any direct engagements the taxpayer should provide fulsome information to ensure that it can rely on any representations made on foot of the information. Any engagements with Revenue should be recorded in writing and should make clear that the taxpayer is relying on them. Taxpayers should also have regard to the tight timelines for bringing judicial review proceedings, namely, three months from the relevant decision.

The Supreme Court's decision in *Wiley* (see above) suggests that the courts will not make a finding of legitimate expectation where this would result in the taxpayer obtaining a relief to which it was not otherwise entitled or require Revenue to act in an unauthorised manner. If so, this suggests that a legitimate expectation claim is most likely to be relevant in cases where Revenue needs to apply some judgement or discretion in applying the tax legislation to the facts of a particular case, and represents that it will exercise its powers in a particular way. This could include cases where:

- Revenue must approve or authorise a taxpayer for certain purposes (e.g. as being approved as a tax warehouse keeper or "authorised receiver");
- certain matters must be demonstrated by the taxpayer to the satisfaction of Revenue (as under s77 Finance Act 2003 for relief from APT); and
- Revenue has the power to impose certain conditions on a relief or authorisation (e.g. the provision of security before approving a person as an "authorised receiver").

UK Position and Potential Application in Ireland

Naturally, however, a taxpayer will also wish to rely on a representation from Revenue that suggests it may receive an entitlement that it is not entitled to as a matter of law, or suggests that Revenue may not enforce a liability that would otherwise be legally due. The UK courts have adopted a more nuanced approach to the question of whether a taxpayer can rely on a legitimate expectation that it will receive a more favourable tax treatment than afforded by the correct application of the law.

In general, as in Ireland, UK public law does not protect legitimate expectations that could be adhered to by a public authority only by contravening the law or acting inconsistently with its legal duties. However, legitimate expectation can sometimes be relied on by a taxpayer to protect its expectation of a particular form of tax treatment, even if this is more favourable than the outcome that would result from a correct application of the relevant tax legislation. A taxpayer seeking to rely on this must demonstrate not only that HMRC's conduct gave rise to a reasonable expectation that the taxpayer would be treated in a certain way but also that it would be unfair and an abuse of power for HMRC to act inconsistently with that legitimate expectation.

This recognises that HMRC has a managerial discretion in collecting taxes, and the efficient collection of taxes is promoted by HMRC's providing guidance to taxpayers and acting consistently with that guidance, even if it is subsequently decided by the courts to have been based on a wrong interpretation of the law. Accordingly, in *R (Davies) v HMRC* [2011] UKSC 47 the UK Supreme Court accepted that a taxpayer could acquire a legitimate expectation that it would be treated in the manner provided for in HMRC's published guidance or based on its settled practice, even where this did not correctly reflect the law, provided the guidance was clear and unambiguous, and read as a whole.

In *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 the English High Court held that a taxpayer is entitled to rely on a ruling or other statement given by HMRC provided that, when seeking the ruling, the taxpayer "puts all its cards face upwards on the table" by giving HMRC full details of the relevant transaction and that HMRC's ruling is "clear, unambiguous and devoid of relevant qualification".

Significantly, Revenue adopts a similar position to HMRC on the binding nature of formal opinions issued by the Revenue Technical Service (RTS). In Part 37-00-00a of the Tax and Duty Manual, Revenue states (at paragraph 7.2):

> "In addition, an opinion/confirmation will only remain valid for so long as the facts and circumstances on which the opinion/confirmation is based continue to exist and the relevant legislation and practice remains in place. An opinion/confirmation can be reviewed at any time by Revenue, with a view to amendment or withdrawal, in the light of relevant facts, circumstances or other information changing or where Revenue decides to reconsider its position. The amendment or withdrawal will have effect from the time when the facts, circumstances or other information changed, or the taxpayer is notified by Revenue that it has reconsidered, and changed, its position. **Where Revenue has previously given an opinion to a taxpayer based on a full disclosure of all relevant facts, then Revenue will follow that opinion**. However, if on reviewing the opinion Revenue believes that it is incorrect, it may be withdrawn prospectively [emphasis added]."

As noted above, the Irish courts have not yet fully explored whether it is possible to establish a substantive legitimate expectation to a particular tax treatment. However, in the authors' view, it is not wholly clear that the Irish Supreme Court's decision in *Wiley* entirely precludes the enforceability of a legitimate expectation that a person should benefit from a more favourable application of the law than would otherwise apply. This might be considered further by the Irish courts in a case where there is a clear and unambiguous statement by Revenue on which a taxpayer has relied, particularly where the taxpayer has complied with the requirements of the RTS.

EU Law

EU law recognises a principle of protection of legitimate expectations, which is similar to the Irish domestic law principle of legitimate expectations but protects legitimate expectations even where affording a particular treatment would require a public authority to act contrary to legislation. This EU law principle could be relevant in certain cases involving EU-derived taxes (such as VAT and custom duty), although this is outside the scope of this article.

Contrast with Tax Appeals Commission

A taxpayer's normal remedy when it receives a tax assessment or other adverse decision from Revenue will be to appeal to the Tax Appeals Commission (TAC). The TAC is a creature of statute, which has various statutory powers to hear appeals against assessments and decisions of Revenue. Appeal rights against particular matters are given by various provisions of the Tax Acts.

A court may refuse judicial review relief to an applicant where there is an alternative remedy available. It is important, therefore, that taxpayers understand the basis of their complaint and whether or not an appeal to the TAC or judicial review is the appropriate remedy.

The Court of Appeal recently considered the remit the of the TAC's predecessor, the Appeal Commissioners, in *Lee v Revenue Commissioners* [2021] IECA 18. The court found that the jurisdiction of the Appeal Commissioners was limited to determining whether an assessment to tax had been properly made having regard to the relevant charging provisions. This will extend to making findings of fact or law on the issues incidental to their inquiries. However, the Appeal Commissioners did not have jurisdiction to consider questions of public law such as whether a taxpayer could rely on a legitimate expectation, or whether Revenue had contractually agreed to compromise a tax liability.

Given the similar powers and statutory basis of the TAC, *Lee* is also likely to be relevant to the extent of the TAC's jurisdiction, although it remains to be seen if the courts will consider that the TAC has any greater jurisdiction than the Appeal Commissioners.

In some cases there may be both a dispute over the correct interpretation of tax legislation that is within the jurisdiction of the TAC and a legitimate expectation argument that can be heard only by the High Court. In light of the differing timelines involved, namely three months to bring judicial review proceedings and 30 days for the submission of an appeal to the TAC, both proceedings will have be commenced in tandem. It would then normally be necessary to apply to stay the TAC appeal pending the outcome of the judicial review proceedings, as was the case in the *Perrigo* proceedings. However, there could be clear time, cost and merits considerations to bear in mind when deciding which proceedings to prioritise.

Conclusion

When approaching a dispute with Revenue, taxpayers and their advisers should consider any potential legitimate expectation arguments alongside the technical tax arguments that they might raise. In appropriate cases a judicial review claim may give a remedy in circumstances where the tax legislation may not.

In *Arderin*, the court noted that it was particularly unfortunate that there was no pre-litigation correspondence between the parties, which may have crystallised the issues and avoided litigation. In our experience, where legitimate expectation issues are relevant, there is often advantage in raising these with Revenue at an early stage.

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Section 117 of the Succession Act 1965: Who Has a Potential Claim?

Background

Section 117 of the Succession Act 1965, as amended, allows a child of the testator to apply to the court seeking a payment out of the estate in circumstances where they say that "proper provision" was not made for them by their parent.

Section 117 states:

> *"(1) Where, on application by or on behalf of a child of a testator, the Court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the Court may order that such provision shall be made for the child out of the estate as the Court thinks just.*
>
> *(2) The Court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the Court may*

consider of assistance in arriving at a decision that will be as far as possible to the child to whom the application relates and to the other children.

(3) An order under this Section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.

(4) Rules of Court shall provide for the conduct of proceedings under this Section in summary manner.

(5) The costs in the proceedings shall be at the discretion of the Court.

(6) An order under this Section shall not be made except on an application made within six months from the first taking out of representation of the Deceased's estate".[1]

Who Can Make a Claim?

Before 1987, such applications could be made only by children coming within the definition of children in the 1965 Act (*O'B v S* [1984] IR 316). As held by the Supreme Court, "the meaning of that word in those sections did not include children who were not issue of a lawful marriage" (*ibid*.). This meant that a child could not make a claim against their father's estate if he was not married to the child's mother.

Since the enactment of the Status of Children Act 1987, a non-marital child of a testator may also apply to the court under s117. Furthermore, where a child has been adopted within the meaning of the Adoption Act 2010, they shall be deemed a child of the adoptive parents and not the child of any other persons (s172(a)). Therefore, as matters stand, children, unless adopted, can bring a s117 application against the estate of their parents regardless of the marriage status of those parents. Adopted children can bring an application against their adopted parents' estates.

Earlier this year a man, who was born in a mother and baby home, brought a s117 claim against the estate of his estranged mother (*G.S. v M.B.* [2022] IEHC 65).

Case of G.S.

On 21 January 2022 Stack J gave a judgment in a s117 case, brought by G.S., that received plenty of media attention. G.S. claimed for proper provision out of the estate of his mother, T.N., who died on 9 June 2015 at an advanced age. The deceased, who had no other children, made a will on 17 December 2004. No provision had been made for G.S. in the will, whereas bequests had been made to a number of nieces and nephews of the deceased. At the date of death the gross value of the estate was €671,533.

The Defendant, who was the niece of the deceased, was sued in her capacity as executor of the deceased's estate. The Plaintiff gave evidence stating that it was his belief that he was born in a mother and baby home. He was brought up by another family, having been given to them some months after his birth. There was no formal adoption, and no objection was raised to the right of the Plaintiff to maintain the application as a child of a deceased within the meaning of the 1965 Act, other than the Defendant requiring the Plaintiff to supply DNA evidence of his relationship to the deceased, which he was able to do.

The Plaintiff confirmed in his evidence that he was loved by the family he lived with and had a loving childhood, even though it was clear he grew up in very modest circumstances. The Plaintiff first met his mother by arrangement in a hotel in a local provincial town when he was nearly 23 years old, and thereafter he kept in touch with her by phone. However, the relationship deteriorated, causing "great unhappiness and upset" to him.

In terms of his own personal circumstances, the Plaintiff took early retirement and, when

1 The six-month time limit was reduced from 12 months pursuant to s46 of the Family Law (Divorce) Act, 1996.

the case was heard, had a pension of €313.97 per week. In the course of her judgment, Stack J noted that the Plaintiff and his wife had "significant assets".

With regard to the Plaintiff's education, the family he lived with stressed the value of education, and the Plaintiff did his Group Certificate, Intermediate Certificate and Leaving Certificate. He obtained honours in building construction, metalwork and mechanical drawing and passes in Irish, English and Maths. He was accepted on a civil engineering course in a regional college. This was a two-year certificate course from which one could progress to a three-year diploma and, ultimately, a degree. Unfortunately, at the end of the second year, the Plaintiff failed one of the exams. It is a key part of this case that because of the straitened circumstances of the family with which the Plaintiff lived, he could not afford to repeat the exams. Accordingly, he left third level without a qualification (*ibid.* at para. 13).

During the case, the Plaintiff submitted a number of expert reports, which were considered by the Judge. It was inferred that the Plaintiff had underachieved educationally and had not achieved his potential in relation to his literacy skills. The reports concluded that qualification as an engineer was a realistic goal for the Plaintiff. The Plaintiff submitted an actuarial report calculating a loss of earnings/ income differential claim. Interestingly, but not surprising, the Court held that it could not grant relief to the Plaintiff in relation to a loss of earnings claim as that is not the purpose of a s117 application.

Expert evidence was given by a doctor, who described the Plaintiff as suffering from depression. The doctor noted that the Plaintiff's childhood experiences – in particular, the fact that he was treated differently in a conservative rural community because his mother was unmarried and he was being raised by adoptive parents – fed into his personality in adolescence and, ultimately, into adulthood. The doctor was of the opinion that the Plaintiff had been hampered in the last 10 years by his depressive illness and that it had restricted him in his opportunities. In the course of her judgment, Stack J stated:

> "Ultimately, nothing that the court can do in a s. 117 application can provide redress for these matters, nor is it any function of the court to comment on the rights or wrongs of what occurred. They are only set out here because they formed such a significant element of the Plaintiff's evidence and submissions." (*ibid.* at para. 29)

Having concluded, and summarising the relevant facts, the Court stated that:

> "Where no provision is made for a child during the lifetime of a deceased, the question on a s. 117 action turns on whether, in light of the assets available on death, there was a failure of moral duty on the part of a testator in failing to make good that position. When drawing up a will, the question of the testator's financial needs become[s] irrelevant as the purpose is to provide for others on death, and the testator's own needs during her lifetime are obviously irrelevant to that question." (*ibid.* at para. 33)

Stack J considered the case law on s117 applications and the well-established principles laid down by Kenny J (in *Re. G.M.; F.M. v T.A.M.* [1970] 106 ILTR 82), which were endorsed by Kearns J in the more recent case of *XC v RT* [2003] 2 IR 250. Out of these principles, the Defendant sought to rely on the following:

> "(e) The duty created by section 117 is not absolute.
>
> (f) The relationship of parent and child does not, itself and without regard to other circumstances, create a moral duty to leave anything by will to the child.
>
> (g) Section 117 does not create an obligation to leave something to each child." (*G.S. v M.B.* [2022] IEHC 65 at para. 37)

It was accepted that the deceased never made any provision for her child, and it was argued by the Defendant that as the Plaintiff could not show financial need, he therefore could not show a failure by the deceased to make proper provision for him in her will. The Defendant laid stress on the high onus of proof that the Plaintiff had to satisfy and the repeated statements in jurisprudence that there is no entitlement to a bequest solely on the basis that one is a child of a deceased.

However, Stack J was of the view that the deceased did indeed fail in her moral duty to make proper provision for the Plaintiff. In concluding, she stated:

> “The question is whether the deceased, having regard to the assets she had available to her and the circumstances and prospects of the Plaintiff at the date of her death, has made proper provision for the Plaintiff in her will. I do not believe that she has. I am of the view that the Plaintiff has discharged the high onus that is undoubtedly on him to demonstrate a failure of moral duty on the part of the deceased.”

In arriving at this conclusion, the Judge noted that there were no competing claims here. She ruled that a lump sum of €225,000 should be awarded to the Plaintiff, charged on the estate’s agricultural lands.

Analysis

Although at the time of this case much media attention surrounded it, when it is broken down, the emotion stripped away and basic legal principles applied, the decision is not all that surprising. There was a mother with a valuable estate and no other children who never provided for her son during her lifetime or in her will. Of course his s117 application was going to be successful.

Furthermore, and again unsurprisingly, the judgment clearly sets out that there is no scope within a s117 application to award monies for loss of earnings/earning potential or mental distress suffered by a child.

From a tax perspective, G.S. would obviously have been able to avail of the Group A threshold for CAT and receive the money from his estranged mother’s estate tax-free. Interestingly, even had G.S. been formally adopted, by virtue of para. 10, Part 1, Schedule 2, of the Capital Acquisitions Taxes Consolidation Act 2003 he would still have benefited from the Group A threshold in respect of inheritances from his natural mother. However, had he been formally adopted, he would no longer have been a “child” for the purposes of s117.

However, it leaves some food for thought about who could potentially bring a s117 claim. Among common law countries, Ireland was relatively late in introducing formal legal adoption. In Ireland pre-1953, informal adoptions were the norm. It was no secret that mother and baby homes were scattered around the country full of young girls and women who, whether by choice or not, were handing over their babies to other families. These women probably thought about their babies on a daily basis but never envisaged that these estranged children would have a potential claim to their estate.

In Ireland, with most adoptions post-1953 formalised, it is likely that we will not see many future cases like this.

But will there be other types of non-conventional s117 applications?

In the present day, assisted reproduction and surrogacy are part of our society. Until very recently, this whole area lacked legislative guidance. Thanks to the Children and Family Relationships Act 2015, there has been some clarity in the area. Hopefully there will be further clarity with the enactment of the Health (Assisted Human Reproduction) Bill 2022.

However, as matters stand in Ireland, surrogacy has no legal standing. According to the Supreme Court (*M.R. & Anor v An tArd*

Chlaraitheoir & Ors [2014] 3 IR 533), the birth mother is considered the mother of the child; genetics are not determinative of motherhood. So, for example, let's take a child born by means of surrogacy, where a couple's sperm and egg are used to create an embryo implanted in the surrogate. As matters stand, and assuming that no adoption took place thereafter, this child would not have any claim to the estate of the woman they grew up with as their mother (whose egg was used), but legally they would have a potential s117 claim to the estate of the woman who gave birth to them. It will be interesting to see if any such cases come before the Irish courts.

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M&A Landscape Changes, and How Interest Limitation May Mean More Changes

Introduction

This article looks at the mergers and acquisitions (M&A) landscape in Ireland, as well as the recent tax provisions and changes in company law that impact on M&A. In the context of recent tax provisions, the article takes a further look at the financing options available to companies in M&A and the potential impact of the interest limitation rule on debt financing.

M&A in Ireland

In the first six months of 2022 there was a drop in M&A activity in Ireland compared with the same period in 2021. Global factors such as Russia's invasion of Ukraine, interest rate increases, rising energy costs and inflation have contributed to a slowing down of M&A activity levels compared to what was a bumper year in 2021. However, notwithstanding decreased levels of M&A activity in 2022, the

Irish M&A market remains active, with activity levels returning closer to pre-pandemic levels. Private equity firms have remained active in the Irish M&A market, with the financial services, technology, media and telecoms sectors remaining active in terms of the number of deals.

Recent Tax Changes

Tax provisions relating directly to M&A activity have evolved gradually over time. Some of the most significant recent tax changes introduced in Ireland have focused primarily on implementing the EU Anti-Tax Avoidance Directive (ATAD). Although these provisions are not directly targeted at M&A transactions, many of them have an impact on M&A deals, given that they require purchasers to carry out careful due diligence on targets with a view to assessing and dealing with any potential risks or exposures that these provisions may present.

A number of these recent changes are likely to impact on the structure of how transactions are undertaken or financed. We set out below a brief overview of some of the key tax changes that have occurred in recent years that are likely to be of relevance to M&A deals.

Controlled foreign company rules

The Controlled Foreign Company (CFC) rules were introduced by Finance Act 2018. These provisions came into effect from 1 January 2019. Finance Act 2020 inserted an amendment that modifies the CFC rules in respect of non-cooperative jurisdictions and that took effect from 1 January 2021.

CFC rules are an anti-abuse measure, designed to prevent the diversion of profits to offshore entities in low- or no-tax jurisdictions. Where CFC rules apply, they have the effect of attributing the income of such an entity to its parent company.

In broad terms, an entity will be considered a CFC where it is subject to more than 50% control by a parent company and its associated enterprises and the tax paid on its profits is less than half the tax that would have been paid had the income been subject to tax in the jurisdiction where the parent company is tax resident.

A CFC's undistributed income is attributed to the Irish parent company if relevant activities are carried out in Ireland. Relevant Irish activities are:

- significant people functions (SPFs) and
- key entrepreneurial risk-taking functions (KERTs).

Where a purchaser is seeking to acquire an Irish-tax-resident company that has significant undistributed profits accruing in subsidiaries that are based in low-tax offshore jurisdictions, a careful assessment will need to be carried out as part of due diligence to determine whether the Irish target could have an exposure to additional Irish tax under Irish CFC rules.

Anti-hybrid rules

Anti-hybrid rules were introduced by Finance Act 2019. The rules are complex in that they apply to cross-border transactions and require careful consideration of the tax treatment of transactions and entities in other territories.

The anti-hybrid rules were introduced with the goal of preventing arrangements that exploit the differences in characterisation of an instrument or an entity that arise under the tax laws of two or more jurisdictions, as such arrangements can generate a tax advantage or a mismatch outcome. Typical examples of hybrid transactions are those that give rise to (1) double deduction mismatch outcomes (e.g. where a payment is deductible in two countries but the income against which it is deducted is not included in those countries) or (2) deduction without inclusion mismatch outcomes (e.g. where a payment is treated as deductible for tax purposes in one jurisdiction but the payee does not see itself as receiving a corresponding amount). The anti-hybrid rules apply to all corporate taxpayers, with no *de minimis* exemptions, and the rules apply to all payments made after 1 January 2020.

Furthermore, the reverse hybrid rules, which apply to prevent arrangements that exploit the difference in the tax treatment of an entity to generate a tax advantage, or a reverse hybrid mismatch outcome, are also now in effect in respect of tax periods commencing on or after 1 January 2022.

Similar to the CFC rules, purchasers will need to carry out a careful assessment as part of due diligence to determine whether any entity in the target group has an exposure to the anti-hybrid rules.

Schemes of arrangement

For many years a court-approved scheme of arrangement in accordance with the Companies Act 2014 was the preferred method to effect the takeover of an Irish-incorporated, publicly listed company. This was largely due to the fact that a court-approved scheme of arrangement offered a number of advantages over the traditional takeover offer route. The principal advantage is that the effective shareholder approval threshold is lower under a scheme of arrangement.

Traditionally, a court-approved scheme of arrangement did not attract Irish stamp duty. This was due to the fact that under a scheme the entire issued share capital of the target is cancelled, with new fully paid shares being issued to the bidder, resulting in the bidder's acquiring 100% of the share capital of the target. As a scheme results in no transfer of shares, there was no conveyance on sale that would attract stamp duty. This is different from the position of a traditional takeover, where stamp duty arises as a result of the fact that the shares held by shareholders are transferred to the bidder.

Section 31D of the Stamp Duties Consolidation Act 1999 (as amended), introduced by Finance Act 2019 (s61), contains an anti-avoidance measure. It imposes a stamp duty charge where there is an agreement to acquire a company (target company) using a court-approved scheme of arrangement in accordance with the Companies Act 2014 involving the cancellation of the target company's shares and the issue of new shares to the person acquiring the company.

This new charge recognises the substance of these types of arrangements and imposes the stamp duty charge that, in the normal course, applies to transfers of shares. Stamp duty is charged on the consideration paid to shareholders for the cancellation of their shares.

The charge applies where a scheme order is made by a court on or after 9 October 2019.

Interest limitation rule

Recently, an Interest Limitation Rule (ILR) has been introduced in Ireland, under Finance Act 2021, in accordance with ATAD. It applies to accounting periods of a taxpayer commencing on or after 1 January 2022.

The ILR seeks to limit base erosion by companies through the use of interest deductions. It does so by limiting the net interest deductions of corporate entities to 30% of a taxpayer's taxable earnings before interest, tax, depreciation and amortisation (EBITDA) as defined in the Taxes Consolidation Act 1997 (as amended) (TCA 1997).

The new ILR provisions allow for its application using a single-entity basis or a "group approach", i.e. determining the interest restriction at the level of a local group of companies (an "interest group"). Membership of this group is to be determined on an elective basis. An interest group will include all companies within the charge to corporation tax in Ireland that are members of a financial consolidation group, as well as any non-consolidated companies that are members of a corporate tax loss group. There may be benefits to opting into a group, such as pooling of interest and spare capacity, but this decision should be based on detailed tax analysis and modelling, as there is a minimum three-year period for staying within a group once the election is made.

There are also a number of exceptions where the ILR does not apply, which are mentioned below.

Careful due diligence will need to be carried out to assess whether target entities that have borrowings in place have been correctly applying interest limitation rules. Furthermore, the introduction of these rules will be relevant to how transactions are financed (see the next section for further detail on this).

Financing of Acquisitions and ILR

In M&A the choice of financing used is an important consideration. The structure of the financing will be guided by a number of factors, such as commercial, legal and tax considerations. The ILR is now an additional factor to be considered in respect of assessing the tax implications of how an M&A deal is financed.

Financing an acquisition

Typically, a buyer will finance an acquisition through the use of existing cash reserves, debt, equity or any combination of the three.

Using existing cash reserves is the simplest method of financing a transaction. It may, however, not be the most efficient method, especially where debt financing is an option. Most companies refrain from using cash reserves to fund acquisitions, given the potential impact it would have on working capital and long-term budgets.

As an alternative to using cash reserves, a bidder may choose to raise the funds required (or part of them) to fund an acquisition through the issue of new equity to existing shareholders (e.g. a rights issue). Alternatively, a purchasing company could also issue new shares in itself to the seller as consideration or part of the consideration for an acquisition (i.e. effecting a share-for-share or "paper-for-paper" transaction instead of a cash acquisition).

The main advantage of equity financing is that it tends to be more flexible than debt financing. Typically, a lending institution will approve a loan only if the bidder or target that is poised to be acquired is profitable and asset-rich and offers a steady revenue stream to secure the loan and fund interest payments.

The main drawback with equity financing is that it results in a dilution in the shareholdings of existing shareholders, which ultimately results in the relinquishment of some control and the sharing of profits for an undefined period of time. This contrasts with debt financing, which is finite in terms of timeframes and interest rates.

The third option that can be used to fund an acquisition is debt. Compared to equity, debt is often regarded as a cheaper way to obtain financing for an acquisition, particularly where interest paid on the debt is deductible for tax purposes.

Generally, for an Irish acquiring entity to qualify for tax relief on debt taken out to fund an acquisition, it has to meet the conditions of s247 TCA 1997. Under that section a deduction should be available in respect of a loan used to acquire shares in a trading company, a holding company that is part of a trading group and a holding company that is part of a multi-tiered holding company ultimately owning trading entities. Where relevant conditions are met, qualifying interest can be offset as a charge on income, with any excess surrendered on a current-year basis to other Irish-resident group companies that have taxable profits.

Effect of ILR on debt financing

In addition to navigating the complexity that is entailed in seeking to avail of interest relief under s247 TCA 1997, borrowers now have to assess the impact of the ILR on the tax deductibility of borrowings obtained to fund M&A activity. Detailed analysis of the key provisions of the ILR, including areas to watch, key issues for SMEs, Revenue interpretation and guidance, has already been provided in three recent issues of *Irish Tax Review* and therefore is outside of the scope of this article[1]. However, the key thing that borrowers now need to keep in mind is that the ILR may limit the amount of tax relief that is available in a particular year where the net borrowing costs in a given year surpass the allowable amount (30% of the company's EBITDA). Therefore, when considering the mix of debt and equity to use in an acquisition, there is now an additional consideration that needs to be factored in when modelling the cost of debt.

It is important to note that the ILR does not grant deductibility for interest that would not otherwise be allowed under existing legislation, nor does it change the underlying nature of interest. Instead, the impact of the ILR is that, if it applies, it will operate to defer rather than deny the deductibility of interest for the accounting period in which the restriction applies. Net interest deductions that surpass the allowable amount may be carried forward as deemed borrowing costs to reduce the company's future earnings, provided it has not met the allowable amount limit for that future accounting period under the ILR. The impact of the ILR will need to be factored in to cash-flow modelling forecasts where M&A transactions are being undertaken.

The ILR is also cognisant of the fact that certain industries are more highly leveraged than others. This is evident from the worldwide relieving measures that are in place, i.e. the group ratio relief and the equity-to-assets ratio exception. In addition to the group rule, Ireland has adopted the following exclusions to the ILR regime in line with ATAD:

- a *de minimis* exemption for interest expenses up to €3m,
- an exemption for standalone entities,
- a legacy debt exclusion for debt put in place before 17 June 2016 and not altered since then and
- a long-term infrastructure projects exclusion.

Other Changes Relevant to M&A Transactions

This section considers important recent changes in company law in the context of M&A.

Simplified merger notification procedure

An important change to the Irish merger notification regime occurred on 1 July 2020, with the introduction of the simplified notification regime ("the Simplified Procedure") by the Competition and Consumer Protection Commission (CCPC). The Simplified Procedure was a welcome development in Ireland, in relation to M&A transactions that do not raise competition concerns in Ireland.

In its consultation document, the CCPC noted that applying the European Commission's Simplified Procedure criteria to 219 notifications to the CCPC between 2016 and 2018 indicated that approximately 55% of mergers would qualify if the EU rules were applied here. It can be expected, therefore, that a substantial percentage of Irish deals will qualify for simplified notification.

Foreign direct investment screening

The EU Investment Screening Regulation became fully operational across the EU on 11 October 2020. Where foreign direct investments are likely to affect security or public order, Member States are subject to mandatory cooperation and information-sharing requirements.

1 See also the Irish Tax Review articles below:
"Interest Limitation Rules: Key Provisions and Areas To Watch", by Emma Arlow, *Irish Tax Review*, Issue 1 (2022)
"Interest Limitation Rules: Key Issues for SME", by Emma Arlow, *Irish Tax Review*, Issue 2 (2022)
"Interest Limitation Rules: Interpretation and Guidance", by Lorraine Mulligan, *Irish Tax Review*, Issue 3 (2022)

At present, no investment screening mechanism exists in Ireland; however, a draft Bill has been published. Under the proposed legislation, the Minister would be able to investigate, authorise, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria. Overseas buyers typically account for a considerable portion of M&A transactions in Ireland every year, and so deal-makers will be watching closely to ensure that the legislation does not have an impact on the attractiveness of Ireland to potential investors.

Conclusion

Although the M&A tax landscape has not changed hugely over recent years, practitioners would be well advised to be cognisant of the legislative changes that have occurred, particularly in the context of ATAD, when advising clients on M&A transactions. Those changes are likely to significantly increase the level of tax due diligence that is required on multinational groups.

In addition, Ireland has for many years been regarded as having a complex system for determining the deductibility of interest incurred on loans taken out to fund the acquisition of companies. The ILR and its implications are now layered on top of those rules. This will result in significant additional complexity for companies when determining the most efficient method to finance M&A transactions. As a result of the introduction of the ILR, consideration and simplification of Ireland's rules around the deductibility of finance costs would be welcomed.

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Digital Services Tax

Introduction

We don't have to look too far from where we are now while reading this article to see the advancements in digital technology and the impact they have had on workers, employers, companies and society. The Covid-19 pandemic accelerated digital technologies as a priority for many companies globally, not only as a means of engaging with their customers but also as a new way of conducting business and facilitating employees to continue working, while dealing with the challenges of public health restrictions. Even before the pandemic, there was a trend towards digital technologies, and over recent years such technologies had arguably developed more rapidly than any other innovation in our history.

With such advances come positives and negatives, and challenges to be addressed. One of the main debates over the past decade has been international tax rules and whether they are still fit for purpose in a globalised economy. This debate stems from the design of such rules, which typically are based on "bricks and mortar", i.e. where companies are physically located (e.g. where employees work and/or real estate is located) determines where they pay tax. However, the current digital world does not fit within this design – the very meaning of digital goes against "physical presence" as a requirement for conducting business in certain locations. Yes, companies need a presence somewhere to have (non-remote) employees, their services, operations and the like, but no longer is the location of such tied to where their customers are. Today, it is plausible to have a successful business in a jurisdiction without any physical presence there. This divergence has led to many debates on companies paying their "fair share of tax" – in particular in market jurisdictions. Thus, a digital services tax (DST) ensued.

In this article the history of the digital tax debate and the drivers of OECD (Organisation for Economic Co-operation and Development) and EU actions are explored. The current main unilateral DSTs, with a particular focus on the UK's experience, are summarised, as well as the OECD's initiation of the Pillar One project. The article then considers the Irish position and what are the next steps expected from the OECD under Pillar One.

History of Digital Services Tax

OECD

In 2013 the OECD identified the challenges of the digital economy as a key part of the action plan for the Base Erosion and Profit Shifting (BEPS) project. It was such a significant part that it was Action 1 (out of 15 actions) from the BEPS project, and in 2015 the OECD published its report - *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*. The challenges to address are:

(1) where taxes should be paid – "nexus" rules, currently determined by physical presence; and
(2) how to allocate between jurisdictions – "profit allocation", which traditionally follows the arm's-length principles of transfer pricing.

The Inclusive Framework on BEPS was established in June 2016 to monitor and support the implementation of the BEPS package and take forward ongoing work arising from the project, including the international tax implications of digitalisation. In 2018 the Inclusive Framework responded to the G20's concern around the ability of existing tax rules to meet the needs of a rapidly digitalising economy with an interim report on solutions to the tax challenges arising from digitalisation. The Interim Report presented an in-depth analysis of value creation across different digitalised business models and described the main characteristics of digital markets.

The OECD's work focused on a global, consensus-based solution, and the threat of unilateral measures encouraged all parties to attempt to achieve a global consensus. Since 2018 the OECD has moved towards reaching a global consensus solution, with public consultations on proposals in 2019 and the publication of two detailed Blueprints in October 2020, on potential rules for addressing nexus and profit allocation challenges (known as Pillar One) and on global tax rules (known as Pillar Two). Pillar One is covered below. Pillar Two is beyond the scope of this article.

European level

In March 2018 the European Commission adopted its proposals for taxing the digital revenue of companies. The package – "Fair Taxation of the Digital Economy' – comprised two proposals. One concerns a permanent reform of the corporate tax regime; the other is a proposal for a Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services. As there were so many countries involved in the OECD plans, it was expected that it would be hard to reach agreement with all countries involved. Therefore, the European Commission drafted this proposal to start with an EU agreement on a DST.

The European Commission identified – in line with the OECD discussions – that the physical presence rules were not sufficient for the taxation of digital businesses and that the current rules failed to recognise the way in which profits can be created in the digital world, where users play a significant role in value generation. The specific objective of this proposal was to put forward measures that target the revenues stemming from the supply of certain digital services, which should be "easy" to implement and help to level the playing field in the interim period until a comprehensive (global) solution was in place.

The European Commission's initial digital proposals provided for both a short-term, interim solution and a longer-term plan in respect of the tax treatment of digital transactions. The short-term plan was a 3% tax on the gross revenues of certain digital transactions, broadly based on where target customers are located. As an example, if a company in Ireland receives €100 in advertising revenue in respect of advertising targeted at French customers, €3 digital tax would be payable to the French authorities. The rationale is that the French customer data is regarded as creating value for the Irish company, hence it should be taxed in France.

The short-term measures would apply only to large groups, with global turnover in excess of €750m and EU turnover in excess of €50m annually. However, the longer-term plans would apply to a much wider group of companies.

The EU Directive has not passed into law, however, as Member States have not reached agreement. Multiple countries did not give their approval, most notably Ireland, Denmark and Sweden. Ireland specifically encouraged a broader outlook and wished to focus on the OECD discussion.

Current Status

OECD's Pillar One

The goal of Pillar One is to ensure a fairer distribution of profits and taxing rights among countries with respect to the largest multinational enterprises (MNEs), including digital companies. It would reallocate some taxing rights over MNEs from their home countries to the "market" countries – the countries where they have business activities and earn profits – regardless of whether companies have a physical presence there. According to the OECD, it is expected that taxing rights on more than USD125bn of profit will be reallocated to market jurisdictions each year due to these new rules.

After years of intensive negotiations to update and fundamentally reform international tax rules, at the end of last year Ireland, along with 136 other countries, agreed to the Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. In July 2022 the technical rules of the new taxing right (referred to as Amount A) were presented and opened for public consultation until August 2022. A new public consultation document was released in October 2022 to obtain further input from stakeholders on the administration and tax certainty aspects of Amount A.

In brief, under the proposed new rule, multinationals with revenues greater than €20bn and profitability greater than 10% will be in scope of Amount A. These thresholds will apply at the group level. Amount A reallocates 25% of the multinational's profit in excess of 10% of its revenues to market jurisdictions in which the MNE satisfies specific quantitative tests subject to certain adjustments. The OECD published a process map for Amount A setting out the five steps under: scope determination, nexus and revenue sourcing, tax base determination, allocation of Amount A and elimination of double taxation.

One other important measure of Pillar One is that the agreement will include a withdrawal of all existing digital services taxes and other relevant similar measures. This should significantly decrease the compliance costs for multinationals. See below, under national unilateral (measures).

Pillar One will establish the legal obligations of the countries to implement the rule in a coordinated and consistent manner. Pillar One should be delivered through a Multilateral Convention (MLC). It is expected that the MLC will be opened for signature in the first half of 2023 and come into effect in 2024 after a critical mass of countries has ratified it.

National unilateral measures

After the apparent failure to achieve consensus on the European Commission proposals and political pressure to tax digital companies, several European countries decided to introduce their own, unilateral measures. EU countries that have already enacted DST legislation are Austria, France, Italy and Spain. Most recently, Denmark has moved ahead with its own digital streaming services levy, with draft legislation expected to be presented to the Danish Parliament at the end of October 2022. Other countries, outside the EU, such as Turkey, Kenya, India and Malaysia have also implemented unilateral DSTs.

The unilateral measures have created significant risk and uncertainty, mainly due to different thresholds, taxable bases and tax rates, as well as compatibility issues with double taxation treaties. On a practical level, to fulfil all of the unilateral requirements, companies – especially those involved in cross-border trade and investments – are dealing with increased compliance costs. The OECD in its efforts to achieve a global consensus-based solution seeks to address these risks and uncertainties.

UK experience

The UK introduced a DST from 1 April 2020. It is a 2% tax on gross revenues (rather than profits). It exists outside the remit of the arm's-length principle and the UK's tax treaty network. The DST could apply where, under traditional methods, no profits should be allocated to the UK or where businesses have no UK taxable presence for corporation tax purposes.

There are many parallels to the European Commission's proposal for a DST discussed above. However, there are a few key differences, the main ones being that the UK DST has specifically defined the business models, before dealing with the type of revenues that might arise from such activities, and that the UK rate is 2% rather than the European Commission's proposed 3% rate.

The policy intent of the DST in the UK (and from OECD and European Commission recommendations) is to target only large businesses. Small and medium-sized enterprises (SMEs) are exempted from any DST by the threshold conditions provided for in UK law. Generally, these conditions limit the scope of the DST to those with the largest revenue base from digital activities – globally and in the UK. In a 12-month accounting period a group must have both global digital services revenues of over £500m and UK digital services revenues of over £25m to breach the DST thresholds – both thresholds must be breached.

No provision for credit relief exists, and therefore, as a gross revenue tax, a liability to DST cannot be credited against UK corporation tax. The DST is intended to be a further tax levied and, as mentioned earlier, is outside the treaty network, which seeks to alleviate double taxation.

In determining whether the UK DST may be **deductible** when calculating taxable profits for corporation tax purposes, HMRC guidance *DST47100 – UK CT Deductibility of DST* tells us that:

> "The availability of any deduction will depend on the particular facts and circumstances of the business. However, it should be noted that a company's DST expense is directly related to the earning of its revenues and is a legal obligation of performing that trade. Therefore, in most cases it is likely the expense will have been incurred wholly and exclusively for the purposes of the trade."

The UK DST was intended to be a temporary measure from the outset – the legislation includes a "sunset clause" requiring a review of the DST by HM Treasury and a report submitted to Parliament before the end of 2025. The UK Government has stated its commitment to reaching a multinational solution to the taxation of the digital economy as part of the OECD's projects. It is therefore possible that the UK DST will be removed at the end of 2025 and replaced with the OECD Pillar One solution.

Ireland's Position

OECD and EU proposals

Commenting on the OECD's Pillar One initiative, the Minister for Finance, Paschal Donohoe TD, noted that implementation will be complex for governments, tax authorities and businesses alike. Specifically for Ireland, there will be a "big price to pay", but the Government is willing to pay this price to ensure tax certainty and stability in the global trading environment and reduce the risk of disputes and trade tensions. (Extracts from Paschal Donohoe TD, Minister for Finance's keynote address at the Irish Tax Institute's Global Tax Policy Webinars, 17-18 May 2022).

It is in Ireland's interest for agreement to be reached, ideally at OECD level for a global consensus. Ultimately it is envisaged that Ireland will remain arguably one of the most compelling locations in Europe for foreign investors.

Administration

Pending the current initiatives at OECD and EU level, the Irish Revenue Commissioners (Revenue) provided guidance on the tax treatment of DST expenses for corporation tax purposes. Until an agreement has been reached on a global or EU DST, Revenue confirmed that DST expenses are in principle deductible for Irish tax purposes if the DST is incurred wholly and exclusively for the purposes of a trade.

The unilateral DSTs – specifically those in Austria, France, Italy, Kenya, Spain, Turkey, the UK and India (Equalization Levy) – are, at the time of writing, specifically allowed to be deducted. If a DST is levied in a country that is not (yet) included on this list, a company has the option to discuss the tax treatment thereof with Revenue.[1]

Conclusion

The OECD's intention is to move forward with the Pillar One proposal in the first half of 2023, with ratification by the majority of countries expected during 2023 and the proposals in effect for 2024. Unilateral DSTs are expected to be replaced by Pillar One measures, and consequently the risks and uncertainties in dealing with unilateral DSTs as identified in this article should be removed. Until then, the basis of calculation and thresholds of the different unilateral regimes will require careful consideration.

It should be noted that there is uncertainty regarding the timing of Pillar One implementation, in particular if its ratification in the US hits a roadblock. Given the number of US-based MNEs within the scope of Pillar One, failure to get support there could influence the end of Pillar One and the continuation of unilateral measures. Unilateral DSTs increase the compliance burden for companies and look likely to continue to do so until such time as a global consensus is reached.

1 Revenue TDM https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-04/04-06-03.pdf.


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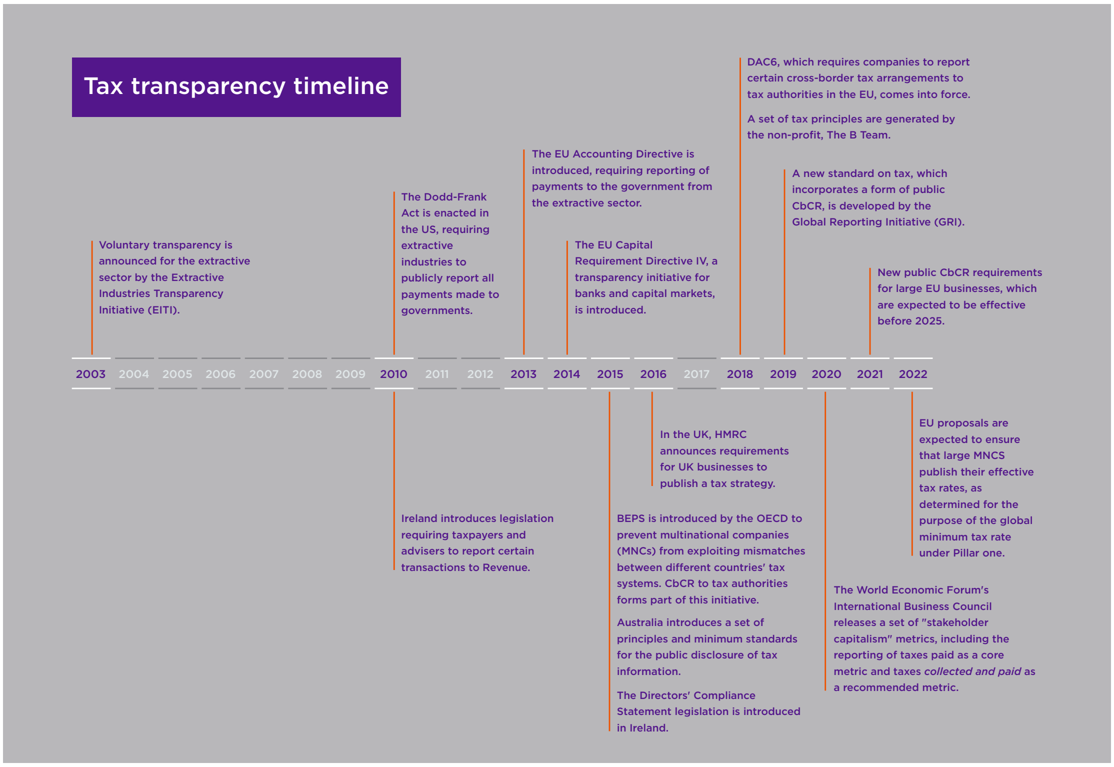
Tax Transparency: What Does It Mean for Companies?

Introduction

Taxes are an important source of revenue for governments, integral in developing fiscal policy and attaining macroeconomic stability around the world. Although public interest in companies' tax affairs is far from new, they are currently being scrutinised by bigger audiences than ever before. The unprecedented investment by governments due to the Covid-19 pandemic has also added to this wider conversation about how businesses contribute to society. As a result, tax transparency has become increasingly important for companies and their stakeholders. The purpose of this article is to outline some of the drivers shaping the tax transparency landscape and the factors to consider when developing a company's tax disclosure strategy.

Tax Transparency Timeline

Policy-makers, most notably the OECD and the European Commission, for many years have been requesting businesses to make greater tax disclosures, resulting in the continuing introduction of legislation mandating greater public reporting of certain tax data. This has resulted in a number of key initiatives at both global and local levels, as summarised in the tax transparency timeline.



One of the most significant developments in this space was the introduction of country-by-country reporting (CbCR) in 2015 on foot of recommendations in the OECD's base erosion and profit shifting (BEPS) package. CbCR requires large multinationals to report certain financial information (including corporate tax paid, revenue, profit and employees) at a country level rather than globally. Although CbCR only requires the submission of this information to tax authorities, it has been the catalyst for more significant changes. More recently, EU Member States reached agreement on a public CbCR Directive, which will require large multinational groups operating in the EU to publicly disclose details of corporate tax paid at a country-by-country level by 2025.[1] The recent agreement on the OECD's Pillar One and Pillar Two proposals has also brought tax into focus. As a result, the debate around tax transparency continues to gain significant momentum, resulting in stakeholders' demanding a greater level of tax transparency.

A Mechanism to Build Trust

Tax transparency is not just about providing additional detail on tax payments. It requires a broader view of a company's tax strategy and tax risk management policies and procedures, and the consideration of the wider impact of its tax contributions.

It is important for companies to put tax information in the right context because they don't contribute only by way of corporation tax, and by communicating their total tax footprint – including duties, levies and taxes collected on behalf of governments, such as employment taxes – they can demonstrate their true impact on society and the markets in which they operate.

1 EU Member States have reached agreement on a public CbCR Directive, which will require large multinational groups operating in the EU to publicly disclose details of corporate tax paid by 2025.

There is no one-size-fits-all model; every company's approach to tax transparency is different. How much information a company decides to voluntarily disclose on tax varies and is influenced by several factors, which could include regulatory or reputational drivers. Tax disclosures also present risks, which companies need to consider. For example, the disclosure of certain tax and financial data at a country-by-country level may be commercially sensitive and could impact a company's competitiveness.

By building stakeholder trust through tax reporting, there is great potential to establish trust in other areas of a company's operations.

Tax and Sustainability

Tax as an ESG metric

As the broader area of environmental, social and governance (ESG) continues to come to the fore – spurred by investors, policy-makers, employees, suppliers and customers – organisations are now considering their purpose beyond just financial growth. This means finding a balance between financial returns, social interests, the environment and transparency. This balance, if struck right, can lead to better results for both businesses and society.

Tax is now an important metric in that ESG conversation. In this regard, a company's approach to tax is no longer a question of compliance alone. It is a gauge of how a business views its role in society and its commitment to its purpose. It is a critical element of a business's social contribution, and part of the S in ESG.

ESG reporting presents an opportunity for a company to control its narrative as part of a larger movement to better align with the societies in which it operates. Tax is fast becoming part of that narrative.

Adopting an ESG lens can provide a more holistic view of a company and its purpose, leading to increased trust with stakeholders. Irish companies are increasingly reporting on sustainability matters, with more than half of the companies listed on the main market of the Irish Stock Exchange (Euronext Dublin) issuing a separate ESG report.

Tax reporting frameworks

Stakeholders now look at tax when assessing a company's sustainability performance. For example, a number of institutional investors have released codes of conduct setting out principles to promote responsible tax practices in respect of their investments. The Dow Jones Sustainability Index also incorporates tax criteria into its sustainability assessment of companies.

Compared to other sustainability issues such as Net Zero (i.e The point at which greenhouse gas emissions are reduced as close to zero as possible with remaining 'hard to reduce emissions' removed by carbon sinks, e.g. forests), methods of tax reporting have historically been less developed. However, this has changed in recent years. Companies can now choose to follow a range of tax transparency frameworks when considering their approach to tax disclosures. These frameworks have been developed by different stakeholders, including business organisations, not-for-profit organisations, tax authorities and investors.

Common themes that emerge from these frameworks include:

- having a published tax strategy,
- the importance of board oversight of a company's tax affairs,
- having good tax governance and risk management procedures embedded in the organisation and
- incorporating tax into a company's reporting on ESG matters.

Every company's approach to tax transparency is different. There are risks as well as benefits to increased transparency. In our experience, large companies typically have a tax strategy and a robust governance framework in respect of tax. How much information a company chooses to publicly disclose varies and is influenced by several factors. There is no optimal level of tax disclosure.

Numerous frameworks are available, but here is an overview of two of the most commonly adopted tax reporting frameworks: The B Team Responsible Tax Principles and GRI 207.

The B Responsible Tax Principles

The B Team is a non-profit organisation created by business leaders worldwide to encourage a way of doing business for the wellbeing of people and the planet.

The B Team, in conjunction with several leading businesses, developed a tax reporting framework based on seven principles: governance, compliance, business structure, interactions with tax authorities, tax incentives, effective tax systems and transparency. Any business can choose to adopt the framework, but to do so they must publicly endorse *The B Team Responsible Tax Principles*, incorporate the principles in practice, publish a tax strategy and implement enhanced tax reporting.

The B Team Responsible Tax Principles

- **Accountability and governance:** tax is a core part of corporate responsibility and governance, and is overseen by the company's board of directors.
- **Compliance:** the company complies with the tax legislation of the countries in which it operates and pays the right amount of tax at the right time in the countries where value is created.
- **Business structure:** the company uses business structures that are driven by commercial considerations, aligned with business activity and have genuine substance. The company also includes statements affirming that abusive tax results are not sought.
- **Relationships with tax authorites:** the company seeks wherever possible to develop cooperative relationships with tax authorities based on mutual respect, transparency and trust.
- **Seeking and accepting tax incentives:** where tax incentives offered by governments are claimed, the company ensures that they are transparent and consistent with statutory or regulatory frameworks.
- **Supporting effective tax systems:** the company engages constructively in national and international dialogue with governments, business groups and civil society to support the development of effective tax systems, legislation and administration.
- **Transparency:** the company provides regular information to stakeholders including investors, policy-makers, employees, civil society and the general public about its approach to tax and taxes paid.

GRI 207

The Global Reporting Initiative (GRI) has developed a set of global sustainability standards, which are widely accepted as good practice for reporting on a range of economic, environmental and social topics. More than 10,000 organisations in 100 countries use the GRI standards for sustainability reporting, including many Irish companies.

In 2019 a tax standard called GRI 207 was introduced to meet greater stakeholder demand for tax transparency. The standard applies to companies using the GRI framework and is effective for reports published on or after 1 January 2021. Disclosures on tax strategy, governance and risk management are included in the standard. It also incorporates a disclosure on public CbCR.

GRI 207 disclosure requirements

GRI 207 enables companies to report on tax practices as part of their sustainability reporting. It consists of four key disclosures that fall under management approach disclosures and topic-specific disclosures:

Management approach disclosures:

- **Disclosure 207 - 1** Approach to tax.
- **Disclosure 207 - 2** Tax governance, control, and risk management.
- **Disclosure 207 - 3** Stakeholder engagement and management of concerns related to tax.

Topic-specific disclosures:

- **Disclosure 207 - 4** Country-by-country reporting.

Tax Disclosure Requirements in Ireland

Although there is no requirement in Ireland for companies to make tax disclosures, there have been growing requests for companies to disclose more meaningful information on tax. Investors, regulators, the media and civil society are increasingly asking for more transparency.

It is worth pointing out at the outset that there is no standard approach for companies to follow when deciding their approach to tax transparency.

There are risks involved, particularly around the disclosure of commercially sensitive data that could impact a company's competitiveness. There is much to navigate in terms of peer reporting, stakeholder interests and regulatory requirements when it comes to tax disclosures. Although tax disclosures – including the publication of tax strategies – are not mandatory in Ireland, many Irish companies are embracing tax transparency and are increasingly choosing to voluntarily disclose information on their tax affairs. This is being done carefully, with a considered approach that is navigating the potential commercial risks.

Every company's approach to tax transparency is different. There are risks as well as benefits to increased tax transparency. Typically, large companies have a tax strategy and a robust governance framework in respect of tax. How much information a company chooses to disclose varies and is influenced by several factors. There is no optimal level of disclosure.

Published Tax Strategy

A published tax strategy, sometimes referred to as a company's approach to tax or tax policy, is currently the primary means by which Irish companies make tax disclosures. The strategy should clearly communicate a company's vision on tax and make reference to key principles such as tax compliance, governance and risk management. There is no requirement in Ireland for companies to publish a tax strategy.

In developing a tax strategy, tax departments often work closely with other teams across the business, such as sustainability and investor relations. The development of the tax strategy may also be overseen by the board, which will have ultimate responsibility for its execution.

A good tax strategy document should:

- include a statement on a company's approach to tax compliance and tax planning
- demonstrate that the company's tax strategy aligns with its business model
- outline who has responsibility for the oversight and governance of tax
- discuss the existing tax risk management controls and procedures
- indicate how relationships with tax authorities are managed

The tax transparency disclosures of Irish companies listed on the main market of the Irish Stock Exchange[2] make for interesting reading. It can clearly be seen that Irish companies are embracing tax disclosures and are choosing to make voluntary public tax disclosures.

Typically, large companies do have a tax strategy and a robust governance framework in respect of tax; however, a company may decide not to publish details of its tax strategy or its governance arrangements for a variety of reasons. Therefore, it cannot be assumed that the absence of a published tax strategy, or specific disclosures therein, means that these components are not in place. Rather, they are not being made publicly available.

Although companies can use a variety of publicly available documents to make tax disclosures, we found that substantial tax disclosures were made in a published tax strategy. Therefore, the insights[3] that are shared in this article relate to Irish companies with a published tax strategy. There are a number of key trends among the Irish companies, which include those outlined below.

Strong practices of tax strategy publication, mainly with a global lens

Although there is no requirement in Ireland for companies to publish a tax strategy, 13 of the companies reviewed voluntarily published a tax strategy, or equivalent document.

77% of the published tax strategies were global tax strategies, which is unsurprising given the global scale of the companies reviewed. A global tax strategy sets out a company's policies for managing its tax affairs in all countries in which it operates. It is reassuring for businesses that the principles of a tax strategy can translate well across different jurisdictions, with varying and complex tax regulations.

Close alignment of tax and business strategies

77% of the companies state that their tax strategy seeks to support the company's broader business strategy. Consistency between the management of a company's tax affairs and its wider business strategy is important, demonstrating that tax is aligned to broader commercial objectives.

Companies seek cooperative relationships with tax authorities

Tax authorities are a key stakeholder when it comes to companies' tax affairs. In this respect, it is unsurprising that all companies state that they seek to have a cooperative and/or transparent relationship with tax authorities.

All companies included general statements on the company's approach to compliance with tax regulations.

Good governance of tax and strong board oversight

Tax governance refers to a company's approach to tax risk management and the responsibility for oversight of tax affairs. Stakeholders want to understand whether the tax strategy and tax risks are discussed outside the tax team – with the board or audit committee, for example. It provides comfort that tax is overseen at an

2 PwC Ireland's report *A New Era in Tax Transparency*, published in April 2022. This involved a review of the tax disclosures of all 24 companies listed on the main market of the Irish Stock Exchange, which was strictly limited to publicly available information in respect of financial years ending in 2020, as published on 31 December 2021. To the extent that they were published on their websites, companies' tax strategies, annual reports and ESG or sustainability reports were reviewed.

3 A summary of the key findings in the PwC Ireland report *A New Era in Tax Transparency*, published in April 2022, is reproduced here.

appropriate level and compliance obligations are monitored effectively.

Of those companies with a published tax strategy, all provided some form of disclosure on tax governance procedures. All of the companies also stated that the board has oversight of the company's tax affairs, while some explicitly stated that the board approved their published tax strategy.

It is common for the board to delegate oversight of tax matters to one of its sub-committees, typically the audit committee. Eleven companies make reference to the audit committee overseeing tax matters, while several have specifically included tax oversight in the audit committee's terms of reference.

Directors' Compliance Statement

It is important to note that Irish company law requires board oversight on tax matters. In accordance with the Directors' Compliance Statement legislation, the directors of most large Irish companies are required to include a statement in the financial statements to acknowledge responsibility for tax compliance and to confirm that arrangements (i.e. processes and controls) are in place to ensure tax compliance and that those arrangements have been reviewed during the year.

Clear reassurances on tax controls and risk management

Stakeholders look for assurances that a company is aware of its tax risk footprint and has appropriate controls and processes in place to manage that risk. Disclosures in this area provide comfort that tax is embedded within a company's broader risk management framework.

Of those companies with published tax strategies, all include a general statement confirming that tax risk is managed and specifically refer to controls being in place to manage this risk. 69% of these companies include a statement on the company's risk appetite. Many companies state that they have specific arrangements in place to actively monitor tax risk. Some companies refer to testing tax controls, while others state that they track tax developments that may be relevant to them.

Increasing expectations from Revenue on tax controls

There is a growing expectation from the Revenue Commissioners (Revenue) that companies have controls in place to manage tax risk. For example, companies participating in Revenue's Co-Operative Compliance Framework (a programme designed to create a Revenue/taxpayer relationship based on trust and transparency) are required to have a tax control framework in place. Furthermore, Revenue recently introduced a new compliance intervention framework, which places an onus on all companies to get tax returns correct first time and to self-detect and self-report tax errors.

Evolving Tax Transparency Trends

Total tax contribution

As outlined above, companies contribute to public finances not only by paying taxes on profits but also by administering taxes on behalf of the Exchequer. Total tax contribution (TTC) quantifies the total amount of taxes paid by a company, often distinguishing between taxes borne by the company and taxes collected on behalf of the Exchequer. With CbCR regimes currently focusing on corporation tax, companies are voluntarily disclosing information on their TTC to improve understanding and provide visibility of the wider contribution that they make to public finances. Sector taxes such as irrecoverable VAT (for banks) and business rates (for retailers) can be more significant than corporation tax.

Although TTC reporting is not mandatory, some Irish companies are choosing to voluntarily disclose more information on their total tax contribution.

Tax is being incorporated into ESG reporting

The analysis shows that Irish companies are embracing tax transparency and are primarily using their published tax strategies to communicate with stakeholders. Incorporating some of these tax disclosures into broader ESG reports presents an opportunity for companies to demonstrate how they are adopting sustainable tax practices. Some Irish companies are already making tax disclosures in their ESG reports, using ESG reporting standards including GRI 207 as a benchmark.

The Tax Transparency Journey

As outlined above, every company's approach to tax transparency is different. There are risks as well as benefits to increased tax transparency. How much information a company chooses to disclose varies and is influenced by several factors; there is no optimal level of disclosure or one-size-fits-all approach. To that end, we include some key takeaways to assist companies in deciding their optimal level of tax disclosure.

- **Assess the company's current tax disclosures**
  Review any current tax disclosures, e.g. tax strategy, annual report and ESG reports, to see if they align with stakeholders' expectations.

- **Consider the company's stakeholders**
  Understand what each stakeholder wants to know about tax, and why they want to know it.

- **Consider the company's optimal tax disclosure strategy**
  Disclosures can explain and inform the company's narrative around how it is taxed and its larger societal impact. There is no optimal level or one-size-fits-all approach to tax transparency. Each company's perspective is different and will be driven by a number of factors, including its own brand values and stakeholder interests.

- **Consider what the company's peers are reporting**
  What tax disclosures are the company's peers making? Consider how the company's tax disclosures compare.

- **Consider stakeholders' awareness levels**
  Once the company has decided what disclosures to make, it will then need to consider whether the target audience will be able to understand each disclosure. Would it be beneficial to include additional information that may help to explain the disclosure and provide additional context?

- **Establish the optimal reporting framework for the company**
  Is the company using a reporting framework, such as GRI, for the purpose of its wider sustainability disclosures? Consider how its current tax reporting aligns with the tax disclosures in that framework.

- **Create alignment across the company**
  Ensure that there is full engagement with the sustainability team and other internal stakeholders.

- **Establish processes and procedures for tax disclosures**
  Establish processes and procedures to ensure that the company is accurately reporting information in its tax disclosures.

- **Regularly review tax disclosures**
  Review tax disclosures on a regular basis to ensure that they compare favourably with those of the company's peers and they are in line with current stakeholder expectations.

Conclusion

As can be seen from the above, the tax transparency landscape continues to evolve. Although reporting is still voluntary, it appears that, with increasing regulatory requirements and stakeholder demands, more companies are choosing to disclose tax information. The impact for companies choosing to voluntarily disclose tax information cannot be underestimated, and more and more companies are indicating that the benefits outweigh the risks. Trust can be built by companies that adopt a strategic response to their tax disclosures. Disclosures can explain and inform the company narrative around how it is taxed and its larger societal impact. However, it is wise to continually assess the value that increased disclosure can deliver against possible risks to the business.

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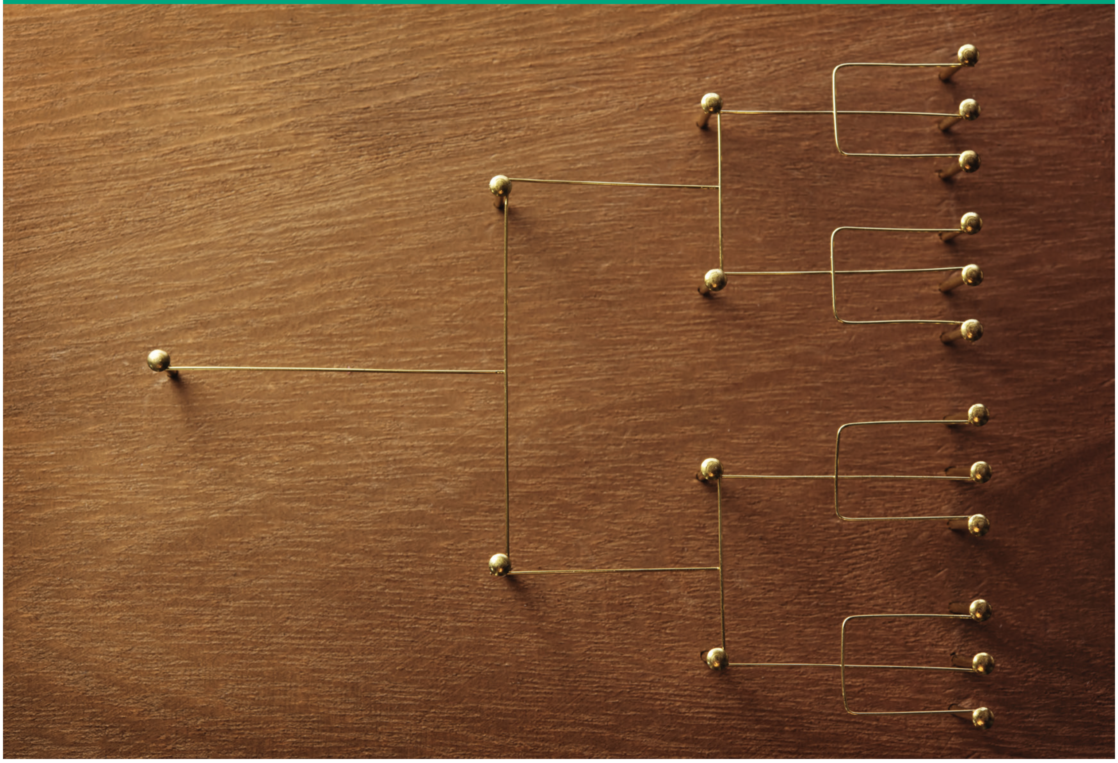
The Unshell Directive



Introduction

On 22 December 2021 the European Commission released a draft Directive (referred to as the Unshell Directive or ATAD3) that proposed:

- rules to prevent the misuse of so-called shell entities for tax purposes in the EU and
- amending Directive 2011/16/EU on administrative cooperation in the field of taxation (to allow for exchange of information between EU Member States).

Broadly, Unshell is designed to discourage the creation of shell undertakings (including shell companies) in the EU where such undertakings are used for improper tax purposes, including tax evasion and aggressive tax planning (including treaty shopping). The proposed measures will facilitate tax authorities in identifying shell undertakings by requiring undertakings to report information that will enable the relevant competent authority to assess whether the undertaking has a real/ substantial presence/economic activity in the relevant jurisdiction. Certain tax benefits will be denied in the absence of such real/ substantial presence/economic activity.

The Prongs

There are a number of prongs to the Unshell Directive, as follows.

Prong 1 – Scope (Articles 2 and 6.2)

Is the undertaking in scope? Certain entities are exempted from the rules.

Prong 2 – The gateway test (Article 6.1)

The gateway test looks for three characteristics that must exist in order to proceed to Prong 3 (reporting). These broadly comprise (a) type of income (relevant income as defined), (b) whether the undertaking is engaged in cross-border activity and (c) the level of activity that has been outsourced. If one or more of these characteristics are not present, then no further action is required. If all three criteria are present, then the undertaking will have a reporting requirement. To be clear, passing through the gateway does not in itself result in any negative tax consequences (other than reporting requirements). The negative consequences arise only in the absence of substance indicators (see Prong 4).

It has been proposed that the Unshell Directive will take effect from 1 January 2024. Broadly, a two-year look-back rule will be applied to determine whether an undertaking falls within the scope of the Directive, i.e. some of the gateway tests consider the position in the prior two years. Therefore an undertaking's activity level etc. may need to be considered as of 1 January 2022.

Prong 3 – Reporting (Article 7.1)

If an entity passes through the gateway, it is required to report to its tax authorities. However, an undertaking may request an exemption from its reporting obligation if it can provide evidence that its existence does not reduce the tax liability of the beneficial owner or of its group (Article 10).

Where such reporting is required, the reporting must set out whether the undertaking satisfies certain prescribed substance indicators. There are three of these indicators, broadly: (a) the undertaking has premises, (b) the undertaking has an active EU bank account and (c) the undertaking has directors and/or employees that meet certain residency and functional/qualification requirements.

Prong 4 – Shell?

- If the undertaking can demonstrate that **all three** substance indicators are present, then the undertaking will not be presumed to be a shell (i.e. presumed to have minimum substance) (Article 8.1).
- If the undertaking cannot demonstrate that **all three** substance indicators are present, then the undertaking will be presumed to be a shell; i.e. even if only one indicator is not met, then the entity will be presumed a shell (Article 8.2).

Prong 5 – Rebuttal of presumption

When an undertaking is considered to be a shell, the taxpayer has the right to rebut the presumption by, for example, showing the business need for the relevant structure (Article 9). Failing that, the following tax consequences may apply (Articles 11 and 12):

- denial of treaty benefits;
- denial of access to the Interest and Royalties Directive/Parent–Subsidiary Directive;
- if the shareholders of the shell entity are not within the EU, then payments made by EU companies to the shell entity may be subject to source-state withholding tax under national law; and
- introduction of home-country taxation type rules, i.e. whereby the profits of the shell undertaking would be taxed in the country of its shareholder(s) if the country of the shareholder is in the EU.

Prong 6 – Exchange of information

Member States will exchange the information with respect to undertakings that pass the gateway, i.e. even if the undertaking is not a shell or has rebutted the presumption that it is a shell, the information will still be exchanged with other Member States.

Each of the above prongs is discussed in further detail below.

Prong 1 – Which Entities Are Targeted?

The Unshell Directive will apply to all undertakings that are considered tax resident in an EU Member State and are eligible to receive a tax residency cert. There is no minimum threshold (Article 2). However, certain entities are excluded from the need to report as such undertakings are considered to be of low risk of being found to lack minimal substance and used with the main objective of obtaining a tax advantage (Article 6.2). Excluded entities include:

- companies that have a transferable security admitted to trading or listed on a regulated market or multilateral trading facility as defined under Directive 2014/65/EU (MiFID2) of the European Parliament and of the Council (on markets in financial instruments);
- regulated financial undertakings (this category includes 19 types of EU-regulated institution, including certain credit institutions, investment funds, UCITS (undertakings for collective investment in transferable securities), insurance undertakings, certain pension institutions and certain securitisation special-purpose entities);
- undertakings whose main activity is the holding of shares in operational businesses in the same Member States while the beneficial owners are also tax resident in the same Member State;
- undertakings with holding activities that are resident for tax purposes in the same Member State as the undertaking's shareholder(s) or the ultimate parent entity; and
- undertakings with at least five own full-time equivalent employees or members of staff exclusively carrying out the activities generating the "relevant income" (see below).

Prong 2 – Gateway Test

The Unshell Directive in the first instance distinguishes undertakings that are at risk of lacking substance and may be misused for tax purposes from those that are considered low risk of being misused. This is done by analysing three "gateway" criteria (Article 6.1).

First gateway

The first gateway test is met if more than 75% of the revenues accruing to the undertaking in the preceding two tax years is "relevant income". Relevant income, according to Article 4 of the Unshell Directive, includes:

- interest or any other income generated from financial assets, including crypto-assets;
- royalties or any other income generated from intellectual or intangible property or tradable permits;
- dividends and income from the disposal of shares;
- income from financial leasing;
- income from immovable property:
- income from movable property, other than cash, shares or securities, held for private purposes and with a book value exceeding €1m ("private purposes" is not defined);
- income from insurance, banking and other financial activities; and
- income from services outsourced by the undertaking to other associated enterprises. (Associated enterprises are defined in Article 5 of the proposed Directive and include persons holding significant influence/25% of voting rights, profits, capital etc.) For example, ACO (the "undertaking") provides services to XCO. However, ACO does not perform the activities associated with providing the services. Instead, ACO outsources the activities to BCO, an associated company, i.e. employees of BCO carry out the activities, which BCO then provides to ACO for on-supply to XCO.

With regard to relevant income, there would appear to be no trading/passive income distinction.

It should be noted that an undertaking that holds immovable property/property held for private purposes (in certain circumstances) shall be deemed to meet the relevant income gateway if the book value of these assets is more than 75% of the total book value of the undertaking's assets, irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years. For example, an entity holding only immovable property that generates no income would be deemed to pass the relevant income gateway (Article 6.1). Also, an undertaking that holds shares shall also be deemed to meet the relevant income gateway if the book value of these assets is more than 75% of the total book value of the assets of the undertaking, irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years. This provision would presumably prevent certain groups from falling outside of this gateway by, say, not paying dividends (Article 6.1).

Second gateway

The second gateway test requires meeting a cross-border activity test, i.e. the undertaking would be considered to be engaged in cross-border activity if:

- more than 60% of the book value of the undertaking's assets that fall within the scope of Article 4(e) (income from immovable property) and (f) (income from movable property, other than cash, shares or securities, held for private purposes and with a book value exceeding €1m) was located outside the Member State of the undertaking in the preceding two tax years; or
- at least 60% of the undertaking's relevant income is earned or paid out "via cross-border transactions" (current-year test, i.e. no need to look back two years). (At its most basic, a company with a back-to-back loan arrangement (with either or both a non-resident borrower and a non-resident lender) would pass this gateway.)

Third gateway

The third gateway test focuses on whether corporate management and administration services are performed in-house or are outsourced. It would be met if, in the preceding two tax years, the undertaking outsourced "the administration of day-to-day operations and the decision-making on significant functions".

As mentioned above, if an entity meets all three gateway tests, it will then be in scope of the Directive, with, at a minimum, an onerous reporting requirement (Article 7.1). This is subject to the Article 10 exemption. Under Article 10, an undertaking that passes the gateway test and is, as a matter of principle, subject to reporting may request an exemption from reporting if it can be shown that the existence of the undertaking does not reduce the tax liability of its beneficial owner(s) or of the group as a whole of which the undertaking is a member.

The Unshell Directive provides that Member States shall impose potentially significant penalties of **at least 5%** of the undertaking's turnover in the relevant tax year if the undertaking that is required to report does not comply with the reporting requirement for a tax year within the prescribed deadline or makes a false declaration in the tax return (Article 14).

Prongs 3 and 4 – Reporting

Once an entity meets all three gateway tests, it becomes subject to a reporting obligation. The entity is required to report in its tax return to its Member State of residence certain "substance" characteristics (Article 7.1). The entity must show that it has met the following substance indicators:

- the undertaking has its own premise, or premises for its exclusive use, in the Member State;
- the undertaking has at least one own and active bank account in the EU; and
- one of the below indicators, (a) or (b), in relation to the undertaking's directors or employees.

(a) Directors

One or more directors of the undertaking (i.e. the test can be met by one director):

(i) are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that

Member State insofar as such distance is compatible with the proper performance of their duties;

(ii) are qualified **and** authorised to take decisions in relation to the activities that generate relevant income for the undertaking or in relation to the undertaking's assets;

(iii) actively and independently use the authorisation referred to in point (ii) on a regular basis;

(iv) are not employees of an enterprise that is not an associated enterprise (leg 1) and do not perform the function of director or equivalent of other enterprises that are not associated enterprises (leg 2). This seems to be aimed at non-executive directors who hold multiple directorships with multiple unrelated companies. For example, Jane is a director of ACO and a director and full-time employee of an associated company (BCO) within the same group. She has no other employments or directorships. Therefore, Jane is not an employee of an enterprise that is not associated with ACO, i.e. she is an employee only of BCO, which is associated with ACO (leg 1). Jane does not perform the function of director or equivalent of any enterprises that are not associated with ACO (leg 2). However, Pat is also a director of ACO and is a full-time employee of XCO, a third-party services company. He is also a director of *c.* 30 unrelated companies. Pat is an employee of an enterprise that is not associated with ACO. (leg 1), and he performs the function of director or equivalent of other enterprises that are not associated with ACO (leg 2).

(b) Employees

The majority of the full-time equivalent employees of the undertaking are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member State insofar as such distance is compatible with the proper performance of their duties, and such employees are qualified to carry out the activities that generate relevant income for the undertaking.

Undertakings required to report in their tax return would have to accompany their tax return declaration relating to the above three minimum substance indicators with documentary evidence. The draft Directive lists the type of documentary evidence required, which would include the address of the premises, the number of directors/employees, the directors'/employees' qualifications and place of residence for tax purposes, and details of bank accounts (Article 7.2).

An entity that passes the gateway tests and cannot demonstrate that **all** of the substance indicators are present will be presumed to be a shell entity for the purposes of the rules, i.e. an undertaking that fails to meet even one of the indicators listed above shall be presumed to be a shell for the purposes of the Unshell Directive (Article 8.2).

On the contrary, if an undertaking meets all of the three substance indicators, it shall be presumed not to be a shell. There would be no further obligations or consequences for such an entity under the Unshell proposal (Article 8.1) (albeit the reported information will be shared with other EU tax authorities).

Prong 5 – Rebuttal of the Presumption (Article 9)

The European Commission has stated that it recognises that the "substance test" is based on indicators and therefore may fail to capture the specific facts and circumstances of each individual case. For that reason, the Unshell Directive allows an entity to rebut the presumption that it is a shell entity, i.e. even if one or more substance indicators are not met (see Prong 4), the entity may still make a case to the tax authority that it should not be regarded as a shell.

The Explanatory Memorandum to the Unshell Directive states:

> "To claim a rebuttal of a presumption of shell the taxpayers should produce concrete evidence of the activities they perform and how. The evidence produced is expected to include information on the **commercial (i.e. non-tax) reasons for setting up and maintaining the undertaking which does not need own**

premises and/or bank account and/or dedicated management or employees… [emphasis added].”

Although it is not stated, one would have to assume that this rebuttal is to ensure that the fundamental freedoms enshrined in the EU Treaty would not be interfered with – see dicta in *Cadbury Schweppes* C-196/04.

Tax Consequences of Being a Shell (Articles 11 and 12)

Article 11 (1) – Deny access to treaty/ Interest and Royalties Directive

Article 11.1 states that:

> “Member States other than the Member State of the undertaking shall disregard any agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, in force with the Member State of the undertaking as well as Articles 4, 5 and 6 of Directive 2011/96/EU [EU Parent–Subsidiary Directive] and Article 1 of Directive 2003/49/EC [EU Interest and Royalties Directive] to the extent that those Directives apply due to the undertaking being deemed to be resident for tax purposes in a Member State, where the following conditions are met:
>
> (a) an undertaking is presumed not to have minimum substance;
>
> (b) an undertaking does not rebut the presumption referred to in point (a) for a tax year.”

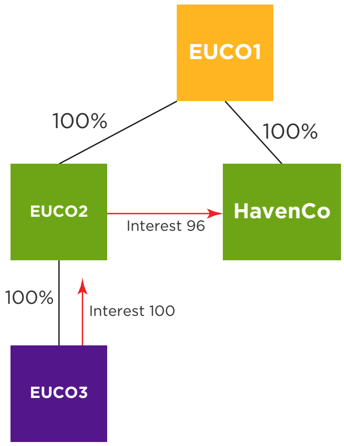
Article 11.2

Article 11.2 covers three situations.

Situation 1 (Article 11.2, para. 1) – Home taxation like rule

Where both the shell company’s shareholders and the payer (of the relevant income) are resident in an EU Member State, the Member State of the shell entity’s shareholder(s) shall tax the relevant income of the shell entity in accordance with its national law as if it had directly accrued to the shell entity’s shareholder(s) and deduct any tax paid on such income at the Member State of the shell entity. By way of example:

- EUCo1 is tax resident in Country 1 and owns all of the shares in EUCo2. The tax rate in Country 1 is 30%.
- EUCo2 is a shell entity, tax resident in Country 2.
- EUCo3 is tax resident in Country 3. EUCo3 pays interest of 100 to EUCo2.
- All of the interest received by EUCo2 with the exception of a small margin (of 4) is paid to HavenCo (tax resident in a haven and a subsidiary of EUCo1). The margin is taxed at 25% by Country 2, i.e. tax of 1 (4 @ 25%) is payable by EUCo2 to the Country 2 tax authorities.
- EUCo3 will not tax the payment made to EUCo2 (see Explanatory Memorandum to Unshell Directive, page 13, where it states “EU source/payer: [EUCo3] it will not have a right to tax the payment but may apply domestic tax on the outbound payment to the extent it cannot identify whether the undertaking’s shareholder(s) are in the EU”).

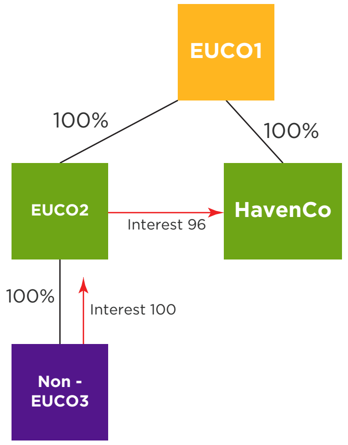


- Further to the above:
    - The relevant income of EUCo2 (the relevant income is the gross interest receipt of 100) would be taxed on EUCo1 in Country 1 at 30%, i.e. tax of 30. (EUCo1 would not get a deduction/deemed deduction for the

interest paid by EUCo2 to HavenCo.) This is on the basis that Article 11.2 says that the Member State of the undertaking's shareholders "shall tax the relevant income of the undertaking in accordance with its national law". "Relevant income" is defined in Article 4 as including "interest and other income generated from financial assets…". It does not say profits from activity comprising interest, and therefore it has to be presumed that "interest" would not be subject to any deduction. Put another way, the Directive appears to tax gross income.

- A tax credit may be available in Country 1 for EUCo2's tax of 1, leaving a balance of tax payable in EUCo1 of 29. (Article 11.2 provides that the Member State of the undertaking's shareholders shall tax the relevant income and deduct any tax paid on such income at the level of the shell undertaking. However, it is not clear what the tax is deducted from, i.e. from the Country 1 tax liability (i.e. a tax credit) or from the imputed income. We will need to wait and see how this may be implemented in domestic legislation. Page 13 of the Explanatory Memorandum to the Unshell Directive makes reference to relief pursuant to a treaty or an EU Directive – such relief is normally in the first instance by way of tax credits. This might indicate that a tax credit approach is more likely.)

Situation 2 (Article 11.2, para. 3) – Home taxation like rule



(See page 13 of Explanatory Memorandum to the Unshell Directive.)

- This extends the home country taxation rule in Situation 1 to situations where the payer is not tax resident in the EU, e.g. if EUCo3 in Situation 1 were tax resident outside the EU (in Situation 2, EUCo3 will hereinafter be referred to as Non-EUCo3).
- The EU Unshell Directive will not cover a third country. Non-EUCo3 may apply withholding tax on the interest payment made between Non-EUCo3 and EUCo2 (albeit that the third country may deny treaty benefits in the absence of EUCo2's providing a certificate of residence).
- EUCo1 will then provide relief for tax paid by EUCo2 in its home country and for any tax paid at source in the third country. (Such relief in Country 1 for third-country taxes would seem to be available only where there is a tax treaty between the third country and Country 1. If there is no tax treaty in place, there would be a risk of double taxation in the absence of domestic unilateral relief.)

Situation 3 (Article 11.2, para. 4) – Withholding tax rule

Where the shell undertaking's shareholder(s) is (are) not resident for tax purposes in an EU Member State, the EU "Member State of the payer of this income shall apply withholding tax in accordance with its national law, without prejudice to [a double taxation agreement (DTA)] in force with the third country jurisdiction of the [shell] undertaking's shareholder(s)".

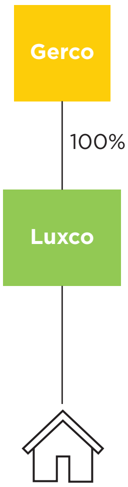
Article 11.3 – Immovable property

Where the shell undertaking owns immovable property:

- the Member State where the immovable property is situated shall tax such property, as if such property was owned directly by the shell entity's shareholder(s), without prejudice to any agreement (i.e. a DTA) that provides for the elimination of double taxation with the jurisdiction of the shell entity's shareholder(s);

- the Member State of the shell entity's shareholder(s) shall tax such property as if the shell entity's shareholder(s) owned it directly, without prejudice to any agreement (i.e. a DTA) that provides for the elimination of double taxation with the jurisdiction where the property is situated.

For example:



- German shareholders own LuxCo.
- LuxCo is a shell entity that holds Irish real estate.
- Using domestic law, both Ireland and Germany will ignore LuxCo. The German shareholders will be taxed in both Ireland and Germany as if they directly owned the Irish real estate.
- The undertaking would remain taxable in LuxCo also.

To facilitate the above tax consequences (Article 11.1–11.3), where a shell entity is resident for tax purposes in an EU Member State, that Member State shall:

- deny a request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State (Article 12(a)); or
- grant a certificate of tax residence that prescribes that the undertaking is a shell and is not entitled to the benefits of a DTA and the Interest and Royalties Directive or the Parent-Subsidiary Directive (Article 12(b)).

Prong 6 – Exchange of Information (Article 13)

The Unshell Directive provides for the automatic exchange of information between Member States of all entities in scope of the Unshell Directive, regardless of whether these are shell entities or not, i.e. if an entity passes the gateway test, it it must report, and such information is exchanged between Member States.

The proposal also provides that if one Member State has reason to believe that an undertaking that is tax resident in another Member State has not met its obligations under the Unshell Directive (e.g. has not reported but should have reported), the former Member State may request the latter Member State to conduct a tax audit of that entity and communicate the outcome to the former Member State as soon as possible and no later than one month after the outcome of the audit is known (Article 15).

Status of Unshell Directive

Member States will need to unanimously agree the draft text of the proposed Unshell Directive before it can be implemented into the law of each Member State. At this time, there is no certainty that the Directive will be adopted. Also, even if the Directive is adopted, the final rules may differ from the draft Directive published on 22 December 2021. If adopted, the Unshell Directive would require Member States to transpose the rules into their domestic legislation by 30 June 2023, with such rules taking effect from 1 January 2024.

In May 2022 the EU Parliament's Committee on Economic and Monetary Affairs proposed a number of changes to the Unshell Directive, including reductions in the penalties proposed, not treating outsourcing to associated companies within the same jurisdiction as outsourcing for the purposes of the gateway test, and pushing the date from which the Unshell Directive takes effect back to 1 January 2025. These proposals are draft and may not be adopted as part of the final EU Directive.

It is understood that in September 2022 the Czech presidency of the EU Council proposed three options to EU Member States regarding the tax consequences set out in the Unshell Directive. The first option would be to have no tax consequences set out in the Directive and instead use national anti-abuse rules. This would mean that the Directive would result only in an exchange of information between Member States on shell entities. The second option would be to limit the tax consequences to denial of the EU Parent–Subsidiary and Interest and Royalty Directives. The third option would be to keep working on the basis of the Commission proposal as described above. It is understood that EU Member States reportedly favoured the second option.[1]

Also, the draft Directive deals only with EU shell undertakings. However, the European Commission intends to introduce another Directive to deal with non-EU shell undertakings.

Conclusion

The Unshell Directive could result in negative tax consequences for taxpayers and/or an increased compliance burden for taxpayers (and accordingly increased resource requirements and costs). Although the Directive is currently draft, taxpayers should, nonetheless, perform an assessment to see where they stand.

It is likely that rules such as the principle-purpose test in the Multilateral Instrument, BEPS Pillar Two rules, controlled foreign company rules and the 2017 changes to transfer pricing rules have already prompted reviews in relation to shell undertakings. This directive should prompt further review of such entities within structures and consideration as to whether they are appropriate going forward.

1 https://www.taxnotes.com/tax-notes-today-international/corporate-taxation/eu-considers-tax-consequences-shell-companies/2022/10/04/7f6x2

News and Moves

PwC Ireland acquires boutique tax practice Twomey Moran

PwC Ireland is delighted to announce that it has acquired the boutique tax practice, Twomey Moran. The acquisition forms part of both firms' strategies to achieve exponential growth in private business services. Twomey Moran's **Dave Moran** and **Paul Morris** join PwC as Partners and, together with Twomey Moran's co-founder and managing director, **Kieran Twomey**, they look forward to driving the combined business forward. The acquisition brings PwC Private's full complement of tax professionals to over 100, as a leading professional services practice dedicated to private clients and private business nationwide.

Pictured at the announcement are left to right: Paul Morris, Partner, PwC Private; Susan Kilty, Head of Tax, PwC Ireland; Colm O'Callaghan, Partner, PwC Private; Mairead Harbron, Partner, PwC Private; Kieran Twomey, PwC Private and Dave Moran, Partner, PwC Private.

Laura Lynch & Associates rebrands to L&J Tax

Laura Lynch & Associates has rebranded to L&J Tax. Owned and managed by CTAs Laura Lynch and Emer Joyce, L&J Tax continues to provide tax advice, transaction support and full end-to-end project execution services, whilst specialising in EIIS. Founding partner, Laura Lynch, commented 'Emer joined the firm as tax partner in January 2021 and our rebranding is recognition of what has been a great combination both professionally and commercially. We look forward to an exciting future and to attracting likeminded talented tax professionals to our team, enabling us to continue to provide tailored tax solutions to our valued clients'.

KPMG announces 14 new Partners

KPMG has announced 14 new Partners. The three newly appointed Tax Partners are

John Doran

John is a Tax Partner advising a broad range of Irish and international businesses. He has 20 years of experience across professional practice and industry roles and his clients include privately owned and multinational public companies.

Olive O'Donoghue

Olive is a Tax Partner within our People Services tax practice specialising in employment tax and executive remuneration. She has extensive experience across a wide range of sectors including the aviation, motor, banking, and pharmaceutical industries.

Ciara Wrafter

Ciara is a Tax Partner advising a diverse range of Irish headquartered and multinational clients on all aspects of tax. She has a particular focus on the insurance, renewable energy, and alternative investment sectors.

Orbitus Tax – Delivering Client-Led Services

Orbitus is delighted to announce the appointment of Tommy Walsh as the Director of Orbitus Tax. Tommy is a Council member of the Irish Tax Institute and will work closely with Jennifer Downing, LLP Managing Partner, Darren Fitzgerald, Partner and Louise Lonergan, Partner in Orbitus Law LLP.

Orbitus Tax forms part of the Orbitus Group and sits alongside the group's other services, Orbitus Law LLP and Orbitus Commercial Advisory. The group are also launching a dedicated Orbitus Client Services Department, led by John Keating and Mike Stack.

L-r: John Keating, Orbitus Group Director & Client Services; Louise Lonergan, Partner, Head of Litigation; Darren Fitzgerald, Partner, Head of Private Clients; Jennifer Downing, Managing Partner, Orbitus Law LLP, Tommy Walsh, Director of Orbitus Tax and Mike Stack, Director of Client Services.

McKeogh Gallagher Ryan Celebrates Ten Years in Business

McKeogh Gallagher Ryan celebrates ten years in business. Established in Limerick city in 2012 by Mary McKeogh, Eoin Gallagher and Eoin Ryan, the firm has seen significant growth and now has over 60 staff, a fourth Partner – William Lomasney, and offices in Ennis and Nenagh.

L-r: Eoin Gallagher, Partner, Audit & Accounting; Eoin Ryan, Partner, Advisory & International; Mary McKeogh, Partner, Tax and William Lomasney, Partner, Audit & Accounting.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